

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 12/2018

In the matter between:

THE STATE

and

**KAREL CLAASEN
DION HARASEB
ZELDA HARASES**

**ACCUSED NO 1
ACCUSED NO 2
ACCUSED NO 3**

Neutral citation: *S v Claasen* (CC 12/2018) [2020] NAHCMD 82 (09 March 2020)

Coram: LIEBENBERG, J

Heard: 13 - 17 May 2019; 01 August 2019; 05 - 09 August 2019; 18 - 19 November 2019; 20 January 2020.

Delivered: 09 March 2020

Flynote: Criminal law – Private defence – Accused no 2 said that whilst wrestling for possession of the firearm a shot accidentally went off – Accused

further narrates that shot went off because deceased had finger on the trigger whilst barrel of firearm pointing to his abdomen — Expert evidence established that it is impossible for the deceased to hold one finger on the trigger whilst the rifle was pointed at the deceased's abdomen – Evidence of expert not rebutted.

Criminal law – Private defence – Version proffered self-contradicting – Contradiction between plea statement and testimony of accused no 2 regarding shooting incident – Irreconcilable versions - Accused shown to be misleading the court – Unreliable witness – Considered in totality of evidence – Private defence rejected.

Criminal law – Housebreaking with intent to rob and robbery with aggravating circumstances – Charge relates to breaking in of deceased's farmhouse – Accused admitting intending to take deceased's property as compensation for lost income – Accused had to kill deceased in order to take property – Elements of robbery require causal link between the violence and the taking of property — Causal link between the killing of the deceased and taking of property established.

Criminal law – Housebreaking with intent to rob and robbery with aggravating circumstances – Accused raised defence of necessity – Accused persons allege to having been coerced to take deceased's property by co-accused – Court to look at all facts in deciding whether accused persons satisfied defence of necessity – Evidence support defence of necessity in respect of one accused partly and fully in respect of another accused – Accused knew property was stolen and made him guilty of theft.

Criminal law – Robbery with aggravating circumstance – Charge relates to robbing of truck belonging to deceased – Accused abandoned vehicle – Abandoning of stolen property with reckless disregard for whether it will be found or not constitutes theft – Accused guilty of robbery.

Criminal law – Robbery with aggravating circumstance – Accused assisted co-accused to remove stolen property from farm – Accused not involved in act of robbery himself – Actions of accused amounts to accessory after the fact.

Criminal law – Contravention of section 83(2) of the Road and Transportation Act 22 of 1999 – Use of motor vehicle without owner's consent – Ambit of act wide to include a passenger in a vehicle – Question whether accused as passenger acted out of necessity when boarding vehicle – Evidence established accused acted out of necessity as she had no choice but to board vehicle with co-accused.

Summary: On 19 October 2015 the deceased was murdered on his farm and his property stolen. As a result of the incident three accused persons who worked for the deceased were charged with eight counts, including and amongst others, murder, housebreaking with intent to rob and robbery, defeating or obstructing the course of justice and use of a motor vehicle without the owner's consent. Accused no's 1 and 3 pleaded not guilty on the basis that they acted out of duress. On the other hand, accused no 2 pleaded guilty to counts, 5 (use of motor vehicle without the owner's consent), 6 (defeating or obstructing or attempting to defeat or obstruct the course of justice), 7 (possession of firearms without a licence) and 8 (possession of ammunition). However on the remaining counts he pleaded not guilty and raised private defence.

Held, that, with regards to the circumstances that led to the firing of the first shot, there is no evidence rebutting the evidence of the expert that it would have been impossible for the deceased to hold one finger on the trigger whilst the rifle was pointed at the deceased's abdomen during the struggle for possession.

Held, further that, there is a material contradiction between accused no 2's plea explanation and his testimony regarding his actions during the shooting incident. Accused found to be unreliable witness rendering his defence of private defence to be false and rejected.

Held, further that, accused no 2 had the intention earlier on to steal the property of the deceased and in order to do so he had to overcome any resistance the deceased may put up. Therefore the offence of housebreaking with the intent to rob and robbery had been proved because a causal link between the killing of the deceased and the taking of the property had been established.

Held, further that, in order to decide on the defence of necessity, the court has to look at all the facts of the case.

Held, further that, whilst evidence may support a defence of necessity up to the stage where the goods were loaded onto the truck nothing showing that whatever transpired thereafter was done under duress. Therefore, accused no 1 knew property to have been stolen and made him guilty of theft. As for accused no 3 the offence of theft not proved.

Held, further that, although accused no 1 was not part of the robbery itself his actions satisfy the definition of an accessory after the fact by facilitating accused no 2's evasion of liability.

Held, further that, the ambit of section 83 (2) of the Road and Transportation Act 22 of 1999 is wide enough to include a passenger in a vehicle. The court is of the view accused no 3 acted out of necessity when she boarded the truck.

ORDER

Count 1: **Murder –**

Accused no's 1 and 3: Not guilty and discharged

Accused no 2: Guilty

Counts 2 and 3: Housebreaking with intent to rob and robbery (aggravating circumstances) –

Accused no 1: Not guilty and discharged

Guilty of the competent verdict of theft

Accused no 2: Guilty

Accused no 3: Not guilty and discharged

Count 4: Robbery (aggravating circumstances) –

Accused no 1: Guilty (accessory after the fact)

Accused no 2: Guilty

Accused no 3: Not guilty and discharged

Count 5: Use of motor vehicles without the owner's consent (c/s 83(2) of Act 22 of 1999) –

Accused no 1: Guilty

Accused no 2: Guilty

Accused no 3: Not guilty and discharged

Count 6: Defeating or obstructing or attempting to defeat or obstruct the course of justice –

Accused no 1: Not guilty and discharged

Accused no 2: Guilty – Defeating or obstructing the course of justice

Accused no 3: Not guilty and discharged

Count 7: Possession of firearms without a licence (c/s 2 of Act 7 of 1996) –

Accused no 1: Guilty (revolver)

Accused no 2: Guilty (rifles)

Accused no 3: Not guilty and discharged

Count 8: Possession of ammunition (c/s 33 of Act 7 of 1996) –

Accused no 1: Not guilty and discharged

Accused no 2: Guilty

Accused no 3: Not guilty and discharged

JUDGMENT

LIEBENBERG J:

Introduction

[1] The accused persons are indicted on eight counts¹ to which accused no's 1 and 3 pleaded not guilty while accused no 2 pleaded guilty to counts 5, 6, 7 and 8, but not guilty to the remaining counts. Statements prepared in terms of s 115 of the Criminal Procedure Act 51 of 1977 were handed in, setting out the defence of each of the accused persons. I will return to these statements later in the judgment.

¹ **Count 1:** Murder.

Count 2: Housebreaking with intent to rob and robbery with aggravating circumstances.

Count 3: Housebreaking with intent to rob and robbery with aggravating circumstances.

Count 4: Robbery with aggravating circumstances.

Count 5: Use of a motor vehicle without the owner's consent – c/s 83(2) of Act 22 of 1999.

Count 6: Defeating or obstructing or attempting to defeat or obstruct the course of justice.

Count 7: Possession of firearms without a licence – c/s 2 of Act 7 of 1996.

Count 8: Possession of ammunition – c/s 33 of Act 7 of 1996.

[2] The accused persons were represented as follows: Accused no. 1 – Mr *Siyomunji*; Accused no. 2 – Ms *Gebhardt*; and Accused no. 3 – Mr *Tjituri* while Mr *Olivier* appears for the state.

[3] On 19 October 2015 Mr Willem Cornelius de Klerk (hereinafter ‘the deceased’), aged 71 years, was killed on his farm Villa Rosa situated in the district of Usakos. The accused persons were employed and resident on the farm, though it seems that accused no. 2 was only in temporary employ at that stage. The deceased’s homestead as well as that of Mr Koch (being part of the farmstead) were ransacked and the stolen property transported from the farm in a refrigeration truck belonging to the deceased. Part of the loot were taken to Windhoek by accused no’s 1 and 3 whilst accused no 2 took his share to Swakopmund. Firearms were amongst the property stolen from the deceased which were found with the accused respectively. The charges indicted emanate from the events of that fateful day. It is common cause that on the date of their arrival in Windhoek, accused no 3 informed her mother of the killing of the deceased; also that she that same night made a phone call to Mr Koch in Swakopmund informing him about the death of the deceased. This prompted Mr Koch to travel to the farm where the gruesome discovery was made early the next morning.

Case for the State

[4] Mr Albertus Koch and the deceased were friends and had a close relationship. This also explains why he built himself a home close to that of the deceased whom he occasionally visited and helped out on the farm.

[5] The evidence of this witness essentially concerns two aspects, namely, the phone call received from accused no 3 at around 01h30 on the morning of 20 October 2015 to say that ‘Grandpa’ was killed and the observations made on the farm in the morning as regards the deceased and the ransacking of the

two dwellings and property stolen. He said he spoke to both accused no 1 and 3 on the phone and recounted their brief narrative of events that led to the deceased's death and them leaving the farm. It however differs in material respects from what they themselves testified in their defence. I will return to this part of the evidence later. With regards to the deceased's health and physical condition, Mr Koch said that the deceased had shortly before the incident been discharged from hospital and that he was still weak. With regards to accused no 2's assertion that there was a struggle between him and the deceased, the witness doubted this saying that the deceased was a frail man who was 70 or 71 years of age with a height of 1.75 meters and weighed in the region of 55 kg. In his opinion due to the deceased's physical condition he could not have matched the power of accused no 2 who is physically well build.

[6] At the scene he found the deceased's swollen body (already in a state of decomposition) lying inside an old water tank. He further observed scuffle and drag marks on the ground which appeared to have been made by the heels of the deceased when dragged. The deceased's Land Rover had been crashed into the rear of another truck parked in front of the shed. After the arrival of the police they entered the houses and found it in a state of disarray. He subsequently listed the stolen items with a total value of N\$723 200.

[7] In cross-examination Mr Koch was adamant that there was no instance where the deceased failed to pay his workers and particularly, that accused no 2's assertion that he went to report the matter to the labour office was false. He further said that when speaking to accused no 1 on the phone that night, he in fact inform him that "they" had put the deceased's body into the tank. As regards his house not having been locked at the time of the break-in, the witness refuted the allegation. The witness also pointed out that he cannot say whether the revolver listed in the indictment on count 2 is the one that went missing, as he never saw the revolver with the deceased.

[8] Emelda Tsamases and Gerson Tsamaseb are the biological parents of accused no 3 to whom accused 1 and 3 turned upon their arrival in Windhoek.

Emelda said she received a big bag containing a lot of groceries and upon enquiring as to where it came from, accused no 1 said that he had bought them. A revolver was also handed over to her which accused no 1 claimed to be his but denied that it had been used in the killing of the deceased. It was accused no 3 who made the first report to her mother about what happened on the farm, upon which accused no 1 responded by saying that it was accused no 2 who had shot the deceased. He elaborated on how they took the deceased's belongings before leaving the farm. Emelda informed her husband, Gerson, of the report made to her and he then contacted a certain detective Gaeseb with whom a meeting was set up to interview the two accused. After the meeting the police were informed and this kicked off the investigation.

[9] In cross-examination Emelda was unyielding about the firearm belonging to accused no 1 and disputed that he accidentally found it among his belongings; despite this aspect of her evidence not being included in her witness statement made to the police. Witness Gerson, in turn, said that accused no 3 told him about the shooting and that accused no 2 then forced them to leave the farm.

[10] A spent cartridge found at the crime scene was examined by Mr William Nambahu, a ballistic scientist formerly attached to the National Forensic Science Institute and found to have been fired from a rifle belonging to the deceased. Although the finding is consistent with evidence that the deceased was shot with the said rifle, the evidence does not support the inference that the cartridge itself can be linked to the two shots that killed the deceased, or that it was fired from the position where the cartridge was found at the entrance of the cold storage unit.²

[11] The evidence of Inspector Fredrick Vilonel, a qualified gunsmith employed by the Namibian police, mainly turns on the specifications and functioning of the firearm from which the fatal shots were fired. The purpose of

² Winchester .308 with serial no: 184724 (Exhibit 1).

his evidence is clearly aimed at refuting the explanation advanced by accused no 2 in para 25 of his s 122(2) statement³ where it is stated:

‘At some point, while struggling, me and the deceased person, were holding the firearm. I managed to turn the firearm towards the deceased person. He still had his finger on the trigger. One shot went off and in the process of the deceased falling down, the second shot went off. The deceased person fell to the ground with the firearm.’

[12] During his testimony Inspector Vilonel elaborated on the report he prepared and submitted into evidence where he reached the following conclusions: (a) The .308 Winchester rifle has a bolt action which means that two shots cannot be fired consecutively without the bolt being manually opened in order to eject the spent cartridge and reload the next live round into the chamber; (b) from reconstructions conducted by him it is evident that the angle of incident could not have been fired from a struggling position as the gunshot would then be at point-blanc range; (c) in light of the measurements of the firearm, it would not have been possible for the deceased to pull the trigger with the firearm pointing in his direction; and (d) the gunshot wounds as per the post mortem report are inconsistent with the explanation advanced by accused no 2. As will be shown later, the evidence of this witness has likely brought about a diversion from the explanation initially advanced by accused no 2 as to the events leading up to the shooting.

[13] Dr Mamadi Guriras on the 23rd of October 2015 performed an autopsy on the body of the deceased and compiled a Medico-Legal Post-Mortem Examination Report⁴ on her findings. The gist of this report is reflected in the chief post-mortem findings which are the following:

- Distant gunshot entry wound to the left abdomen;
- Distant gunshot entry wound to the right flank;
- Exit wound to the right back;
- Exit wound to the right flank;
- Fracture of ribs 8 and 9 on the right;

³ Act 51 of 1977.

⁴ Exhibit ‘V’.

- Features of advanced decomposition.

The cause of death was 'multiple shooting' (gunshot wounds).

[14] Noteworthy of the report is that there were *two distant* gunshot wounds to the body, namely to the left chest and right flank and two corresponding exit wounds. This conclusion is based on the absence of tattooing and soot formation around the wounds which would have been present had the shots been fired at close range.⁵

[15] Warrant Officer Godfried Anton was the Station Commander at Usakos when the report about the murder at farm Villa Rosa was received. He and his colleagues visited the crime scene in the morning where Mr Koch pointed out certain pointers such as drag marks and the container in which the deceased's body had been stashed. The refrigeration truck belonging to the deceased was found abandoned next to the road, some 22km outside of Usakos. He further testified about an incident when accused no 3, who had been detained at the police station Usakos, summoned him to her cell and informed him that she wanted to make a confession. In his and Warrant Officer Geiseb's presence she narrated what had happened that led to the deceased's death.

[16] This so-called confession was never reduced to writing by either of the officers made to, neither was it confirmed by the accused in the presence of a magistrate. Except for stating that this report does not meet the requirements of a confession but merely exonerates accused no 3 whilst implicating her co-accused, the report differs significantly from what the accused testified in her defence. The court in its assessment of the evidence should therefore give little weight thereto, unless where corroborated by other evidence. That briefly summarises the relevant evidence of witnesses testifying for the state.

Case for the Defence

⁵ Tattooing means unburnt metal particulars from a gun when shot.

[17] Accused no 1 was in the employ of the deceased at farm Villa Rosa where he cohabited with accused no 3. On the day of the incident he and accused no 2 were busy working the sheep when the deceased returned from the cattle post and then sent him to call accused no 3 from home. He proceeded to their living quarters and whilst waiting on accused no 3 to get herself ready, two gunshots rang out. Shortly thereafter accused no 2 arrived driving the deceased's Nissan pickup. He and accused 3 were scared off by the manner in which the vehicle was driven and both ran off. He disembarked from the vehicle carrying a firearm and told them immediately to pack their belongings. They obliged and accused no 2 instructed accused no 1 to drive back to the homestead of the deceased. On their way and when passing the kraal, accused no 2 pointed to the place where the deceased's body lay. At the homestead he observed that some of Mr Koch's belongings were already taken from his house; he never entered that house. Accused no 2 then told them to load the goods onto the truck. Because he was afraid of accused no 2 they co-operated; they also transferred their own belongings from the pickup onto the truck. They followed accused no 2 into the deceased's home from where they removed groceries and other valuables. He then drove the truck up to the Usakos main road where accused no 2 told them to disembark. After offloading their belongings accused no's 1 and 3 walked up to a filling station from where they boarded a taxi going to Windhoek. He paid the transport fees from N\$2 000 cash he had on him.

[18] When they reached the house of accused no 3's parents in Katutura, she told her mother that accused no 2 had shot the deceased and that they left the farm under threat. The mother notified a police officer who interviewed them later in the day. As regards the revolver found with accused no 1, he explained that it might have ended up in his bag when he and accused no 3 transferred their belongings from the pickup and the revolver got mixed up with his belongings. This was the deceased's revolver which, according to accused no 1, was usually lying on the seat of the pickup next to the deceased. The next day he, accused no 3 and her mother were taken to Usakos where he made a statement to the police. He disputes having killed or handled the body of the deceased and claims to have acted under duress

when executing accused no 2's instructions to take the deceased's property and drive the pickup and truck during the getaway.

[19] In cross-examination accused no 1 changed his evidence to say that they put their personal belongings in the loading box of the pickup and not in the cabin as he initially testified. That obviously negates the possibility of him accidentally taking the revolver from the cabin as he claims. He further denies having broken a window to gain access to the deceased's home. He confirmed that the relationship between the deceased and accused no 2 was poor which had led to the latter's dismissal but improved later and normalised to the point where the deceased called on accused no 2 to assist with duties on the farm two days before and he agreed. That was still the position on the day of the incident. According to him the labour issue that arose with the deceased did not affect accused no 2 as he was only appointed in September 2015 and barely worked for two months.

[20] He further disputes imputations by accused no 3 that he and accused no 2 had been drinking and smoking cannabis the previous evening or that he told accused no 3 in the morning that accused no 2 was busy breaking into the house of Mr Koch. According to him she stayed at home that morning. When the deceased returned from the cattle post he appeared and acted normal and was not carrying his rifle.

[21] Accused no 2's narrative of events that led to the killing of the deceased on the morning of 19 October 2015 and subsequent thereto, is that he started working on the farm shortly after his arrival on 28 August 2015. The employment relationship however disintegrated within a short period of time to the point where he was blamed for the loss of several sick sheep which led to his dismissal. An agreement was reached that he could stay on until a replacement was found.

[22] Whilst busy with his chores that morning, the deceased approached him and accused him of causing disruption on the farm; he was pointing a firearm (.308 rifle) at the accused. This prompted the accused to try and

snatch it from him and got a grip of the barrel where after they started wrestling for possession of the firearm. At one stage they both fell down when the firearm was pointed in the deceased's direction and one shot rang out, striking the deceased in the abdomen. According to accused no 2 the shot fired because the deceased at all times had his finger on the trigger. The accused then picked up the rifle, reloaded and fired a second shot, not necessarily aiming at the deceased. In an attempt to explain the firing of the second shot, the accused submitted that the consumption of liquor the previous evening might have had some impact on his actions.

[23] He confirmed driving up to their living quarters where he informed his co-accused about the shooting incident but denied having taken the rifle along. It was then agreed among themselves to pack their belongings and leave the farm; he disputes having forced anyone to go with him. They gained access to the deceased's house after accused no 1 broke a window where after they proceeded to appropriate the deceased's property which was loaded into the rear of the truck. They also removed items from Mr Koch's house after opening the bedroom door. He said the purpose of entering was to see what was inside the house and take valuable items that would cover for the money owed to him by the deceased. As regards the deceased, he explained that accused no 1 assisted him carrying the body from where it lay next to the kraal, to the old tank where they dumped it. He was however unable to explain why he decided to put the body in the tank. On his version, they only fetched their personal belongings *after* they raided the deceased's homestead and not as testified by his co-accused. He admitted taking the rifle and placed it in the back of the truck with the other property.

[24] According to the accused they all intended to go to Windhoek but parted ways near Usakos when one of the tyres of the truck blew out. After accused no's 1 and 3 removed their belongings from the back of the truck, he took out the remainder and proceeded to Usakos and further to his aunt's house in Swakopmund. Later in the day he was arrested at a bar where after he led the police to the address where the stolen property was recovered.

[25] Under cross-examination accused no 2 was taken to task to explain the contradictions, particularly between his evidence in chief and the s 112(2) statement⁶ handed in at the stage of pleading, as regards the firing of the shots that killed the deceased. There is no need to paraphrase the explanations advanced by the accused as I will deal with it later to the extent required. Suffice it to say that there are material differences in the respective versions which remained unexplained especially when the accused claimed ignorance of the contents of the statement setting out his plea, bearing his signature. The accused's testimony that he was assisted by accused no 1 to conceal the deceased's body by placing it in the old water tank is further inconsistent with his plea explanation which reads at para 27 that he '... panicked and *dragged* the deceased person's body and placed it into the water container and covered it ...' in order to conceal it. Thus, his plea of guilty on count 6 (defeating or obstructing the course of justice) is based on the fact that he acted alone. With regards to the fighting and shooting of the deceased he said his co-accused were not involved and unaware thereof (until he told them). Despite saying in cross-examination that when firing the second shot he was in shock and did not know what he was doing, he clearly recounted his actions when picking up the rifle and shooting the deceased whilst down. He qualified this by saying that the deceased tried to get up but did not manage before he fired the second shot.

[26] Accused no 3 testified that on the previous day (18th October) she accompanied the deceased to Usakos and returned to the farm with liquor she had bought and which she and her co-accused drank until late into the night. In the morning accused no's 1 and 2 reported for work and she followed them later. This was the time the deceased had already left for the cattle post. When accused no 1 passed some of his chores on to her, she enquired as to the reason and this was when accused no 1 told her that he wanted to check on accused no 2 who intended breaking into the house of Mr Koch; she also saw him (accused no 2) close to Koch's house. After finishing what she was requested to do she realised that accused no 1 was not doing his duties and raised it with him; he then sent her home to fetch the liquor. Before she could

⁶ In terms of the Criminal Procedure Act 51 of 1977.

return, accused no 1 arrived saying that the deceased had called her. This was when two gunshots rang out.

[27] She confirmed the evidence of accused no 1 in respect of accused no 2 arriving with the deceased's vehicle whilst armed and them fleeing their home. She ran into the bush where she hid herself. She only returned when called back by accused no 1. This was when accused no 2 said that he had shot the deceased and they had to pack their belongings. To her mind they had to leave because of what happened; she was not forced by accused no 2 to leave. On the way to the farmstead accused no 2 pointed at where the deceased was lying, saying 'There is your boss lying. I shot him'. She entered the house on the instruction of accused no 2 who told her to pack all the food stuff while he and accused no 1 went into the deceased's bedroom; accused no 2 still carrying the rifle. She said things were confusing and she could not clearly recount as to what exactly happened. She explained how the goods were loaded and transferred onto different vehicles and that they eventually left in the truck. On the way her co-accused discussed how they were to sell some goods at Okahandja. They travelled up to the entrance of Usakos where she and accused no 1 disembarked with their belongings and accused no 2 departed driving off in the truck.

[28] She said accused no 1 suggested that they should go to Mariental but she intended going to her parents in Windhoek. When she noticed accused no 1 was having a small firearm on him and made his intentions known that he would not involve the police, she became afraid of him. Once in the presence of her mother, accused no 1 reported that 'something big happened' and that accused no 2 had shot the deceased; also that accused no 1 was carrying a firearm. Her mother then took the firearm from him despite accused no 1 saying that it was his and which he was having for quite some time. Accused no 3 confirmed having reported the incident to a police officer when taken there by her father. She also confirmed having phoned Mr Koch and informed him about the deceased having been shot. Later she was taken to Usakos and the farm to do the pointing out. She was only arrested and charged one month later.

Evaluation of evidence

[29] It is settled law that the evidence presented by the state and the defence must not be considered in isolation as an independent entity when assessing the credibility of the witnesses and the reliability of their evidence. The approach the court must follow is to take into account the state case and determine whether the defence case does not establish a reasonable hypothesis. In *S v Radebe*⁷ at 168D-E the court said:

‘The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis.’

In its assessment of the evidence adduced, the court will be guided by the stated approach.

Count 1: Murder

[30] Accused no 2:- There is no direct evidence implicating the accused in the killing of the deceased except for his own self-incriminating evidence testified in court and reports made to his co-accused after the shooting incident. With regards to the firing of the first shot the accused maintained that this occurred whilst wrestling the deceased for possession of the rifle and the deceased having pulled the trigger. As for the second shot, the accused admitted to picking up the rifle and firing one shot. Although he was not willing to admit that at the time of firing he had aimed at the deceased, it is not disputed that the deceased was hit in the abdomen and subsequently succumbed to two gunshot wounds inflicted.

[31] I earlier alluded to the conflicting versions proffered by accused no 2 with regards to the events leading up to the firing of the two fatal shots.

⁷ 1991 (2) SACR 166 (T).

Counsel representing the accused submitted that the accused's actions were not unlawful as he acted in private defence when the deceased charged at him whilst pointing a firearm at him, telling him to leave the farm. It was further submitted that in the absence of evidence refuting the evidence of accused no 2 as to what led to the firing of shots, the court is bound to accept the accused's version i.e. his evidence stated under oath. In order to decide whether the accused's evidence is credible it must be considered in light of the body of evidence presented and whether it is reasonably possible.

[32] When pointed out to counsel that the accused proffered two irreconcilable versions as regards the firing of the second shot, she submitted that the court should be appreciative of the fact that the accused came clean as to what actually happened. How appealing counsel's contention may be, it does not satisfactorily explain why the accused presented the court with two conflicting versions. Clearly appreciative of the impact of Inspector Vilonel's evidence on his version of the preceding events leading up to the shooting incident, the accused changed his version as regards the firing of the second shot. However, he qualified his actions by again giving two conflicting explanations namely, (a) that he did not take aim at the deceased and was unable to explain his actions due to intoxication; and (b) that he fired the second shot when the deceased was trying to get back onto his feet which posed a continued danger and him acting in private defence. Again, these are two irreconcilable explanations which remained unexplained. Furthermore, the explanation advanced by the accused whilst under cross-examination as to the version advanced in his plea explanation i.e. that he was not familiar with the content of the statement, was simply not true because he appended his signature to the document and confirmed the correctness thereof in open court.

[33] With regards to the circumstances that led to the firing of the first shot, there is no evidence rebutting the evidence of Inspector Vilonel that it would have been impossible for the deceased to hold one finger on the trigger whilst the rifle was pointed at the deceased's abdomen during a struggle for possession. This conclusion is based on tests done by the witness and is

consistent with the post-mortem findings of Dr Guriras that two *distant* gunshot wounds were found on the deceased's body. These are two independent witnesses whose findings were not rebutted in any manner. There is accordingly no reason why their evidence should not be found credible and reliable.

[34] Besides the contradictions in the evidence of accused no 2 alluded to earlier, there is a material contradiction between his plea statement and testimony as regards his actions following the shooting incident. Contrary to his testimony that accused no 1 assisted him to carry the deceased's body to the old water tank, his plea statement reads that he 'dragged the deceased person's body and placed it into the water container ...' without making any mention of the assistance of accused no 1. Observations made at the scene pertaining to drag marks suspected to have been made by the heels of a person are thus consistent with the plea statement and not the accused's *viva voce* evidence.

[35] With regards to the probabilities considered in light of all the evidence adduced, it seems noteworthy that on the strength of the evidence of accused no's 1 and 3, there would have been no reason for the deceased to have threatened the accused with a firearm that morning as there was a mutual agreement that he would stay on until a replacement was found. The deceased appeared normal when he returned from the cattle post and was unarmed. He had sent for accused no 3 so that she could assist with the collecting of pods in the veld. There was no indication from the deceased's side that he had a bone to pick with accused no 2 at that stage and, if he wanted to arm himself when confronting the accused, he could have done this with the revolver kept in the Nissan bakkie he was driving with. This he did not do. In these circumstances the deceased must have fetched the rifle from inside the house, which begs the question why he would have locked the door on the way out as the house was found locked and access had to be obtained by the breaking of a window. This seems highly unlikely.

[36] Thus, for the afore-stated reasons, I find myself unable to come to the same conclusion as counsel for accused no 2 that he told the court the truth during his testimony. There can be no doubt that the accused changed and adapted his version as the state case progressed and presented the court with a version most favourable to him. His evidence thus falls to be rejected as false except where corroborated by other reliable evidence.

[37] It however does not follow from the fact that the accused lied in court that he is guilty, for it is possible that he might have thought that the truth is unlikely to be sufficiently plausible. However, while such conduct does not in itself establish the guilt of the accused, it is a factor this court is entitled to take into account together with all other relevant and material factors as part of the totality of the evidence adduced in deciding whether the guilt of the accused has been established beyond reasonable doubt.⁸

[38] With regards to the defence of private defence relied upon by accused no 2, his own evidence refutes such defence when saying that he reloaded the firearm and fired the second shot in the abdomen of the deceased who was still alive but down on the ground. This implies that, on his own account, the deceased's alleged unlawful attack on the accused had passed. It further shows that the accused could not subjectively believe when he so acted that he was acting in private defence; a requirement of the defence of private-defence. Whether the deceased died as a result of the first or second gunshot wound, in these circumstances, is insignificant. Counsel for accused no 2 referenced the unreported matter of *Tangeni Toivo v The State*⁹ in support of the argument that the accused's version of the shooting incident was not refuted and therefore had to be accepted. However, the two cases are distinguishable in that the circumstantial evidence supported the appellant's defence of private-defence, contrary to what has been established in the present matter. When the court considers the circumstances surrounding the firing of the second shot together with all other factors which had duly been proven and showing that the accused did not act in private-defence, it seems

⁸ *State v Lazarus Shaduka*, (unreported) Case No SA 71/2011 delivered on 13 December 2012 at para 44.

⁹ CA 91/2015 [2016] NAHCMD 197 delivered on 08 July 2016.

inevitable to find that the accused's explanation is not only improbable, but false beyond reasonable doubt. Hence, the only reasonable conclusion to come to is that accused no 2 did not act in private defence. I accordingly so find. This conclusion is reached with due observance of the established rules of logic in connection with circumstantial evidence formulated in *R v Blom*.¹⁰

[39] Turning next to the intention of the accused when firing shots at the deceased, the court is guided by the *dictum* generally referred to as the *Mlambo* case *dictum* adopted with approval by the Supreme Court in the *Shaduka* case where the following appears at para 38:

'It is summarised in the sworn translation of the judgment in *S v Steynberg* 1983 (3) SA 140 (AD) which the court has been provided with. It reads:

"When an accused causes somebody's death by means of an unlawful assault and only the accused is able to explain the circumstances of the fatal assault, but he gives an explanation which is rejected as false, then the Court can make the inference that the accused committed the said assault with the intention to kill rather than with any other less serious form of *mens rea*. (At 147C-D)"

[40] In Hoffmann & Zeffertt, 4th Edition at p602 the learned authors discuss the view taken by South African courts when considering the circumstantial effect of an accused's giving false evidence and at p603 states:

'... Everything depends on the facts of each case; but in a criminal case, the evidence of an accused may form an essential part of the entire evidentiary material. ... A proper application of the *Mlambo dictum* merely signifies that an accused cannot complain if, because of his falsehood, the trier of fact does not give him the benefit of the doubt in this context, that he killed the deceased without intending to kill him or that he killed him with a lawful purpose.' (Emphasis provided)

See: *S v Rama*, 1966 (2) SA 395 (A); *S v Engelbrecht*, 1993 NR 154 (HC).

¹⁰ 1939 AD 188 at 202 - 3.

[41] In the present instance the court, having rejected the accused's evidence regarding the shooting incident as false, does not have the benefit of reliable evidence on the subjective state of mind of the accused, in other words, to determine what was going on in his mind the time when he fired the shot (*S v Mokeng*¹¹). In deciding that, the Court considers objective factors such as the type of weapon or instrument used; at which part of the victim's body was the assault directed; and the nature of the actual injury sustained by the victim (*S v Beukes*).¹² The court will then draw inferences from these indicators.

[42] Accused no 2 used a powerful firearm when firing two shots at the deceased which struck him in the abdomen and resulted in death. In view of the deceased's advanced age, the serious injuries inflicted on a vulnerable part of the body and who had been left at his own mercy, these are all factors indicative of the accused's mind-set i.e. to kill the deceased and to have acted with *dolus directus*. Consequently, accused no 2 stands to be convicted on a charge of murder.

[43] Accused no 1: It was submitted on behalf of the state that accused no 1 should be convicted as an accessory after the fact on the strength of the testimony of accused no 2 who said that he was assisted by accused no 1 in carrying the deceased's body to the old water tank where it was hidden. Accused no 1 disputed such evidence and denied being involved in the killing of the deceased, even as an accessory after the fact.

[44] The bold assertion by accused no 2 implicating accused no 1 in the murder has not been corroborated in any form or manner by independent witnesses, or accused no 3. As already shown earlier herein, the evidence of accused no 2 in this regard contradicts his plea explanation and, furthermore, is inconsistent with evidence of drag marks found at the scene. Despite the state's stance that the court should accept the evidence of accused no 2 on

¹¹ 1992 NR 220 (HC).

¹² 1988 (1) SA 511 (A).

this point, there is simply no basis for coming to such conclusion; moreover, where the court has found his evidence to be false and unreliable. The court cannot go about selectively when evaluating the evidence of accused no 2 by rejecting it in some respects and accepting it in other respects without having good reason to do so. Such reason does not exist and there is a reasonable possibility that the explanation advanced by accused no 1 in this instance is true. Hence, the state failed to prove beyond reasonable doubt that accused no 1 committed the offence of murder albeit, as an accessory after the fact, and he is entitled to his acquittal.

[45] Accused no 3: With regards to this accused there is no evidence that remotely incriminates her as being involved in the commission of the murder. This much the state conceded. Accused no 3 is therefore to be acquitted on the charge of murder.

Counts 2 and 3: Housebreaking with intent to Rob and Robbery with aggravating circumstances

[46] These counts relate to the break in of the houses of the deceased and that of Mr Koch in which it is alleged that the intention at the time of the break in was to rob and the accused persons unlawfully and with the intention to force him into submission, assaulted the deceased by firing two gunshots at him. Items listed in the annexure were then stolen from the respective houses.

[47] There is no clear evidence as to the stage the actual break in of the two houses were committed as the accused contradict one another in that regard. Accused no 1 is the only one saying that he noticed property outside Mr Koch's house when they returned to the homestead by car. This implies that the property must already have been taken from the house by accused no 2. It is unknown whether this was done before or after the shooting incident. Although accused no 3 said that whilst the deceased was still away accused no 1 told her that accused no 2 planned on breaking into Mr Koch's house, accused no 1 denied making such report to her. As for the break in

into the deceased's home by breaking a window, accused no 1 disputes the evidence of accused no 2 saying that it was him. Bearing in mind that the rifle used to shoot the deceased, in all probability, was taken from the house while the deceased was still at the cattle post, this implies that access must have been obtained prior to the shooting incident. However, it is accused no 2's version that the break in of the two houses was done after the shooting incident, involving himself and accused no 1. The evidence of accused no 3 on this score takes the matter no further in that according to her, the house stood open when she entered on the instruction of accused no 2.

[48] Accused no 2: No evidence was led as to the intention of the perpetrator(s) at the stage of the break in except for accused no 2 who said that he intended stealing valuables from the deceased to make up for the loss he suffered on his salary. This was after the deceased had been killed. Irrespective of the time when making his intentions known, it is clear that accused no 2 intended stealing from the deceased. This would not have been possible with the deceased around from whom he could reasonably expect some resistance when executing his intention; resistance he knew he physically had to overpower.

[49] The elements of the crime of robbery are the following: (a) theft of property (b) through the use of either violence or threats of violence (c) a causal link between the violence and the taking of the property (d) unlawfulness and (e) intention.¹³ In essence the crime is committed when theft by violence is perpetrated.

[50] When applying the elements of the offences of housebreaking with intent to rob and robbery to the present facts, I am satisfied that the evidence established a causal link between the killing of the deceased and the taking of the property. Accused no 2 already formed the intention to steal from the deceased and in order to achieve that, he first had to physically put the

¹³ *C R Snyman Criminal Law* (6th Ed) at 508.

deceased out of action. The property he intended stealing after killing the deceased were inside the house and to gain access thereto, he had to break in. Whether he has done so personally or whether accused no 1 gained access through the broken window makes no difference as he (accused no 2) at all times had the intention to break into both houses and rob the deceased and Mr Koch of their property. The evidence further established that both crimes were committed with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977 in that grievous bodily harm was inflicted. Accused no 2 therefore stands to be convicted on counts 2 and 3.

[51] Accused no's 1 and 3: With regards to the commission of the offences of housebreaking with intent to rob and robbery, there is no evidence showing that either of the accused were involved in the planning thereof. As for the evidence of accused no 2 that the actual break in of the deceased's home was done by accused no 1 – which he disputes – there is no evidence supporting accused no 2's version. For reasons mentioned, the court cannot rely on the uncorroborated evidence of accused no 2 and has to give the benefit of the doubt to accused no 1 as to his involvement in the break in into both houses.

[52] It is common cause that all three accused entered the deceased's house and engaged in the taking of property; accused no 3 took groceries from the storeroom while accused no's 1 and 2 ransacked the bedroom from where a variety of items were taken. Both accused raised the defence of necessity as ground of justification, claiming to have acted under coercion. The learned author Snyman (*supra* at 116) describes relative compulsion (*vis compulsive*) as an instance where a person commits a voluntary act whilst under threat. Such person has a choice to give in to the threat or bear the consequences of the threat by refusing. The latter seems to find application to the present facts. In order to decide whether or not the participation of

accused no's 1 and 3 in the commission of the offences charged fall within the ambit of the defence of necessity, one has to look at the facts.

[53] The manner in which accused no 2 arrived at their living quarters shortly after two gunshots rang out, instilled fear in accused no's 1 and 3, prompting them to run away. According to them this was because of the manner in which he drove the deceased's vehicle – something he had not been doing on the farm – and the fact that he was carrying a rifle. It was only after he spoke to accused no 1 that accused no 3 came out of hiding when called. Upon hearing that accused no 2 had shot the deceased they realised that they could not stay any longer on the farm and packed their belongings in order to leave. They adhered to accused no 2's instructions that they must enter the house and gather food and valuables as directed. Both claimed to have acted under coercive circumstances as accused no 2 was still armed.

[54] Although accused no 2 disputes having compelled his co-accused to commit any of the offences for which they are charged, the circumstances at the time were such that it likely impacted on their free will and decision making. However, the circumstances had changed significantly once the loot was gathered and loaded onto the Nissan pickup and accused no 1 willing to drive off, leaving accused no 2 behind. They only reunited when the pickup developed mechanical problems and accused no 2 came to help and where after the goods were transferred to the truck with which they eventually left the farm. When they separated ways near Usakos, accused no 1 offloaded their belongings while accused no 2 drove on. Accused no 3 was not involved in the loading or offloading of any of the stolen property or their personal belongings.

[55] The intention with which accused no 1 had been acting earlier on the farm only became clear after their arrival in Windhoek and he offered the

stolen groceries to Emelda Tsamases which he claimed to have bought. As for the firearm (revolver) found in his possession, he also claimed ownership thereof. It was further the testimony of accused no 3 that she overheard accused no's 1 and 3 whilst on the way saying that the loot should be sold in Okahandja; also that accused no 1 intended to go to Mariental. This is clearly not the conduct of a person acting under coercive circumstances. Whilst the evidence may support a defence of necessity up to the stage where the goods were loaded onto the pickup, there is nothing on record showing that whatever transpired thereafter was done under duress. He knew the goods he appropriated were stolen property and as such made himself guilty of theft.

[56] Although the offences of housebreaking with intent to rob and robbery in counts 2 and 3 have not been proved, I am convinced beyond reasonable doubt that accused no 1 committed theft, a competent verdict on the charge set out in counts 2 and 3. This would only be in respect of the items found in his possession. In respect of accused no 3, there is no evidence to refute her defence of necessity when told by accused no 2 to collect the groceries from the storeroom. Although related to accused no 2, the prevailing circumstances were such that she had reason to fear accused no 2 and therefore adhered to his instruction. To this end she must be given the benefit of any doubt that may exist in this regard. As for the groceries and firearm found with accused no 1, there is nothing that links her to the appropriation thereof. She did not pack it into their bags and neither did she offload their belongings from the truck when they disembarked and parted ways with accused no 2. Accused no 3 is accordingly entitled to be acquitted on both counts 2 and 3.

Count 4: Robbery with aggravating circumstances

[57] This charge relates to the robbing of the Nissan truck belonging to the deceased which was used to transport the loot off the farm and which was found abandoned next to the road some distance outside of Usakos. It is common cause that accused no 1 drove the truck from the farm up to Usakos

from where accused no 2 took over and drove the truck up to where there was a tyre blowout and him abandoning the vehicle.

[58] Accused no 2: The position of accused no 2 as regards this count is no different from that of counts 2 and 3 where the accused made himself guilty of robbery. The result should therefore be the same where the accused killed the deceased and then steals his vehicle to transport the loot off the farm. The fact that the vehicle was subsequently found abandoned next to the road makes no difference to the commission of the offence of theft or robbery. The abandoning of stolen property with a reckless disregard for whether it will ever be restored to its owner constitutes theft.¹⁴ Accused no 2 will thus be convicted as charged.

[59] Accused no's 1 and 3: As regards the driving of the truck by accused no 1 upon their departure from the farm, this was done in circumstances where he knew that the taking of the vehicle was consequential to the killing of the deceased. Not only did it afford them – including accused no 2 – the opportunity to get away from the farm, it was also the means to assist accused no 2 to remove the stolen property from the farm and take it elsewhere. By so doing, he did not only make his own escape good, but also provided assistance to accused no 2 with the intention to evade liability and to escape justice. Evidence about him and accused no 2 discussing the selling of the loot is consistent with such conclusion. Although he was not involved in the robbery itself, his actions satisfy the definition of an accessory after the fact by facilitating the perpetrator's (accused no 2) evasion of liability. As regards the defence of necessity, there is no evidence showing that he was compelled to assist. That much is evident from their amicable separation upon reaching Usakos when they decided to go to Windhoek whilst accused no 2 proceeded to Swakopmund.

¹⁴ *South African Criminal Law and Procedure* Vol II: J R L Milton at 618.

[60] As for accused no 3, she was a mere passenger and although she appreciated what had happened, she did not commit any act to further the offence committed or assist the perpetrator to evade justice. Accused no 3 is thus to be acquitted on this count.

Count 5: Contravening section 83(2) of the Road and Transportation Act 22 of 1999 – Use of motor vehicles without the owner's consent

[61] The particulars of the charge concern the unlawful driving of the truck and the Land Rover, the property of the deceased.

[62] Accused no 2: The accused pleaded guilty to the charge and admitted to the offence charged. The state accepted the plea on the basis tendered and the accused will accordingly be convicted.

[63] Accused no 1 and 3: Accused no 1 on his own admission drove the deceased's truck to get away from the farm with the stolen property and to escape justice. He had no permission to use the vehicle and thereby made himself guilty of the offence charged. Section 83(2) under which the accused are charged provides that 'No person shall ride in or drive a vehicle without the consent of the owner, operator or person lawfully in charge thereof'. (Emphasis provided) The ambit of the section is wide and includes a passenger in a vehicle, driven without the owner's consent. As for accused no 3, she must have realised that the use of the deceased's vehicle in those circumstances was unlawful. It however raises the question whether the accused when boarding the truck, acted out of necessity in that she was still a victim of the circumstances she found herself in and simply had to go along with the plans of accused no 1 and 2 to leave the farm. It would not be farfetched to find that the accused's decision to travel along in the truck is the mere execution of the decision taken by her co-accused that they should

rather leave the farm and, in her view, there was no alternative but to leave. In these circumstances, I am of the view that accused no 3, as far as it concerns the unlawful use of the deceased's vehicle, acted out of necessity when she boarded and travelled to Usakos in the truck. Accused no 3 is therefore entitled to be acquitted on this count.

Count 6: Defeating or obstructing or attempting to defeat or obstruct the course of justice

[64] Accused no 2: The accused admitted to the commission of the offence of defeating or obstructing the course of justice when dragging the deceased's body from the scene and placed it into an old water tank before covering it with some loose items in order to conceal it. The accused's plea satisfies all the elements of the offence and whereas the state accepted the plea, the accused stands to be convicted on his plea of guilty.

[65] Accused no's 1 and 3: Whereas these accused did not involve themselves in any manner in the handling of the body of the deceased, they are to be acquitted on this count.

Count 7: Contravening section 2 of the Arms and Ammunition Act 7 of 1996 Possession of firearms without a licence

[66] It is common cause that three firearms were among the goods robbed or stolen from the deceased of which included a revolver and two rifles. The revolver was subsequently found in possession of accused no 1 while accused no 2 pleaded guilty to the possession of the rifles.

[67] Accused no 2: The accused formally admitted to the possession of all the firearms stolen and that he did not have the requisite licence to possess any of these firearms. The state accepted the accused's plea and he stands to be convicted on this count.

[68] Accused no's 1 and 3: Although accused no 1 admits to having found the revolver in the bag containing his belongings, he disputes having had the required *animus possidendi*. The evidence led in this regard showed that whilst they were travelling to Windhoek, accused no 3 noticed that accused no 1 was carrying a firearm on his person. This scared her and prompted the decision to first go to her parents in Windhoek, before proceeding to Mariental. Once with her parents she informed her mother about the firearm with accused no 1 who then handed it over for safekeeping. The accused then advanced the explanation that it was his firearm and that he has been with it for quite some time. That was clearly not true as the revolver was part of the loot taken the previous day. Against this background the only reasonable conclusion to come to is that accused no 1 stole the firearm and intended keeping it for himself. His explanation as to his possession of the firearm is accordingly false and falls to be rejected. Counsel for the accused conceded that a conviction on this count would be proper. I agree. As for accused no 3, there is no evidence before court that links her with the offence charged and she must be acquitted.

Count 8: Contravening section 33 of the Arms and Ammunition Act 7 of 1997
– Possession of Ammunition

[69] Again, it is common cause that ammunition was included among the items that were robbed from the deceased and which were subsequently found in possession of accused no 2.

[70] Accused no 2: The accused, as in count 7, pleaded guilty to this charge and admitted having been found in possession of an unspecified number of • 22 calibre bullets without being in lawful possession of an arm capable of firing such ammunition. The state accepted the plea and accused no 2 stands to be convicted on this count.

[71] Accused no's 1 and 3: Although the revolver found in possession of accused no 1 is of the same calibre than the bullets found with accused no 2, there is no evidence that accused no 1 also had in his possession any ammunition. The same applies to accused no 3. Both the accused therefore are to be acquitted on this count.

Conclusion

[72] For the reasons set out in the preceding paragraphs, the court is satisfied that, as indicated in each count, the state has succeeded in proving the guilt of accused no's 1 and 2 beyond reasonable doubt whilst the evidence falls short of proving any of the offences charged against accused no 3.

[73] In the result, the court's verdict is the following:

Count 1: Murder –

Accused no's 1 and 3: Not guilty and discharged

Accused no 2: Guilty

Counts 2 and 3: **Housebreaking with intent to rob and robbery (aggravating circumstances) –**

Accused no 1: Not guilty and discharged

Guilty of the competent verdict of theft

Accused no 2: Guilty

Accused no 3: Not guilty and discharged

Count 4: **Robbery (aggravating circumstances) –**

Accused no 1: Guilty (accessory after the fact)

Accused no 2: Guilty

Accused no 3: Not guilty and discharged

**Count 5: **Use of motor vehicles without the owner's consent
(c/s 83(2) of Act 22 of 1999) –****

Accused no 1: Guilty

Accused no 2: Guilty

Accused no 3: Not guilty and discharged

**Count 6: **Defeating or obstructing or attempting to defeat or
obstruct the course of justice –****

Accused no 1: Not guilty and discharged

Accused no 2: Guilty – Defeating or obstructing the
course of justice

Accused no 3: Not guilty and discharged

**Count 7: **Possession of firearms without a licence (c/s 2 of Act
7 of 1996 –****

Accused no 1: Guilty (revolver)

Accused no 2: Guilty (rifles)

Accused no 3: Not guilty and discharged

Count 8: **Possession of ammunition (c/s 33 of Act 7 of 1996) –**

Accused no 1: Not guilty and discharged

Accused no 2: Guilty

Accused no 3: Not guilty and discharged

JC LIEBENBERG
JUDGE

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