

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 10/2014

In the matter between:

THE STATE

and

**WERNER JOHANNES SHETEKELA
KLEOPAS SHIKALEPO KAPALANGA
ELIA NAKALE**

**FRIST ACCUSED
SECOND ACCUSED
THIRD ACCUSED**

Neutral Citation: *S v Shetekela* (CC 10/2014) [2019] NAHCMD 106 (19 March 2020)

Coram: USIKU J

Heard: 06 – 16 June 2016; 18 – 19 July 2016; 06 – 08 March 2017; 03 – 07 April 2017; 12 July 2017; 07 August 2017; 06 – 09 November 2017; 10 September 2018; 01 October 2018; 02 March 2019; 26 April 2019; 05 – 08 November 2019; 18 – 19 November 2019 and 20 February 2020.

Delivered: 19 March 2020

Flynote: Criminal law – Murder – Mens rea - Common purpose – Not necessary to prove causal link between act of accused and death of deceased – Accused acting in concert – Where court cannot determine whether each accused contributed causally to deceased's death – Such accused can still be guilty of murder on basis of common purpose – However certain prerequisites must be met: a) They must have been present at the scene where the violence was being committed; b) He must have been aware of the assault on the victim; c) He must have intended to make common cause with those who were actually perpetrating the assault; d) He must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others; e) the requisite mens rea; i.e., in respect of the killing of the deceased, he must have intended him/her to be killed, or he must have foreseen the possibility of he/she being killed and performed his own act of association with recklessness as to whether or not death was to ensue – Kidnapping – Unlawful deprivation of one's liberty of movement – Lawful arrest – Intention to deprive one's liberty to be proven – Defeating or obstructing to the course of justice or attempt to do so – What constitutes.

Summary: The accused persons are jointly charged with the crime of murder, obstructing the course of justice or attempting to do so as well as kidnapping. Each accused pleaded not guilty to the charges preferred. After the trial, each accused was found guilty and convicted on the charge of murder with *dolus eventualis* on the first count as well as on the charge of attempting to obstruct the course of justice. Each accused was however acquitted on a charge of kidnapping.

ORDER

Count One: Each accused person is found guilty on the charge of murder based on *dolus eventualis*.

Count Two: Each accused must be found not guilty and be discharged on that count.

Count Three: Each accused is found guilty on the basis of common purpose on a charge of attempting to obstruct the course of justice.

JUDGMENT

USIKU, J:

[1] In more than one respect, the 16th of April 2013 was a faithful day in the life of one Mandela Ramakutla. During that evening, Mandela Ramakutla was severally assaulted and was later on admitted to the Katutura State Hospital but unfortunately lost his life on the 24th of April 2013, exactly nine days after the assault. I will refer to him as the deceased herein.

[2] Three persons were charged with a number of offences. These three persons are now before court as accused one, two and three. They each face charges of murder, obstructing the course of justice or attempting to do so and kidnapping. When the trial started before court, each accused pleaded not guilty to all the preferred charges. All counsels acting for the accused persons each confirmed that their pleas were in accordance with their respective instructions.

[3] Accused one, two and three each handed in statements in terms of s 115 of the Criminal Procedure Act 51 of 1977. Certain admissions made in terms of s 220 of the same Act were handed in respect of accused one. With regard to accused two, he through his counsel made an admission to the effect that he was in the company of accused one and three on the night of 16 April 2013 after the deceased had already been arrested.

[4] Whereas counsel for accused three indicated that they would stand by the contents of their reply to the State's pre-trial memorandum dated 22 June 2015. A plea explanation in terms of s 115 of the Criminal Procedure Act was also handed in as Exhibit 'C' and became part of the proceedings. In respect of the pre-trial memorandum, accused three admitted the following; the deceased's date of birth, that on 16 April 2013, he was a member of the Windhoek City police and that on the same date, he was on standby duty. Further that a City police pick-up motor vehicle with registration number N4954W was allocated to him and his co-accused to perform official duties. That during the evening of 16 April 2013, he and his co-accused collected the deceased from a drinking place namely, Uukwamatzi no. 1 near the Katutura Single Quarters.

[5] No less than 16 witnesses testified for the State, while all the accused persons also testified under oath. Accused two called his wife as a defence witness. One other witness also testified for defence. Several exhibits, both documentary and specific items were handed in all numbered and identified by several of the witnesses. There was a notice of an application to recall a witness filed to the Supreme Court, which application was accordingly granted where after the main trial proceeded to its conclusion.

[6] It is impossible to refer to the evidence of each State witness in detail. However, much of the evidence is in fact common cause and I shall attempt herein to summarise the events of that day and thereafter, with regard to evidence that were not in dispute in order to provide a background picture of what transpired. The evidence that was disputed during the trial will be analysed thereafter in more detail.

Eliazer Iyambo

[7] He testified that he was employed at the City Police, Windhoek Municipality on 01 June 2006 and was attached to the Crime Prevention Unit. He knew the accused persons as they were his subordinates and under his direct supervision at City Police. Accused 1 started to work with him on 07 January 2013, while accused two started on 05 June 2006 and accused three on 07 June 2013 respectively.

[8] The witness further testified that when joining the City Police, one goes through an introduction course consisting of physical training, training on criminal procedure and the law. All three are given focus. The witness further emphasized that with regard to criminal procedure training, he presents it himself so as to give new recruits a picture to know what is expected of them.

[9] The witness also testified that apart from criminal law and procedure, he touches on the aspect of arresting a suspect. In cases of an injured suspect or any other person, the witness testified that when carrying out the arrest, it must be communicated through channels, i.e. a superior officer needs to be informed. In this matter, he is the superior officer as the accused persons worked under his supervision.

[10] In cases where minors are involved, the witness testified that whenever minors are arrested by City Police, most of the times, they are taken to their parents or guardians where in their presence, they are interrogated or asked basic questions.

[11] In respect of the events that led to the matter at hand, the witness testified that at the beginning of April 2013, a case of theft was allegedly committed at the City Police offices and in the course, the suspects were captured by CCTV. A case was opened under CR 131/4/2013. This information was then circulated to City Police, specifically to the witness's office, which is responsible for investigations.

[12] His role was to investigate within the structure and channel the information to his members. The information was that CCTV footage recorded the suspects as they came into the building and left. They were two in number. He confirmed that the deceased was seen on the CCTV footage, entering and going out of the building whilst carrying something. After preliminary investigations, he tasked members to find out who the suspects were and to activate informers or sources. On 16 April 2013 between 18h00 and 20h00, he received a call from accused two, informing him about a suspect having been sighted at Single quarters. Accused three accompanied by accused one decided to pick up the alleged suspect.

[13] Having picked up the alleged suspect, their intention was to proceed to the Wanaheda Police Station, to continue with preliminary investigations where after he would give further directives. The purpose was to show the deceased the footage on the CCTV. He advised the accused to take the deceased to his home for a search. Chief Kanime was then informed about the arrest. The suspect, now the deceased herein, was only taken to the police station late in the evening. He confirmed that accused two's number was 0811498622 at the time and he knew it. It was accused two who informed him about the arrest of the deceased. He then requested accused two to take the deceased to the police station immediately and make a follow up the next day.

[14] He further testified that accused two related to him that the deceased was taken to the police station where he was detained. That was the last time he spoke to accused two about the deceased having been detained. On the next day, 17 April 2013, they had a meeting about the deceased's arrest, whereby the three accused persons were tasked to go the police station in order to consult with the investigating officer. After that meeting, he received a call from accused two informing him that the deceased was taken to a hospital for treatment. Accused two made reference about an assault.

[15] He explained the procedure to be followed when a suspect is arrested. That firstly is to inform the suspect about his or her constitutional rights as per the Constitution. Secondly, is to confine the suspect's movements by using handcuffs, the purpose being for his safety and that of the member. A suspect may remain handcuffed until such a time when he or she is taken into a police station. That is mandatory. He explained further that if a suspect is injured whilst in custody, it must be reported to the superior officer immediately, and it must also be recorded in the OB (occurrence book).

[16] The witness confirmed that it was upon his instructions to go to the house of the deceased. It would not be wrong to move as per the deceased's directions. The witness's contention is that the arrest was lawful because the suspect had been identified. The accused persons could not have kidnapped someone who was under lawful arrest. According to him, if the accused persons had not seen injuries on the deceased, they could not report on something they were unaware of.

[17] With regard to the OB, the purpose thereof is to state the status of a suspect. The duty to ensure that a suspect is fine lies both on the member bringing in the suspect as well as the member receiving the suspect. A search must be done on an arrested suspect. A close inspection must further be carried out on the suspect. It is only when convinced that nothing is wrong with a suspect, that a member would record well-detained in the OB. There is no obligation to receive an injured suspect by a member. The witness further stated that if a suspect is injured, i.e. bleeding, the receiving officer should not accept the suspect but must be taken to a hospital. According to the witness, no one is allowed to make a cancellation in an OB. It is not procedural to do so in terms of the police manual, neither can an entry be made in the absence of a suspect.

[18] On the date in question, he did not receive a report from the Namibian police that there was something wrong with the deceased. If a suspect is received injury free and the same is indicated in the OB but later on a suspect sustain injuries of any sort, such injuries must be recorded in the OB as a separate new entry.

Elias Eigab

[19] He testified that he was employed by City Police for 11 years. He knew the accused persons as co-workers. He reported on duty on the night in question when the deceased was arrested. At around 20h00, the accused persons walked in with the deceased in handcuffs. The deceased walked on his own. He had no visible injuries. He did not know the reason for the deceased's arrest.

Paulet Namutenya Nashilundo

[20] She testified that the deceased was known to her. He used to reside with them in Huang street, Wanaheda, at Erf 1528. On 16 April 2013 at about 21h00 whilst watching TV, she heard a knock at the door. She went to open and upon opening the door, she found two male persons. One of them asked for the deceased, Mandela Ramakhutla. She questioned them why they were looking for him. They explained to her that he had

stolen from the City of Windhoek. She informed them that he was not at home, where after they left. A while later, accused one returned to ask for the second time. He asked whether their grandmother was in. Their grandmother then came out and accused one spoke to her in English and later on in Oshiwambo.

[21] According to her, when the grandmother came out, accused one informed her that there was someone inside the car who wanted to speak to her. They proceeded to the car which had been parked. She saw the deceased sitting in the rear of the double cab. The deceased's head looked swollen and when the grandmother asked him if he was beaten, he made a sign. The witness couldn't recall whether it was a yes or no response. She further testified that when the grandmother asked why the deceased was not taken to the police station, the accused got into their car and drove away. She asked them about which police station they were headed to but got no response. She decided to take the registration number of the vehicle, which was N09574W. She had earlier seen the deceased on 16 April 2013 around 18h00 and was fine, without any swelling.

[22] She confirmed that the deceased was swollen on the face though she did not see any blood on him at the time. Both cheeks were also swollen. She could however not say who had beaten the deceased. She described the pick-up vehicle being white in colour with dark tinted windows.

Alina Shetekela

[23] She is the deceased's grandmother and resided at Wanaheda, at Erf 1528 with her grandchildren. On 16 April 2013, she was in her room after watching the evening news. She then heard Paulete speaking to some people. She got out of her room in order to investigate with whom Paulete was speaking whereafter she saw two male persons, whom she identified as accused one and two. Another person sat in the vehicle. Accused one asked her to go to the vehicle because there was someone who wanted to speak to her as Paulete followed her. She described the vehicle as a white double cab with no police markings.

[24] She approached the vehicle and looked inside in order to see who was inside. She saw accused three sitting inside the vehicle together with the deceased, handcuffed. His face appeared to be swollen. According to her, the deceased had left the house that same day around lunchtime and his face had not been swollen. When she called him by his name, he did not respond. She questioned him why his face looked swollen where after the deceased attempted to respond but the voice could not come out clearly. He appeared to be in pain.

[25] It was at that point when, accused one told her in Oshiwambo that the deceased was lucky not to have been shot. She questioned accused one why the deceased could have been shot. He responded that the deceased did not want to reveal the person with whom he was. Accused one and two thereafter got into their vehicle and drove away. She requested Paulete to write down the registration number of the vehicle because she had doubts whether the accused persons were indeed police officers. She immediately informed the deceased's father about what had happened. At the time, the deceased was a minor and under her care. She did not allow him to be taken away, neither to be interrogated by anyone in her absence. She was able to see inside the vehicle after someone had rolled down the window. At the time, the deceased sat on the right side whilst accused three sat on the left hand side of the vehicle.

Gregorius Katjito

[26] He testified that he resided in Dolam Erf 3333 Tekoa Street with the deceased's father and his girlfriend. On 16 April 2013, around 19h00 to 20h00, a white car came to park in front of their house. It had three occupants. One of the occupants came out of the car and knocked on his door. When he opened the door, the person asked for the deceased's father. He then moved towards the vehicle parked outside his yard and tried to look inside the vehicle but the vehicle's windows were tinted.

[27] He questioned why they were looking for the deceased's father. The response was that they had brought a man who was looking for his father. He requested the person to step out of the vehicle, but they responded that the person might run away. As

the witness asked the police to open the vehicle, he heard the person inside the car trying to callout his father's name. He could tell that the person knew the place. However at first the police did not want to open the car but eventually opened. He discovered that the deceased could not speak and could only make some noises. Neither could he move on his own. When the police moved him out of the vehicle, the deceased fell to the ground. Police claimed that the deceased was faking his illness and that he was drunk and trying to get away, where after they placed him back into the vehicle.

[28] According to the witness, the deceased, although not clearly, called out the name of his father's girlfriend, Jacobeth. Upon closer inspection of the deceased he found that, the deceased appeared to have been assaulted, although no wounds were visible. His previous experience while working at the mortuary allowed him to be able to differentiate when a person has been injured. He then called Jacobeth, the deceased's father's girlfriend. She spoke to the deceased asking him what had happened and also asked the police. He could however not confirm which of the accused person came to his door to ask for the deceased's father.

Jacobeth Samuel

[29] She is the deceased father's girlfriend. She resided at Erf 3333 Tekoa Street, Dolam with her boyfriend, Thomas Shetekela. She knew the deceased as her boyfriend's child. On 16 April 2013 around 21h00, she saw the deceased when he was brought by three officers. One of the three officers asked her whether the deceased was living with her. She denied. She further denied that the deceased brought laptops to her place. Accused one then showed her a picture of the deceased in order to positively identify him. She thereafter called the deceased three times but received no response. Accused one informed her that the deceased will be taken to Wanaheda Police Station, where after accused one spoke to one man called Rohm, who resided in her street at the time, after which they drove away. According to her, Rohm did not speak to the deceased. Neither did she give consent to the police to take the deceased away.

[30] She could only identify accused one from the rest. She persisted that it was accused one who showed her the picture of the deceased. She could however not confirm the condition of the deceased at the time. The deceased did not respond after she called him three times.

Simon Nawa Tangeni

[31] He testified that the deceased was his school mate. On 16 April 2013, he together with Mervin invited the deceased to Uukwamazi bar for a drink. It was roughly around 20h00 or 21h00. Whilst they were drinking and relaxing, he did not notice any injuries or swelling on the deceased. The deceased walked normal and was fine as usual.

[32] After a while, he left with Mervin to go and get his T-shirt. It was when he observed a white double cab pick-up parked across the road. It took him about 8 to 10 minutes to get his T-shirt because his house was within the vicinity of the bar. After they returned, two male persons disembarked from the pick-up he had earlier on observed and approached them. These male persons took the deceased away. He identified them as accused one and three. After they had taken the deceased, they went to stand at the pick-up and spoke to the deceased for about 2 minutes, where after they loaded the deceased in the vehicle and drove off. According to him, when the two male persons came to them at the bar, they did not say anything but only took the deceased away. Both male persons wore civilian attire.

[33] The vehicle the two male persons disembarked from had no markings. After a while, he together with Mervin, went home. At around 22h00, Mervin sent him a text message reading "Bra, there is fire on Mandela side". Having received the text message, he took his uncle's cellphone and called Mervin. Mervin told him that "We do not have Mandela, he was beaten up and can't speak". He saw the deceased the next day at the hospital. The deceased appear to have been assaulted.

[34] According to him, he was not very sure about the time when they were at the bar because he had no watch. He merely estimated the time. They have been drinking

alcohol but the deceased did not drink alcohol as he usually did not consume alcohol. He further denied that the deceased smell of alcohol at the time.

[35] When the deceased, was taken away by the two male persons he was calm and they had no idea that the two men were members of the City Police at the time. He was informed later by Mervin that the City Police had visited his house, accompanied by the deceased who appeared to have been assaulted.

Zenobia Lizian Samuel

[36] She knew the deceased because he resided with other two male persons next to their house. She had known him for a month and 2 weeks before he passed away. On 16 April 2013, she saw a white double cab pick-up which came to park in front of their house. That was around 19h00 to 20h00, though it was at night, the street lights were on and she could see.

[37] Three male persons disembarked from the vehicle. She identified accused one and three as the persons who disembarked. She also noticed a boy laying in the back of the vehicle but could not immediately recognize who he was. She later recognized him from the jersey he was wearing as the deceased, Mandela. One of the accused opened the door on the side where the deceased was and told him to disembark. She observed that the deceased could not stand up on his own and she did not know why this was the case. The accused persons then greeted them as they proceeded to a house next to theirs. She further observed that the deceased was not walking properly. His legs were weak. The police knocked at the door but there was no response. They returned to their house and asked if they knew the people who were residing next door. Her mother responded that they did not know the people. She then enquired why the deceased was facing down to which accused 1 responded that he was just drunk. She could not confirm whether the deceased was indeed drunk or not.

[38] Having received no response at the second house, the accused persons and the deceased returned to the car. In the meantime, she had recognized the deceased from

his clothing and body shape. The vehicle in which the deceased was driven was not marked as a police vehicle and its occupants wore civilian attire.

[39] She confirmed that she couldn't tell whether the deceased was assaulted. All she noticed was that he could not walk on his own. She only identified accused one. She could not dispute whether the deceased was drunk as alleged by accused one as she had not been in close proximity to the deceased at any stage.

Mervin Kayele

-

[40] On 16 April 2013, he resided in Mercy Street, Wanaheda, with one Simon, a friend as well as the deceased, Mandela Ramakhutla. On the day in question, he went to Uukwamazi bar and met the deceased. He left the bar around 21h00. Whilst the deceased was in their company at the bar, he was fine as usual and they exchanged jokes.

[41] At the time, the deceased had no injuries. He could walk on his own and he did not observe any swelling or bruising on the deceased. They later left the bar to get a jacket with his friend, where after they returned to the bar. He then saw the deceased crossing the road with two male persons who were unknown to him. He identified the men before court as accused one and three. The two male persons and the deceased left and stood at the vehicle for a while where after they drove away. The men and the deceased appeared to be in a discussion. Their vehicle was a double cab white in colour. These two male persons who were with the deceased wore normal clothing at the time.

[42] Later on, he left the bar and went home, where after he heard a knock on the door. The person shouted "City Police", which made him afraid to open the door. He later on approached the vehicle which was parked in front of the yard and was asked whether he knew where Mandela was residing or who he was. He responded in the negative. The police thereafter opened the door of the vehicle and he recognized the deceased. He observed that his face was swollen on the left hand side. He was not the same as he had seen him earlier that night at the bar. He appeared to have been assaulted and was

powerless. The deceased did not say anything to him. He thereafter sent an sms to a friend informing him that the deceased was brought by the police and was not in a good condition. The friend immediately called him for more information about the deceased whereby he reiterated to him that the deceased did not look good. That was the last time he saw the deceased alive.

Thomas Shetekela

[43] The deceased was his son. During 2013, the deceased resided with his mother, Alina Shetekela. On 16 April 2013 at around 21h00, he received a call from his mother whilst at the Country Club for dinner. She informed him that the deceased was there at her place with the City Police and is badly injured. She requested him to go there, presumably to the police station. He was informed that the deceased had allegedly stolen a laptop.

[44] He went to his vehicle and drove. He was further informed that the City Police were at his residence by his fiancé, Jacobeth. It was furthermore related to him that the deceased was seemingly injured. Whilst on his way, he learnt that the deceased was being taken to the Wanaheda Police Station. He drove straight to Wanaheda Police Station but did not find the deceased. He proceeded to City Police Dispatch Centre, located near Oshakati service station but found no one there as well.

[45] He drove to the Khomasdal Police Station and met two officers on duty. He explained his situation and they showed him a CCTV video clip wherein the deceased was depicted. He confirmed the culprit to be his son. Further enquiries were made and it was claimed that the deceased was at the Wanaheda Police Station. On arrival at Wanaheda Police Station he explained the situation, and was informed that City Police brought in someone, who was yet to be charged. He was therefore not allowed to see him at that point in time.

[46] Whilst walking back to his vehicle, his mother phoned him for the second time asking him whether he had found the deceased. He responded in the negative. She then

informed him that the deceased was badly injured and he should try to see in what condition he was. He drove to Windhoek Police Station. Upon arrival at the Windhoek Police Station, he was taken inside and found the deceased laying on the floor. The deceased had a swollen face and blood was coming from his nose. When he called him three times, the deceased did not respond. He had been severely injured.

[47] When he asked the police officers why they did not take the deceased to the hospital, they responded that when the City Police brought him, he was drunk and was pretending. The police also told him that they had no transport to take the deceased to hospital. He offered to take the deceased in his car but was informed that he first had to speak to the person in charge. Arrangements were made and the deceased was taken to hospital in a police vehicle as he followed them in his own vehicle.

[48] Upon arrival at the Katutura State Hospital, the deceased did not sustain any further injuries while being transported from the Windhoek Police station. He was attended to by a doctor. At the time, the deceased wore a Brazilian track suit top. Upon examination, he observed marks on the deceased's wrists, presumably injured from the handcuffs. He also observed blood spots on the Brazilian jersey on the left and right sleeve as well as by the collar towards the shoulder and the chest side. He did not give anyone permission to interrogate and drive around with the deceased.

[49] He was not aware of the deceased's condition up and until his mother informed him that his face was swollen. The officer in charge where the deceased was held could not have been aware of the deceased's condition, because the police officers on duty did not do anything as they were informed that the deceased was drunk. Throughout, when the deceased was being transported he made no response or spoke while being carried from the police station to the vehicle that transported him to the Katutura State Hospital. He laid a complaint about the manner in which the deceased was treated.

Onesmus Elago

[50] He was employed by Nampol and was stationed at the Windhoek Police Station during 2013. He knew the deceased as they grew up together and were friends. Their houses were located close to one another and they used to play soccer together.

[51] On 16 April 2013, he received instructions from one sergeant Kashaka, who was the shift commander, to take an injured person to hospital. At the time he had no information who the injured person was. He confirmed that the deceased's father came looking for him and while they were transferring the deceased from the police station to the hospital, he was not responsive. He had blood coming from the nose and mouth. He was also swollen.

[52] He further testified that when a suspect is being detained whilst injured, a well detained entry could still be made in the OB and that when an entry of well detained is made, he explained it to mean that the person is detained, not necessarily to mean that the person has no injuries per se. He however could not confirm whether the deceased was drunk or whether he smell liquor at the time.

Ericson Tangeni Erastus

[53] On 16 April 2013, he was working as a cell register officer, a new position in which he was still getting familiar with, having worked there for 5 to 6 shifts before 16 April 2013.

[54] He further confirm that on the same evening, accused one came in with the deceased as accused two approached him while the other two accused persons held the deceased. When he asked accused two why they were carrying the deceased, accused one responded that the deceased was pretending and was faking his illness because he did not want to reveal where the suspected stolen laptops were. The other two accused persons did not speak to him.

[55] As he started making the entry in the OB, the accused persons were already on the move because they were in a hurry. He noticed that there were entries already made in the OB, one of them being “free from injury, no complaint”. After he had made the entries, he realized that he needed to physically go and see the suspect. He approached the deceased, and noticed blood on his shirt and nostrils. When he spoke to the deceased he got no response. That gave him an impression that he was unable to speak. As he was about to return in order to make further entries about what he observed, the deceased’s father arrived some few minutes after the accused persons had left.

[56] The deceased’s father questioned him angrily why the deceased was not taken to hospital to which he responded that only the shift commander can decide for a suspect to be taken to hospital. He confirmed that the deceased was not at any point assaulted while being held at the Windhoek Police Station. According to him, it was his first time to detain a suspect and he had little practice or know-how to make an entry in the OB. He did concede however that it was a mistake to make an entry in the OB without having first physically observed the deceased. He had made the entry in the OB, relying on information given to him by the accused persons who brought in the deceased at the charge office.

Isaak Fidel Nashilongo

[57] On 16 April 2013, he was posted as a guard at the police cells and observed two male persons carrying a boy by holding him on each arm. He did not recognize the two male persons because he was busy with other duties at the time. He was later on called to assist in taking the boy, the deceased herein, to hospital. Although they did not speak to the deceased, whilst going to the hospital, he noticed that the deceased seemed unconscious. The deceased had dried blood on his nose, and around the nostrils.

Dr. Innocent Zulu

[58] On the 16 April 2013, he attended to one Mandela Shetekela, the deceased herein, at around 23h00 at Casualty Department of the Katutura State Hospital. The deceased had a history of having been assaulted. He was the first doctor to attend to him. He observed that the deceased was in a comatose state, meaning he could not control his own breathing and would drown in his own saliva. He could not talk or open his eyes to command.

[59] He explained the scale he used in observing the condition of the deceased, being as "GSC". That scale consists of the following:

- a) From 15 to 13, a patient is regarded as having mild head injuries.
- b) From 12 to 9, a patient is regarded as having moderate head injuries, and
- c) From 9 below, a patient is regarded as having severe head injuries.

With regard to the above scale, the deceased was evaluated to have scored an 8, being severe head injury and was in a comatose state at the time of the observation.

[60] Having made this observation, the deceased was taken to the resuscitation room where hospital staff do all they can to keep a patient alive. The deceased was observed as not being able to breath on his own and was referred to the Head injury unit, which is managed by the department of surgery to oversee the head injury. Another reason why the deceased was referred was because he was in a comatose state.

[61] He further testified that his main priority at that point in time was to keep the deceased alive and to prepare him sufficiently for the next doctor to observe him further. He did not make thorough observations on the deceased, apart from those already referred to.

Dr. Feliciana Shivute

[62] She was employed as a Medical Officer at the Katutura State Hospital during April 2013 under the Surgery Department. She compiled the report regarding the treatment administered to the deceased. In her report, she observed that there was blood in the deceased urine, which usually occurs through trauma experienced to the kidney. The deceased was further treated for severe head injury. He could not breathe on his own and needed assistance. However, despite the treatment administered to the deceased, his condition did not improve.

[63] She confirmed that the deceased had head injury which was observed to be in the scale of 08 out of 15. In other words, the deceased had swelling on his head as well as on the hip. She further noted that when the deceased was brought to the hospital on 16 April 2013, the injuries noted on him were recent. The blood noted in the deceased's nostril could not have been present for more than 30 minutes as noted by the first doctor who saw him first on that day.

Dr Rufaro Diana Jaravaza

[64] She conducted the post-mortem examination on the body of the deceased and compiled a medical legal post-mortem report handed in as Exhibit 'J'. Her findings on the body were as follows:-

- (a) A history of assault followed by hospitalization. There were signs of medical interventions.
- (b) Small abrasions of lower limbs. Abrasions suggesting application of handcuffs were noted around the wrists.
- (c) Subcutaneous dissection revealed bruising of both arms and forearms including defensive areas. Symmetrical subcutaneous and muscle bruising of both legs. Also bruising of left buttock.

(d) Petechial hemorrhages of brain suggestive of fat embolism.

(e) General visceral pallor.

[65] That as a result of the observations she had made on the body, she concluded that the cause of death was as a result of blunt soft tissue trauma secondary to assault.

[66] From the evidence adduced by the doctor, the injuries on the deceased were associated with blunt force trauma and if regard is had to their numbers and their positions on the body, it shows that the deceased was indiscriminately assaulted all over his body and on his head. The deceased was said to have been assaulted on the 16 April 2013, where after he was hospitalized on the same date prior to his death on the 24 April 2013.

[67] The doctor was cross-examined in detail regarding the injuries. She remained adamant in her opinion that the deceased was assaulted and the injuries sustained were not consistent with self-inflicted or accidental injuries.

[68] With the evidence of Dr Shivute and Dr Rufaro Diana Jarevaza, the State in effect closed its case. I will now proceed to summarise the evidence of the accused hereunder. It must be noted that the accused persons all corroborated each other's evidence about the events of the evening of the 16 April 2013.

Werner Johannes Shetekela

[69] On 16 April 2013, whilst at a soccer practice with accused three he received a call from accused two informing about a suspect in a theft case. The suspect was allegedly spotted near Uukwamazi bar at the Single quarters in Katutura. He informed accused three about the call he received from accused two and they immediately drove to Uukwamazi bar.

[70] Upon arrival at the bar, both accused one and three disembarked from their vehicle and proceeded to the suspect who had been described by accused two in terms of what he was wearing. Accused three walked towards the suspect and introduced himself by showing him his appointment certificate. He informed the suspect about the allegations of theft of a laptop at the City of Windhoek head office. He also informed him that he was in possession of a video clip which the suspect could view at the accused's offices, situated at the Wanaheda Dispatch Centre.

[71] The suspect, who is now the deceased in this matter, agreed to go with them to Wanaheda Dispatch Centre. They drove to Wanaheda Dispatch Centre and met accused two at the office. Accused two was the one who had the alleged video clip on his phone about the suspect. Accused one drove the vehicle at the time, a Mazda double cab pick-up, white in colour. Which had no markings and had tinted windows, usually utilized for undercover work.

[72] Upon arrival, accused two went to greet the deceased and showed him his appointment certificate. He informed him about the allegations against him where after he showed him the video clip. The deceased confirmed that it was him depicted in the video clip together with another friend of his. Accused two questioned the deceased, where the laptop was but the deceased responded that they did not steal the laptop. He claimed to have been sent by their grandmother to buy electricity. Accused two then asked the deceased where he was residing. The deceased responded that he is residing with his grandmother. When accused two told him that where he was depicted in the video is not an area where electricity is bought, the deceased offered no further explanation where after accused two asked the deceased to take them to where he resided with his grandmother. The deceased agreed.

[73] They proceeded to the vehicle, driven by accused one whilst accused two sat in the passenger's seat and accused three sitting with the deceased at the back. The deceased was handcuffed at this time. They drove to Tugela street where the deceased pointed to them a house as they parked a little distance from where the deceased had

indicated that it was his grandmother's house. He and accused two got out of the vehicle while the deceased remain seated in the vehicle with accused three.

[74] Accused one and two approached the house where after accused two knocked at the door of the house and a lady opened the door. Accused two showed her his appointment certificate. He informed her that they were with the deceased who was suspected of having stolen laptops. It was then that Paulette informed him that the deceased did not stay at that house. In the meantime, an elderly lady came out and accused two spoke to her in Oshiwambo. She responded in Otjiherero claiming that she does not speak Oshiwambo.

[75] When accused two informed her in English that they were with the deceased who was suspected to have stolen laptops, she responded that the deceased did not stay with them and told them to proceed to his father's house. They both returned to the vehicle and drove to the deceased's father's house upon the directions of the deceased.

[76] Upon arrival at the deceased father's house, accused two stepped out of the vehicle and shouted 'City Police' as a male person (later identified as Katjito) came out. He explained to him that they brought the deceased and wanted to check his room for the stolen laptops. Katjito proceeded to call a lady who also rented in the same yard, identified as Ms Samuel. Accused two asked her if the deceased stayed there, to which she responded in the negative. He further asked her where the deceased's father was whereby she informed them that he was not around. Accused two then commented that they could not do anything, and she should inform the father that they were taking the deceased to the police station. They drove away.

[77] Upon arrival at the Windhoek Police Station, they all disembarked from the vehicle where after accused two unlocked the handcuffs of the deceased. They proceeded into the police station. Accused three remained at the entrance of the police station. Accused two knocked at the door and a police officer opened. He entered with the deceased. Accused two walk towards the table where the officer was seated and wrote in the OB. From there, the deceased went to sit where other inmates were seated where after

accused two informed Erastus that the deceased was brought in on suspicion of theft of laptops from the City of Windhoek head office. Erastus informed them that he was busy and that they should write down the deceased's and their names so that he could register the case at a later stage. Accused two then told him to write down the information requested.

[78] Having written this information on a piece of paper he found at the police station, he gave it to accused two who then handed it to Erastus. He requested him to detain the deceased, promising to return the next day. At the time, they only knew the deceased's name and not his surname. It was at that point when Erastus went towards the deceased to ask him for his surname. The deceased refused to give his names, where after Erastus told the deceased that he would pour hot water on him. Accused two then told Erastus that the deceased took them to different places and that he should not disturb him, requesting Erastus to leave the deceased in order for him to relax.

[79] At that point in time Erastus searched the deceased and removed his wallet as well as his belt. He proceeded with accused two to the vehicle and met accused three where after they left the police station.

[80] The next day the 17 April 2013 after a morning briefing, Superintendent Iyambo requested them to finalize the previous case and profile the deceased. A directive was given to go back to the deceased's place to see if they could find the laptops. He, together with accused two and three and another police officer Nuuyoma, proceeded to the Windhoek Police Station where they had left the deceased the previous night.

[81] Upon arrival, they were informed that the deceased was taken to Katutura State Hospital. From there they proceeded to the hospital together with one Elago, who was the investigating officer. At the hospital, the officials refused to allow them inside the ward. Accused one confirms to have seen the deceased on 17 April 2013 and that he was still alive. After that, they all left the hospital and drove back to their office and accused two reported to superintendent Iyambo.

[82] Accused one persisted in his testimony that the deceased had no visible injuries, neither did he have blood in his nostrils when they left him at the Windhoek Police Station. He denied that the deceased was assaulted whilst in their custody or before being dropped at the Windhoek Police Station. His head was not swollen either.

Kleopas Shikalepo Kapalanga

[83] On 16 April 2013, he was at home watching a football game around 19h00 to 20h00 when he received a call about a suspect having been seen at Uukwamazi bar. At the time he was on standby duties. Because he did not have a vehicle, he called accused one and three to inform them about the information he received. Accused one and three were informed where after they promise to proceed as per the information. He then left for the Wanaheda Dispatch Centre where he would meet accused one and three. Accused one and three later arrived at the centre with the deceased.

[84] He met the deceased and introduced himself. He explained to him his rights. His observation on the deceased was that he looked normal and had no visible injuries. When he questioned the deceased about the theft, the latter explained that he had gone to the City Police Offices to buy electricity for his grandmother. He then showed the deceased the CCTV footage. The deceased confirmed that the other person in the footage was his cousin from Swakopmund. He could not provide further information.

[85] Whilst at the Wanaheda Dispatch Centre offices superintendent Iyambo informed them to proceed to the deceased's room in order to search for the laptops. It was the deceased who directed them to Huang street where the deceased and his grandmother resided. In the vehicle he sat in the passenger seat whilst accused one drove. The deceased and accused 3 sat in the back. He confirmed the evidence adduced by Werner Johannes Shetekela, accused one.

Elia Nakale

[86] He confirmed to have been at a soccer practice with accused one. He further confirmed information received about a suspect who had been spotted at Uukwamazi bar. He, together with accused one proceeded to Uukwamazi bar and arrested the deceased. The deceased was co-operative. He asked him to come with them to the Wanaheda dispatch centre. The deceased agreed. Upon arrival, accused two took out his phone and showed a picture to the deceased. The deceased identified himself in the video and the other person as his cousin from Swakopmund.

[87] Accused two asked the deceased where he resided after which they drove to Wanaheda where the deceased pointed out the grandmother's house. At the house he sat in the car with the deceased while accused one and two left the vehicle. When accused one and two returned to the vehicle, they informed him that the deceased did not live there, but live with his father in Dolam whereafter they drove to the deceased's father's house as per the deceased's directions. He again remained in the vehicle while accused one and two disembarked. The deceased's father was not at home whereafter they left for Mercy Street in Wanaheda. Again the deceased could not indicate clearly where he lived. It was at that point when accused two indicated that it was getting late whereafter they drove to the Windhoek Police Station to have the deceased detained till the next day.

[88] At the Windhoek Police Station, he remained outside while accused one and two took the deceased into the police station. He is not aware what transpired further in the police station. The next day, the 17th of April 2013 after the morning briefing, accused one, two and himself together with Constable Nuuyoma proceeded to the Windhoek Police Station where they had dropped the deceased off the previous night. They were informed that the deceased was taken to the Katutura State Hospital. They proceeded to the hospital, but were refused entry to the ward where the deceased was admitted. They left to their respective offices and were later served with suspension letters.

[89] With the above evidence of the accused persons summarized, I will now proceed on the evidence adduced before court.

Background based on undisputed evidence.

- a) The deceased was a minor child born on the 26 February 1996.
- b) On the 16 April 2013 whilst in the company of his friends at Uukwamatzi no. 1 bar he was collected by accused one and three. Accused one, two and three are members of the City police.
- c) That from the time that accused three and accused one collected the deceased, the deceased was later on left in the custody of the Namibian police officials at the Windhoek Police Station. The deceased had been in the company of the three accused persons prior to him being dropped off at the Windhoek Station.
- d) That whilst the deceased was in the company of the accused persons, they interrogated and questioned him about the theft and/or the whereabouts of an accomplice and/or stolen goods.
- e) That whilst the deceased was in the accused person's company the accused persons drove around with him and took him to several places; namely
 - (a) Erf 3333 Tekoa Street in Katutura.
 - (b) Erf 1528 Huangho Street in Wanheda.
 - (c) Wanheda City Police dispatch Centre.
 - (d) Erf 1500 Mersey Street, Wanheda.
- f) That accused one cellular telephone number was 081 317 4137 on the 16 April 2013.

- g) The contents of the MTC print out of cell number 081 317 4137.
- h) The cellphone number of accused two on 16 April 2013 was 081 149 8622.
- i) The contents of the MTC print out of cell number 081 149 8622.
- j) The cellphone number of accused three on 16 April 2013 was 081 248 8033.
- k) The contents of the MTC print out of cell number 081 248 8033.
- l) The contents of the Warning Statement of accused three.
- m) The contents of the J88 report on the medical examination on the deceased.
- n) The contents of the National Forensic Science Institute report with Lab/ref/1636/2013/R1.
- o) The contents of pages 025 of the Pol 8 Windhoek Police Station Cell Register.

[90] Photos were taken by a Scene of Crime officer, Immanuel Tangi Shilano and he compiled two photo plan, Exhibit 'F' and 'G'. The photos depicts the deceased at the Katutura State Hospital Ward 3B lying covered in the middle bed on the left upon entry.

[91] The other photos depict the crime scene whereby they visited various places where the deceased was allegedly seen in the company of the accused persons. The photos also indicate certain points pointed out by witnesses where the deceased was seen. The photo plan consists of a google map-portion of Windhoek.

[92] It is necessary to refer to some of these photos and I shall first deal with the photos contained in Exhibit 'F'.

Photos 1 shows features of the deceased as found at Katutura State Hospital's Ward 3 B covered in bedsheets after he was admitted as a result of the alleged assault by the accused persons.

Photo 2 depicts the deceased after the bed sheet had been removed. Photo 3 shows the deceased's upper body and face with medical interventions on his mouth.

[93] Photo 4 shows the deceased's arms which appear to be swollen. Photo 5 shows the deceased's legs also swollen. All these photos were taken on the 19 April 2013 at about 17h00 in the afternoon at the Katutura State Hospital.

Whilst photos in Exhibit 'G' taken on the 17 April 2014 indicates as follows: point 'A' indicates a point where the accused's vehicle allegedly came to stop prior to them meeting the deceased.

Point 'B' indicates a point where the deceased allegedly was before the accused arrived and took him. Point 'B' on page 8 of the photo plan indicates a building on Omongo street, where City Police operates, and where the deceased was taken to. This photo was taken on the 18 May 2014 at 15.47 in the afternoon.

[94] Point 'A' on page 9 of the photo plan depicts a section of Mersey street, Wanaheda representing a point where the accused's vehicle allegedly went to stop where after the accused and the deceased were seen at Erf 1500.

Point 'B' represent a point where the deceased allegedly fell when he was taken out of the motor vehicle by the accused.

Point 'A' on page 11 of the photo plan shows a point where the accused's vehicle allegedly stood when accused and the deceased were seen at Erf 1528 Hwang-Ho Street Wanaheda.

Whilst point 'A' on page 13 of the photo plan represents a point where the accused's vehicle in which the deceased was allegedly seen when they were at Erf 3333 Tekoa street, Dolam location.

Point 'B' on the same photo indicates a point where a marked police vehicle allegedly stopped, which accompanied the vehicle referred to at point 'A' in the same photo.

The photos on page 15 of the photo plan depict the Windhoek Police Station where the deceased was allegedly taken to by the accused persons on the 16 April 2013.

Other photos below depict the Police station holding cells reception area where the deceased was allegedly left by the accused persons.

Common Purpose

[95] The accused persons are jointly charged for murder, kidnapping and obstructing the course of justice or attempting to do so. In the State's summary of substantial facts and list of witnesses in terms of s 144 (3) of the Criminal Procedure Act which was served on the accused persons it concluded with the following sentence:

'At all relevant times the accused were members of the Windhoek City police, who were on stand-by duty and acted with common purpose.'

[96] Section 155 of the Criminal Procedure Act provides that persons implicated in the same offence maybe tried together. The issue of perpetrators, accomplices, the liability of each, as well as the casual link requirement between the aid of an accomplice and the commission of the offence by the perpetrator are comprehensively discussed in the authoritative work of Hiemstra's Criminal Procedure, 22 – 25 and 26. Casualty is therefore not a requirement where the doctrine of common purpose is applied. (*S v Safatza and Others*¹)

[97] The doctrine of common purpose has been formulated by Hiemstra as follows:

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

¹ 1988 1SA 868 (A).

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

[98] The State bears the duty to prove even by inferences, that the participant actually foresaw the act of the other and was indifferent to the result. Courts are however required to be cautious in applying the doctrine of common purpose because it is often unnecessary and inappropriate.

[99] Indeed the doctrine of common purpose had been accepted in our law as a basis for the conviction of more than one participant in a case. The most authoritative case being that of *S v Safatza supra*, where it was stated at 705I – 706 B that in a matter where no prior agreement had been proved, an accused in regard to whom no causal link to the death or wounding of the victim had been proven, can only be held liable for such death or wounding on his own *mens rea* if the following are present:

- (a) presence on the scene of the violence;
- (b) knowledge of the assault on the victim.
- (c) the intent to make common cause with those who in fact perpetrated the assault;
- (d) 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
- (e) presence of the necessary *mens rea* with regard to the killing of the deceased, *dolus eventualis/or directus*. Indeed it is not denied that the deceased was in the company of the three accused persons.

[100] Where there is no direct evidence to establish common purpose it has been held that common purpose can be inferred from joint conduct. Thus in the matter of *Dudley vs Minister of Justice*² it was held:

‘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.’

[101] It is trite that disassociation from common purpose may prevent the conviction of a person based on this doctrine. Therefore the facts of this matter will have to be evaluated against the principle of the doctrine of common purpose in order to determine whether the State can rely on that doctrine to prove the liability of each accused person. It is common cause that the State relies on the doctrine in respect of the murder charge, the obstructing of the course of justice and the kidnapping charges preferred against all the accused persons. That all three accused persons used the same vehicle in which the deceased was transported from one place to the other is not disputed.

Analysis of Evidence

[102] Before I deal with the evidence of the individual witnesses as far as it is necessary, the following became evident during the course of the trial:

a) All the accused persons are implicated in all the events of the night of the 16 April 2013.

[103] Accused one to three were present during almost all the events that night. Accused three was the person to whom the motor vehicle, a city police pick-up with registration number N 495 W was allocated, although he was not the driver of the said motor vehicle during that evening.

[104] As indicated earlier on, I do not find it necessary to refer to the evidence of all the many state witnesses in detail. It is clear from the evidence presented in this court that

² *Dudley v Minister of Justice* 1993 2SA 464 (A) at 468 B.

the evidence in respect of the assault on the deceased by the accused persons is vehemently denied. All the accused have testified that when they left the deceased at the Windhoek Police Station he had no injuries and police there recorded that the suspect was well received which entry was made in the Occurrence Book. Their contention is therefore that if the deceased had been injured, he must have been so injured at the police station where they left him under the custody and care of the Namibian police and they could therefore be the one to be held responsible for the deceased's injuries and his resultant death. Contrary however to their versions, there was evidence led before court that prior to the deceased being taken to the Windhoek Police Station, he was observed by several witnesses, already injured and unresponsive.

[105] There is undisputed evidence that when accused one and three arrested the deceased at Uukwamazi bar on the 16 April 2013 the deceased was not having any injuries. One of his friend, Mervin testified that the deceased was in high spirit when the police officer came and removed him from their company.

[106] The deceased was taken to the Wanaheda Dispatch Centre and that fact has not been disputed either. That it was also at that point when accused two came into the picture. The deceased was still physically well and was able to walk and talk by himself. He had no injuries. This status quo was confirmed by another police officer one Elia Eixab.

[107] It is also clear from the evidence that the deceased was first interrogated and or questioned at the Wanaheda Dispatch Centre, where after he was taken to the house of Alina Shetekela, his grandmother. It was there where the issue of the deceased having been injured arose. The deceased remained in the vehicle with accused three whilst accused one and two approached the house of the deceased's grandmother. Both Alina Shetekela and Paullete testified that they went to the vehicle and saw the deceased handcuffed. He had a swollen head. During the exchange between Alina Shetekela and accused one the latter questioned her whether they were protecting thieves and told the witness that the deceased was lucky that they did not shoot him. Why those threatening words were uttered remain unexplained.

[108] When she asked them why they had assaulted the deceased and they did not take him to the Police Station, there was no response but the accused persons just drove away. That is what prompted Paulete to write down the vehicle's registration number where after the deceased's father was called and informed about the assault. Ms Shetekela also requested the deceased's father to go and find out about the deceased's whereabouts at the Police Station or at the hospital.

[109] All the accused persons denied that Ms Shetekela and Paulete were at their vehicle. They denied further that the two saw the deceased on the 16 April 2013.

[110] The question for determination before this court is whether the accused persons are responsible for the death of the deceased, his kidnapping as well as whether they obstructed the course of justice or attempted to do so in the light of all the evidence adduced at the trial, and whether their guilt was established beyond reasonable doubt. The deceased was arrested by the 3 accused persons and was taken from one place to the other by them in an effort to recover the stolen laptop.

[111] Thus it is the duty of this court to consider the totality of the evidence and to guard against a tendency of focusing too intently upon separate and individual parts of what is, after all a mosaic proof. Doubts about one aspect of evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may however be set at rest when it is evaluated again together with all the other available evidence. Therefore evidence must be looked at as a whole, and not viewed in isolation. Furthermore the evidence must be treated with utmost care and may only safely be relied upon where it is supported by some satisfactory indications, that it is trustworthy.

[112] It is trite that the evidence adduced need not be satisfactory in every respect and that it may safely be acted upon even where it has some imperfections provided that the court at the end is satisfied that the truth has been told.

[113] It has now been established that when the deceased arrived at the Windhoek Police Station he was seriously injured, where after his father arrived shortly and demanded that he be taken to the hospital for medical attention. Though the accused persons had made allegations of him having been drunk, the deceased's father found him on the floor of the police station. Mr Erastus, an officer on duty at the time, confirmed that the deceased was brought in already injured by accused one and two who were in a hurry and immediately left the police station. Though there is a requirement that an injured suspect should not be received into custody, that requirement was ignored by the officer concerned as he only later on found out that the deceased was severely injured when the accused persons had already left the police station. Indeed rules are there to guide police officers with regard to affecting of an arrest, however these rules are not necessarily followed meticulously as is the case herein.

[114] The court also has to consider the fact that a report of the deceased having been assaulted by the City police had already been made to the deceased's father by the deceased's grandmother, Alina Shetekela. That was the reason the deceased's father visited several police stations in search of his son, the deceased. The question that arises therefore is why the accused persons hurriedly left the Windhoek Police Station without having properly handed over the deceased to the officer on duty but only handing him a note with the deceased's first name inscribed on it. This clearly indicates that the accused person's failure to follow the laid down procedures as established in the police manuals was mischievous. These actions on the part of the accused persons demonstrate their clear intentions to hide the fact that they had already assaulted the deceased which they wanted to conceal. Further taking advantage of the fact that the receiving officer was engaged in some other activity which did not afford him sufficient time to immediately inspect the deceased's condition.

[115] Therefore when regard is had to the fact that already at 22h00 a message was sent to Simon Nawa Tangeni by Mervin informing him about the deceased being under fire and further indicating that the deceased was beaten up, that means that the assault on the deceased had been carried out by them prior to the accused persons taking the deceased to the Windhoek Police Station.

[116] It was not only Simon Nawa Tangeni who testified about having received a text message about the assault on the deceased. Ms Zenobia also testified about having seen the deceased on the night of the 16 April 2013 whereby she observed that the deceased could not walk on his own as accused 1 claimed that the deceased was drunk. It has also emerged from the evidence adduced in the trial that the deceased did not consume alcohol at the Uukwamazi bar where he was picked up by accused one and three and as such he could not have been drunk during the evening.

[117] Indeed, the deceased's father found him at the Windhoek Police Station severely injured and he was taken to Katutura State Hospital for medical attention. Doctors who attended to the deceased confirmed his injuries as well as the Post-Mortem examination conducted on the body of the deceased. From the Post-mortem examination report, the deceased had been severely assaulted indiscriminately all over his body including the head and was dropped at the police station where he remained unattended until Erastus observed his injuries and when his father arrived who demanded him to be taken to hospital for medical attention.

[118] The accused persons jointly ought to have foreseen that by assaulting the deceased indiscriminately all over his body that would result in his death if not immediately taken for medical attention. This is especially the case if regard is had to the observations made by the first doctor who discovered that the deceased had a severe head injury. It is a notorious fact that a severe head injury would result in death if one does not immediately receive proper medical care.

[119] On the other hand, it was the defense's contention that the State's case was riddled with contradictions thus that the witness's testimony should not be believed. On this score, this court would like to highlight the following passage:³

'It is not uncommon that witnesses when testifying differ from one another in minor respects, instead of relaying identical versions to the Court. There can be various reasons explaining their differences and it does not necessarily mean that deliberate lies were told to the

³ *S v Awala* 1 NR 1 2008 at 223.

Court. Contradictions *per se* do not lead to the rejection of a witness's evidence as it may simply be indicative of an error.'

[120] Furthermore, if this court take into account the discrepancies which existed in the witness's testimony that could only be attributed to the lapse of time, and those are therefore immaterial discrepancies, which did not go to the heart of the issues upon which the state's case rested. Therefore in case of *R v Mlambo*⁴ the following was said:

'There is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such high degree of probability is raised that the ordinary reasonable man after a mature consideration, comes to a conclusion that there exists no reasonable doubt, that an accused has committed the crime charge. He must in other words, be morally certain of the guilt of the accused.'

[121] There is no evidence before this court to suggest that any of the accused persons had taken any step to disassociate himself from the actions of the other, either by clear expression or conduct during the commission of the crimes or thereafter. All of them just went along.

[122] This court is therefore of the view that when considering all the evidence adduced, it is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused person's guilt has been proven beyond reasonable doubt to warrant a conviction on each of the charges.

[123] Having carefully considered all the evidence presented before court, I have no doubt that the guilt of each accused person have been proven beyond reasonable doubt on the basis of common purpose. Consequently, each accused person is found guilty on the charge of murder based on *dolus eventualis*.

[124] Moving on to the charge of kidnapping which consists of an unlawful intentional deprivation of liberty of movement or custody of another, evidence led before court which

⁴ *R v Mlambo* 1957 4 (SA) 727 AD at 738 A.

appear not to be in dispute is that the deceased was arrested on the 16 April 2013 on suspicion that he with another person was involved in a theft of laptop at the City Police head offices.

[125] In order to prove a charge of kidnapping, it is a requirement that there be an intentional deprivation of someone's liberty of movement. Thus the period of deprivation is not the issue. However in *Mauno Haindongo v The State*,⁵ after referring to *R v Long*⁶ and *S v Mellors*⁷ had following to say:

'Until quite recently the Court considered that for a case of kidnapping to be made out the accused must have intended the deprivation of liberty to last for more than a very short period of time but the more modern approach appears to be to regard the time factor as no more than an indicator of the intention of the accused....In my opinion that is the approach which should be adopted by our Courts....'

[126] The reason for the deceased's arrest was clearly stated which was to investigate a theft case that had been registered. One cannot therefore argue that the deceased's arrest was inappropriate and that a charge of kidnapping had been established beyond reasonable doubt. Accordingly each accused must be found not guilty and be discharged on that count.

[127] The remaining charge faced by the accused person is that of obstructing the cause of justice or attempting to do so. The offence of obstructing or defeating the cause of justice may refer to an interference which may occur before proceedings are instituted. In *casu*, the accused persons had dropped the deceased at the Windhoek Police Station as testified to by Mr. Erastus and confirmed by Mr. Nashilongo. The deceased was injured and could therefore not be placed in the cells.

[128] He was left on the floor of the police station in a hurried manner by accused one and two without informing the officer in charge about his injuries and remained there for a while until his father arrived. The accused persons were charged with the offence of

⁵ *Mauno Haindongo v The State* Cr App 80/94.

⁶ *R v Long* 1970 (2) SA 153 (RA).

⁷ *S v Mellors* 1990 (1) SACR (W).

obstructing the course of justice or attempting to do so. The allegations are that they unlawfully and with intent to defeat or obstruct the course of justice by doing the following acts:

(a) Report to members of the Namibian Police Force at the Windhoek Police Station that the deceased must be detained and that he is drunk and/or pretending to be ill or unconscious or injured; and/or

(b) Fail to report the true facts to members of the Namibian Police Force at the Windhoek Police Station and/or to their superior(s), namely Supt. E. M. Iyambo and/or A. M. Kanime namely that the deceased was assaulted by them or by one or more of them whilst in their custody; and/or

(c) Preventing the deceased from obtaining medical treatment whilst he is in their custody; and/or

(d) Failing to inform the parents and/or guardians of the deceased where they are going to take the deceased, alternatively falsely informing them that they are taking the deceased to the Wanaheda Police Station;

Whereas these acts were perpetrated by the accused whilst they knew or foresaw the possibility that their conduct may:

(a) Frustrate and/or interfere with police investigations into the detention by them of the deceased and the assault on the deceased; and/or

(b) Prevent the collection of physical evidence or conceal physical evidence of an assault perpetrated on the deceased; and/or

(c) Protect one or more of them from being prosecuted for a crime in connection with their detention and/or assault on the deceased; and/or

(d) Prevent the deceased from obtaining medical treatment/observation prior to being detained in the police cells at the Windhoek Police Station.

[129] It is a fact that most, if not virtually all, the issues relating to this charge are factual. It is also now common cause that all 3 accused persons were members of the City Police who are entitled to effect an arrest on a suspect. They were competent to effect an arrest and detain a suspect for interrogation or questioning.

[130] Though denied, evidence before court was that the deceased was left at the Windhoek Police Station severely injured. His father who arrived at the police station found him on the floor of the police station unattended. Mr Erastus's testimony is that he only discovered the deceased's injuries after the accused persons had already left the police station. He was not informed about the injuries on the deceased, but was informed that the deceased was drunk.

[131] The failure on the part of the accused persons to inform the officer in charge immediately about the actual situation/position of the deceased, were part of a design to delay the period within which the deceased could have been taken to the hospital for immediate medical attention, and in so doing, the accused persons attempted to defeat or obstruct the course of justice.

[132] Accordingly, I am satisfied beyond reasonable doubt that the charge of attempting to defeat or obstruct the course of justice has been proven against each accused person.

[133] Their omission to inform the officer in charge about the injuries was meant to prevent the police there to take the deceased to a hospital for immediate medical attention. As police officers they each had a duty to inform the officer in charge about the deceased's injuries.

[134] Accordingly each accused is found guilty on the basis of common purpose on a charge of attempting to obstruct the course of justice.

USIKU J
Judge

APPEARANCES:

STATE : Mr Lutibezi
Office of the Prosecutor-General

ACCUSED ONE: Mr Isaacks (Isaacks & Associates)

ACCUSED TWO: Mr. Visser (Dr Weder, Kauta & Hoveka Inc.)

ACCUSED THREE: Mr Amoomo (Kadhila Amoomo Legal Practitioners)