REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA
MAIN DIVISION, WINDHOEK

JUDGMENT
TRIAL-WITHIN-A-TRIAL

Case No: CC 19/2013

In the matter between:

THE STATE

and

MARCUS THOMAS **FIRST ACCUSED**
KEVIN DONEL TOWNSEND **SECOND ACCUSED**

Neutral citation*:* *S v Townsend (*CC 19/2013) [2021] NAHCMD 193 (14 April 2022)

Coram: LIEBENBERG, J.
Heard: **15 – 17 September 2021; 16 – 17 September 2021;**
31 January – 03 February 2022; 22 & 24 March 2022.
Delivered: **14 April 2022**

Flynote: Criminal Procedure – Trial-within-a-trial – Admissibility of search conducted without a search warrant – Admissibility of evidence obtained in conflict with the constitutional rights of accused – Approach adopted in *S v Shikunga and*

Another endorsed – Court to balance equally compelling claim of society with that of accused – Opposed thereto – Claim that integrity of the judicial process should be upheld.

Summary: The state wanted to lead evidence on three searches conducted by police officials without a search warrant on 7, 8, and 9 January 2011 of the room where the accused persons were accommodated at a guesthouse. Defence counsel objected to the admissibility of evidence found. As regards the searches of 7 and 9 January, the state relied on the provisions of s 22 of the CPA on grounds that the police officials had the belief that a search warrant would have been issued by a magistrate if applied for, and that the delay in obtaining such search warrant would have defeated the object of the search.
It is evident that when the articles were seized during the respective searches, the police officials acted in terms of s 20(b) and seized items which might afford evidence of the commission of the murder. In the absence of evidence showing otherwise, it would follow that seizure of these items were lawful.

Held, the court, is required to consider the admissibility of evidence obtained in conflict with the constitutional rights of accused persons.

Held, that the court must balance the equally compelling claim that society has, namely, that a guilty person should be convicted, opposed to the claim that the integrity of the judicial process should be upheld.

Held, that there is no absolute exclusion of evidence obtained in conflict with the constitutional rights of an accused.

Held, that despite the right to privacy being a fundamental right under the Constitution, it is settled law that it is equally subject to reasonable and justifiable limitation.

Held, that where real evidence was discovered consequent upon an irregular search, the court is still required to make a value judgment regarding the

admissibility of such evidence to determine whether it would be detrimental to the administration of justice.

ORDER

(a) Evidence consequent upon searches conducted on 7 & 9 January 2011 is ruled admissible.

(b) Evidence consequent upon the search conducted on 8 January 2011 is ruled inadmissible.

JUDGMENT

(Trial within a trial)

LIEBENBERG J:

Background

[1] In the main trial, the state sought to lead evidence on three searches conducted by police officials on 7, 8 and 9 January 2011 at the African Sky Guesthouse, situated in Windhoek-West, where the accused persons were accommodated up to their arrest on the 7th of January 2011. Defence counsel acting for both accused however objected to the admissibility of any evidence found in the room consequential to searches and seizures conducted, on grounds that (a) the respective searches were unlawfully conducted as it was done without search warrants issued by a magistrate authorising same; and (b) that the police officers did not introduce themselves or show any form of identification (as regards the search on 7 January 2011). It was argued that failure to do so rendered the searches irregular, unconstitutional and any evidence found during the respective searches, is inadmissible.

[2] It is common cause that, in none of the instances where a search was conducted on the mentioned dates, did the police apply for a search warrant as provided for by s 21 of the Criminal Procedure Act 51 of 1977 (hereinafter 'the

CPA'). The mainstay of the state case is that the police officials at the relevant times prior to conducting the searches referred to, acted in terms of s 22 of the CPA and, during their testimonies, explained the circumstances which culminated in their respective beliefs that a search warrant would have been issued by a magistrate if applied for (as provided for in subs (b)*(i)*) and that the delay in obtaining such search warrant would have defeated the object of the search (subs (b)*(ii)*).

[3] It is against this background that the state led the evidence of six police officials who, in some way or another, were involved in the investigation of the murder. This was to satisfy the requirements of s 22 relied upon, and their reliance on information obtained during the early stages of the investigation. This information was already partly testified to in the main trial by state witnesses.

Information known to the police prior to the arrest of the accused

[4] Detective Inspector Joseph Ndokosho (Ndokosho) was on duty on 7 January 2011 at the Serious Crime Unit (SCU) in Windhoek when summoned to attend to a scene where the deceased was found in the driver seat of a white Land Cruiser vehicle in Gusinde Street, Klein-Windhoek, with a gunshot wound on the right side of the face. He testified on observations made at the scene and stated that no firearm or spent cartridge was found; neither the deceased's cell phone, nor his wallet. From discussions with the deceased's family he learned that the deceased, immediately prior to his killing, had a lunch appointment with two persons unknown to him. He was then provided with the deceased's mobile number which he forwarded to (then) Sergeant Kantema (Kantema). After analysing the scene he went to register a murder case with CR number 192/01/2011. At that stage, no suspect(s) had been identified.

[5] Chief Inspector Kantema explained how he obtained from MTC call record printouts ~~of~~ the deceased's cell phone number (081 288 2883) and that of the last number he had contact with, namely, 081 6814153 (-4153). He dialled one number that had regular contact with the -4153 number and reached one Donny Kok (Donny) who rented out a VW Golf to a person who, from a copy of his driver's

licence, was identified as Marcus Thomas.[1] He further learned that this person and another American in his company, stayed at the African Sky Guesthouse. Donny called the guesthouse to enquire as to the whereabouts of these persons and told they were not in at the time. Arrangements were made to let Donny know of their return where after he would then report to Kantema.

[6] Kantema was still in the process of arranging with members of the Special Branch to surveil the guesthouse when the call came in from Donny saying that the suspects were back at the guesthouse. They decided to go there immediately as they were in search of the firearm used in the commission of the murder and the personal belongings of the deceased; also the cell phone SIM card with the -4153 number.

[7] Ndokosho at that stage regarded the accused persons as suspects because, according to the preliminary investigations, they were the last persons who were in contact with the deceased. Kantema said that he, for the same reasons, regarded them as 'persons of interest' as the investigation was still ongoing. Also that they did not go to the guesthouse to effect the arrest of the accused, but rather to question them and, once more information was available, to then affect an arrest. However, his view in this regard changed when accused no 1 started fighting the first officer who entered the room and made Kantema think that he was protecting something.

The search of 7 January 2011

[8] The officers numbered approximately 10, including Kantema (acting as shift commander), Ndokosho, Alfonso and Namboga, when they approached the accused persons' room. They found the door locked where after they knocked on the door and announced their presence being police officers from the Serious Crime Unit and investigating a murder case. Kantema said accused no.2 (from inside), pulled the curtain slightly aside, at which stage he showed him his appointment certificate and asked that the door be opened as they were investigating a case of murder which occurred earlier that day. The curtain was again closed where after they heard movements coming from inside and feared

[1] American driver's licence.

that evidence was being destroyed. The police instructed them to open the door or else they will force their way into the room; the door was then unlocked.

[9] Some members entered, followed by Ndokosho, while Kantema and Namboga remained standing outside. Kantema testified that he saw accused no.1 fighting one of the officers before being overpowered and placed in handcuffs; while accused no.2 appeared calm. He also saw one of the officers speaking to accused no.2 where after the officers started searching through the room.

[10] Ndokosho said they again introduced themselves and explained the purpose of their visit i.e. that they were looking for any object that was used in the commission of the murder.[2] According to him, both accused then gave permission for them to conduct a search of the room.

[11] On one of the two beds in the room Ndokosho found three mobile phones. He asked as to whom these belong, to which accused no.1 replied that two were his while accused no.2 said that the other one belongs to him. Ndokosho seized the mobile phones.

[12] Alfonso then mentioned that he found cannabis in a drawer and when he asked who the owner of the cannabis was, one of the accused answered that it was theirs. According to Kantema and Ndokosho the search stopped with the arrest of the accused persons for possession of cannabis. They thereafter locked the room and warned the receptionist not to allow anyone inside the room; they went with the key.

[13] Before leaving the guesthouse, Kantema instructed that the rented vehicle be searched but nothing of interest was found. It is not clear whether the objection raised by the defence includes the search of the vehicle but, if it does, nothing turns on this point. They withdrew and returned to their offices.

[14] As to why no search warrant was obtained in advance, both Kantema and Ndokosho explained that it was a matter of urgency and, as it was after official hours, it would have been difficult to obtain a search warrant. Also that the

[2] Page 2911 of the transcribed record.

suspects were armed and found in a public place (the guesthouse). These persons were mobile with no fixed address as they were foreigners. Ndokosho was further of the view that, had they applied for a search warrant, there were reasonable grounds (as required by s 22 of the CPA) to conduct a search for the items as mentioned before, which was necessitated by the circumstances. Under cross-examination he confirmed that they already had the relevant information which was required to apply for a search warrant when going to the guesthouse. Given the existing circumstances at the time and accused no.1 having put up a fight, according to Kantema, they did not require the permission of the accused persons beforehand to conduct the search.

[15] According to Ndokosho the purpose for going to the guesthouse was to effect an arrest on the murder charge but that the accused, instead, were eventually arrested for possession of cannabis. An entry made on 8 January 2011 in the Pol.1 register under Windhoek police station CR No. 224/1/2011[3] confirms this aspect of his evidence. He further explained that there was no evidence at that stage which linked the accused to the murder; thus, they were not arrested for murder. According to him, this only transpired after they appeared in court and pleaded to the cannabis charge. This came about because the police by then had sufficient information to arrest them for murder.

[16] The evidence of Sergeant Namboga (Namboga) in material respects corroborates the versions of Ndokosho and Kantema as regards information known to the police at the time they went to the guesthouse. He added that Donny urged them to act immediately before the suspects could leave the guesthouse. He confirmed his colleagues' version of them finding the room locked and the police announcing their presence and explaining the purpose of their visit prior to entering the room; also about Kantema having shown his appointment certificate to the person who peeped from inside. Further, that after some minutes had passed, they heard movements coming from inside which made them realise that there was a possibility of evidence being destroyed. When the police threatened to use force to enter, the door was unlocked from the inside. Namboga remained outside and could only hear a commotion going on inside the room, but was

[3] (Exhibit 'AAAA').

unable to see what it was about. He did hear Alfonso mentioning about cannabis that was found.

[17] According to Namboga their intention was initially just to do a surveillance of the area and not to obtain a search warrant but, this suddenly changed to a matter of urgency when Donny's call came in saying that they must hurry to the guesthouse. To his mind the intention at the time was to first interview the two persons to see whether they could be linked to the murder. As the situation subsequent thereto developed, he was satisfied that the circumstances compelled a search without a warrant.

[18] During cross-examination these witnesses were taken to task to explain the contents of their witness statements opposed to their testimonies given in court, and other differences in their testimonies pertaining to observations made and beliefs entertained by each during the operation. I will revert to these issues later.

The search of 8 January 2011

[19] It is common cause that the reasons advanced by Ndokosho and Kantema for returning to the guesthouse on the morning of 8 January 2011, differ significantly. Kantema explained that their purpose for going there was because he was contacted by Ndokosko and informed that accused no.2 wanted to fetch something from the room, which turned out to be an Ipod. Besides Ndokosho finding two cell phone starter packs which they seized, Kantema cannot recall conducting a formal search of the room at the time. Their interaction with accused no.2 was normal and he had no objection to the officers taking the starter packs along. Contrary thereto, Ndokosko's narrative of what transpired is that he, on the instruction of Kantema, booked accused no.2 out from Wanaheda police station as they had to return to the guesthouse to conduct a further search of the room and to look for a SIM card. Kantema in cross-examination, however, disputed giving such instruction. According to Ndokosho accused no.2 agreed to come along and, with leave of accused no.2, Ndokosho and Kantema proceeded to conduct a search of the room with the former merely watching on.

[20] As regards the absence of accused no.1 during that search, Ndokosho explained during cross-examination that he did not get an instruction from Kantema to collect accused no.1 to accompany them to the search, as Namboga was supposed to bring him, but was unable to do so because of his sick child. Although the aim of the search was to get the SIM card of the cellphone number which they believed was used by accused no.1, he was not present during the search.

[21] On a further question as to why Ndokosko did not obtain a search warrant for the second search, he indicated that he did not get such instruction from Kantema. Kantema, as stated, denied that a search was conducted; therefore, no search warrant was required.

The events of 9 January 2011

[22] Deputy Commissioner De Klerk (De Klerk), then attached to the Regional Crime Investigation Office, testified that a message was received from the guesthouse where the accused persons were accommodated at the time of their arrest, requesting the police to immediately vacate the personal belongings of the accused from the room as they needed the room for other bookings. He and Chief Inspector Ndikoma (Ndikoma) proceeded to the guesthouse with the intention to collect the accused persons' belongings. With their arrival they met up with the receptionist, Ms. Nehenda, who accompanied them to the room and unlocked the door. Upon entry, De Klerk noticed a black canvas bag on the floor and when he looking inside, he found a white coloured steel pipe which he considered to be relatively heavy. Besides two suitcases found behind the door, he removed a brown briefcase from the wardrobe and, when checking the contents, he found (amongst other items) two steel pipe like items which, upon closer inspection, he realised were two barrels of a firearm. (These items were already received into evidence during the main trial.) Mindful that possession of gun barrels constituted an offence under the Arms and Ammunition Act 7 of 1996, De Klerk decided to conduct a search of the room. This despite knowing that two prior searched had been conducted on 7 and 8 January but which, seemingly, was not properly done. He explained that his finding of the barrels in itself constituted a suspected criminal offence and warranted confiscation. He was also of the opinion that there might be

more items in the room relating to the murder case and took a conscious decision to conduct a proper search of the room. This prompted the presence of a member attached to Scene of Crime Unit to photographically capture the confiscated items.

[23] De Klerk explained that, on the strength of statements obtained from potential witness up to that stage, he was satisfied that a judicial officer would grant a search warrant if applied for by the police. Based on past experience, he was further of the view that, because it was on a Sunday, it would be difficult to get hold of a magistrate. Also that the finding of gun barrels increased the urgency of the matter, as its mere possession was criminal. In his opinion the barrels could not be left in the room in circumstances where they might disappear, together with any other items they reasonably believed might be found in the room, as this would jeopardize the investigation.

[24] On a question during cross-examination why the presence of the accused was not arranged, De Klerk said that it was not realistically possible as it posed a safety risk, given the seriousness of a murder charge they were suspects in, and information the police had about the accused persons being linked to a firearm. He was firm in his opinion that a search warrant was not required when they went to collect the accused persons' belongings and further, the need to conduct a search only arose after they stumbled upon the gun barrels. When asked what linked the accused persons to the barrels found, De Klerk said that during the search of the room, documents were found relating to the purchase of gun barrels. On defence counsel's assertion that a search was conducted under the guise of collecting the belongings of the accused, De Klerk disputed it and said they went there in good faith and, as the items found had to be documented, this required them to go through the possessions found and list them individually.

[25] As regards the status of the accused on 7 January, De Klerk said that, based on information they had on the accused, they were suspects in the murder case. He further disputed Mr. *Siyomunji's* assertion that both the -4153 and -4154 numbers belonged to accused no.2, as information obtained from two potential witnesses, showed otherwise. Furthermore, it was the number of the phone found with accused no.2. He said that although no physical evidence which incriminated

the accused was found with them upon arrest, they remained suspects based on the circumstantial evidence the police had at the time. With regards to the accused persons having been booked for murder in the Occurrence Register and Pol.8 for purposes of detention, De Klerk maintained his position that it was wrong as the arresting statement reads that they were arrested for the possession of cannabis; without registering a case to that effect on the same day. De Klerk said he arrested and charged the accused for murder only on 12 January 2011.

[26] The testimony of Chief Inspector Ndikoma corroborates that of De Klerk in material respects and need not be restated. Pertaining to the search of the room conducted on 9 January 2011 and why consent was not obtained from the accused persons beforehand, he explained that African Sky Guesthouse was the lawful owners and no consent was required. He also considered it a safety risk to bring the accused persons to the guesthouse for purposes of obtaining their consent and to conduct the search in their presence. He elaborated on the -4154 number linked to accused no.2 by saying that on 7 January, when the accused were taken to the offices of the Scene of Crime Unit with the seized items, each was asked to personally list their respective properties which they did, excluding the two gun barrels. Among the items was a Samsung cell phone claimed by accused no.2 as his and which had the SIM card ending with the -4154 number. Although this part of his testimony was not included in his witness statement, Ndikoma said that the list (compiled by accused no.2) was filed on the docket. On a question posed by counsel for accused no.2 as to whether there was any proof that accused no.2 was in Gusinde Street where the murder took place, the witness answered that there was proof that he was indeed in the area of the crime scene.

[27] The accused persons elected not to take the stand and closed their case without the leading of evidence.

Discussion

[28] I earlier alluded to the attack by defence counsel on the testimonies of state witnesses, opposed to their witness statements and differences in their respective narratives of events that took place during searches conducted by the police on the mentioned dates. There is ample case law to the effect that a

witness, during his/her testimony, is not confined to what is recorded in such person's police statement and, only where there is a material deviation from an earlier statement which cannot be reasonably explained, would such deviation impact on the credibility of the witness. Mr. *Siyomunji* referred to *The State v Lukas Nicodemus*[4] where this court occasioned to state the following on the purpose of witness statements:

'It is an established principle of law that a court should be careful in discrediting a witness who has slightly departed from the statement made to the police.[5] A state witness is only at risk of being discredited if there is a material deviation from the witness statement and which the witness is unable to satisfactorily explain. When making the statement to the police, it is intended to obtain the details of the alleged offence for purposes of possible prosecution and not to anticipate the witness's evidence in court. It can therefore not be expected of a witness during his/her testimony to be limited to the statement given to the police. Such statement is often a mere summary or in skeletal form of events testified on in more detail by the witness when testifying in court.[6] It is thus settled law that not every discrepancy between a witness's statement and what is later testified in court would affect the credibility of the witness. It is only when the discrepancy is found to be material and the court being satisfied that what is contained in the earlier statement correctly reflects the witness's version (but differs materially from his/her testimony), that the court may draw a negative inference as regards the credibility of the witness.[7]'

[29] During oral submissions and based on the abovementioned principles, counsel developed the argument that material omissions from the witness statement should equally impact on the credibility of the witness. Though counsel's contention is not *per se* without merit, it is my considered view that the trier of fact should only come to such conclusion if satisfied that the evidence omitted is of compelling nature and central to the evidence of the witness and, when objectively viewed, it must have formed part of the statement. It should further not be considered in isolation but in context with the rest of the witness statement and the evidence adduced as a whole. Unless there is a reasonable explanation for its

[4] *S v Nicodemus* (CC 15/2017) [2019] NAHCMD 271 (06August 2019).
[5] *S v Aloysius Jaar* Case No CA43/2002 (unreported) delivered on 09.12.2009; 2004 (8) NCPL 52 (HC).
[6] *S v Bruiners en 'n Ander* 1998 (2) 432 (SEC), endorsed in this Jurisdiction in *S v BM* 2013 (4) NR 967 (NLD).
[7] *S v BM (supra) at 1014E-F.*

omission, such omission could be considered to be a material deviation when considered against the witness's oral testimony given in court.

[30] During cross-examination of state witnesses, in particular as regards the omission of information in their statements considered by counsel to be material. It was throughout put to the witnesses that the reason why certain aspects of their testimonies are omitted from their statements, is because it never happened as testified. Counsel, by implication, thus contends that state witnesses conjured their evidence in an attempt to either legalise the unlawful searches conducted, or to falsely implicate the accused persons.

[31] In deciding whether the omission of information is material and compelling, the inquiry should not be limited to the content of the statement alone, but should also have regard to the time when the statement was made and importantly, for what purpose was the statement sought. Was it intended to deal with a specific issue or does it cover a wider spectrum of observations made by the witness? Furthermore, sight should not be lost that witnesses' observations will be relative to their personal perceptions and what is considered to be of importance and what is not. In my view, contrary to where there is a material deviation from a previous statement, there is no rule of thumb prescribing to a witness as to what should or should not be included in a witness statement. That will largely depend on facts considered to be material for purposes of making the statement i.e. of skeletal form; opposed to facts of lesser importance which will be in more detail (the adding of flesh to the skeleton).

[32] When applying these principles to the present facts, it is my considered view that the general attack on the omission of facts from witness statements, considered by counsel to be material, is without merit. The omissions complained of, objectively viewed, are not *per se* of a compelling nature or such that they simply *had* to be included in the statement to give purpose thereto. I will return to this issue later.

[33] I am equally of the view that counsel's contention that the witnesses manipulated and manufactured their evidence is without merit. There is nothing suggesting such conduct, neither can it be deduced from the evidence presented;

notwithstanding differences pointed out in the witnesses' respective narratives during cross-examination, which will be dealt with in the judgment when necessary.

[34] As stated, the objections raised by the defence turn on the legality of search and seizures conducted over three days of the room at the guesthouse which the accused persons occupied at the time of their arrest. The first issue for consideration is whether the requisites of s 22 of the CPA in respect of these searches, respectively, were met.

[35] Section 22 of the CPA provides:

'Circumstances in which article may be seized without search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in s 2 –

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes-

(i) that a search warrant will be issued to him under paragraph (a) of s 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search.'

[36] Although it is clear from the state's case that no attempt was made on any of the days to obtain a search warrant as provided for in s 21 of the CPA, it was submitted that consent was indeed obtained by Ndokosho prior to the search conducted on 7 January 2011.

[37] It is not in dispute that while members of the Serious Crime Unit were still in the process of making arrangements to set up surveillance at the guesthouse, the call about the two accused having returned to their room, created some urgency to establish contact with them. Although, according to Kantema, the purpose was merely to question them being 'persons of interest' or 'possible suspects' and to conduct a search and seizure of any article[8] found which could be

[8] Particularly the deceased's wallet and cell phone; a firearm and spent cartridge.

linked to the murder investigation, Ndokosho said that they went there to arrest the persons as suspects. Despite the difference in views, the fact remains that the accused persons were subject matters in a murder investigation which had only commenced around 13h00 of that same day. To this end, they were considered suspects in a murder case.

[38] Immediately upon their arrival at the room the police, in no uncertain terms, announced their presence and the purpose of their visit, namely, the investigation of a murder case. This was repeatedly conveyed to the accused while Kantema showed his appointment certificate to accused no.2 when he peeped through the window. The accused persons, at that stage, must have come to realise that the police sought access to the room, but refused to open the door. Only after being informed that the police would force their way into the room, was the door unlocked. When members of the Special Branch entered the room first, accused no.1 started fighting them. He was already in handcuffs when Ndokosho entered and after repeating the purpose of their presence and the accused persons indicating that they understood, consent was given by both the accused that the room could be searched.

[39] Ndokosho was taken to task during cross-examination regarding the consent he claims the accused persons had given and it was specifically pointed out to him that it was not included in his statement. Though conceding that he failed to mention it in his statement relating to the murder charge, he said it was included in his statement pertaining to the drug charge. However, that statement only makes mention of consent having been requested, but not that it was given. Whereas Ndokosho could take it no further, neither did any of the other witnesses testify that consent was obtained to conduct a search.

[40] When comparing Ndokosho's testimony (that the accused persons gave their consent) to his written statement making no mention of such consent obtained, it appears to me that this information was of such compelling nature that it could reasonably be expected to have been included in the statement if that is what indeed happened. Its mere exclusion casts doubt on the reliability of the witness's evidence on this point and cannot safely be relied upon.

[41] Despite the accused persons electing not to give evidence, it appears to me, based on the available evidence presented on the question whether the requisites of s 22 (a) were satisfied, that no consent was obtained to search the room. The next step in the inquiry is to decide whether the requisites of subs (b) have been satisfied.

[42] What the evidence for the state has established is that up to the time that the police rushed to the guesthouse, no attempt was made to obtain a search warrant. This was explained by Namboga who said that it was decided to rather do surveillance of the guesthouse while in Ndokosho's opinion there was not sufficient information to obtain a search warrant. Kantema in his testimony made it clear that the purpose of their visit to the guesthouse was to conduct a search in order to try and find evidence that is linked to either the deceased or his killing. Yet he made no mention of first obtaining a search warrant and seems to have relied on obtaining consent from the suspects. According to him the situation changed significantly when accused no.1 started fighting one of the officers upon entry. It should however be borne in mind that this was only *after* the police exerted pressure on the accused to open the door. Notwithstanding the subjective beliefs of the officers at the time as to whether the information to their disposal was such that a search warrant would have been issued had they applied for one, it is for this court to objectively decide whether that would indeed have been the case or not.

[43] Detailed evidence was led which explained how the police suspected the two accused persons to be linked to the murder. This included information received from the deceased's family about him meeting up with two Americans for lunch (around the time of the murder); cell phone records which established several contacts between the deceased and two numbers which could be linked to accused persons, and that there was no further contact between these numbers and the deceased after his death. The deceased's cell phone and wallet which were removed from the murder scene, as well as the fact that a firearm was used during the murder and the spent cartridge also not found at the scene, would obviously have established a direct link to the crime if found in anyone's possession. In my view, the collective weight that can be accorded to these factors

are such that it established reasonable grounds on which a search warrant would have been issued, had the police applied for one. That satisfies the requisite under subs (b)(i) of the Act.

[44] Turning to the second leg of the requirement under subs (b), regard must be had to those circumstances which prompted immediate action from the police. It started with Donny's call to say that the suspects were back at the guesthouse and that they should hurry there before they leave. What can be deduced from the manner in which the police approached the situation, it can reasonably be inferred that they did not expect any resistance from the persons they intended questioning and conducting a search of their room. This is borne out by their omission to obtain a search warrant beforehand and the announcement of their presence and purpose of their visit. The lack of response clearly heightened the need to gain access into the room, moreover where there was a belief that the suspects were armed. A contributing factor was that even after Kantema had shown his appointment certificate to accused no.2 when he peeped through the window, there was still no reaction to their continued insistence that the door must be unlocked. During this period there was an audible disturbance (movements) coming from inside the room, which sparked the belief that evidence was being destroyed. The door was only unlocked after threats by the police that they would force their way through the door. Upon entering accused no.1 started to fight the officers and he had to be restrained and placed in handcuffs.

[45] When asked in cross-examination why the police did not at that stage obtain a search warrant when the circumstances suddenly changed, and they now had (more) reason to believe that the accused might be involved, the officers were in agreement that it was already late at night and the time it would take to obtain a warrant from a magistrate would defeat the object of the search. Other factors which played a role was that the room was not their fixed abode; that they were mobile and in the meantime could get rid of evidence the police were looking for.

[46] Given the circumstances as set out above, objectively viewed, it appears to me that the belief held by the police officials that the obtaining of a warrant may

have defeated the object of the search, was reasonable. The stance taken by the defence is similar to that argued in the court of appeal (Full Bench) in *S v Ndlovu and Others*[9] where the following appears at para 51:

> 'The suggestion at the trial, and repeated in this argument in this court, namely that the police could have secured the area while a search warrant was obtained, does not account for the realities of the moment. It is in any event difficult to comprehend how securing the area around the chalet would have prevented the appellants from potentially tampering with evidence, or how Viljoen could have prevented the appellants from leaving the chalet and the resort without further infringing upon their rights.'

[47] I respectfully endorse these sentiments made in relation to circumstances not dissimilar to the present facts. In this instance the police were specifically eager to trace the deceased's wallet and cell phone, both items that could readily be discarded. The accused could easily delete information on their cell phones and other electronic devices which linked them with the deceased, moreover where such link already existed as per the MTC records. To this end there were reasonable grounds to believe that a delay in obtaining a search warrant would defeat the object of the search.

[48] I am accordingly satisfied that the requisites set out in subs (b) have been met, and that the search conducted on 7 January 2011 was in accordance with the provisions of s 22 of the CPA.

[49] When raising the objections against the admissibility of evidence deriving from searches conducted of the room, counsel did not contend that the articles seized by the police fell outside the ambit of s 20 of the CPA. This s-regulates the circumstances under which the state may seize articles and reads:

> '**State may seize certain articles**
> The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) –
> (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

[9] *S v Ndlovu and Others* 2021 (1) SACR 299 (ECMA).

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.'

[50] During the trial-within-a-trial the nature of the articles seized were not disclosed, as the defence specifically objected to this information being disclosed. That obviously would exclude exhibits already handed into evidence during the main trial as no objection was raised as regards the admissibility thereof at the time. From evidence already adduced, it is evident that when articles were seized during the respective searches, the police officials acted in terms of s 20(b) and seized items which might afford evidence of the commission of the murder. In the absence of evidence showing otherwise, it would follow that seizure of these items were lawful.

[51] Next, I turn to the events of Saturday 08 January 2011, as testified on by officers Ndokosho and Kantema.

[52] The contradictions in the versions of these two officers, as shown above, are glaring. This much the state has conceded. As already mentioned, counsel for the accused throughout the testimonies of these witnesses had put it to them that their evidence, as regards the manner in which the searches were conducted, is false. In *Ndlovu* (*supra*) the court in this regard at para 46 stated that '. . . contradictions rather tend to point away from a deliberate stratagem on the part of the police to give false evidence as was suggested on behalf of the appellants' and proceeded quoting from *S v Mkohle*[10] where it is stated at 98f-g thus:

'Contradictions *per se* do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'

---

[10] *S v Mkohle* 1990 (1) SACR 95 (A).

The court was further of the view that contradicting statements made by different witnesses, at face value, mean nothing more than to say that one is erroneous but it cannot be said which one; it therefore leads nowhere as far as veracity is concerned. The court further at para 47 said: 'The importance of the contradictions are to be determined with reference to their nature rather than their number; their importance in the context of other evidence which is not in dispute or which cannot be disputed; and their relevance in the context of the issues which the trier of fact is tasked to decide.[11]'

[53] When applying the aforementioned principles to the present facts one is bound to find that the purpose for returning to the guesthouse on 8 January 2011 by the two police officials, was to conduct a search for which no search warrant was obtained beforehand. Despite counsel for the state's contention that it should be found that accused no.2, having been present at the time, tacitly gave his consent, the conflicting evidence that *no* search was conducted, cannot be disregarded. The contradiction, when considered in the context of other evidence and its relevance in the context of the objections under consideration is not only material, but of such nature that the narratives of the two police officials, as regards the events of that day, is unreliable and falls short of satisfying the requisites of s 22. It then follows that evidence seized on this occasion is ruled inadmissible.

[54] This brings me to the events of 9 January 2011 as testified to by officers Ndikoma and De Klerk.

[55] The gist of their evidence is that they were requested by the management of African Sky Guesthouse to vacate the room in which the accused persons were accommodated up to their arrest. On Sunday, 9 January 2011, the two officials went to the guesthouse to collect the personal belongings of the two accused and after the room was unlocked, they stepped inside. Prior to the gathering of the properties they had examined the contents of a black bag found near the door and a briefcase in the wardrobe. In the bag De Klerk noticed a white pipe[12] and enquired from the lady of the guesthouse whether it belonged to them, which was

[11] See *S v Mafadaliso* 2002 (1) SACR 583 at 593f-593h and the cases cited.
[12] Which looked like the leg of a patio table.

denied. He placed it back and paid no further attention to it. In the briefcase he found two plastic containers and upon opening them, discovered a gun barrel in each. This finding drastically changed the purpose of their visit, now realising that these barrels were likely in unlawful possession. This prompted the decision to conduct a further search of the room despite knowing about the two earlier searches which, in their view, were not properly done. They placed everything back in the position as found and stepped out of the room.

[56] Having at this stage taken an informed decision to conduct a thorough search of the room, officer Namhindo from their office was summoned to capture the circumstances under which the search took place and possible findings. He subsequently compiled a corresponding photo plan.

[57] When asked whether the officers did not deem it necessary to either obtain consent from the accused persons or a search warrant, they were adamant that the presence of the gun barrels did not warrant such action as these could not be left unattended in the room. They were further of the opinion that, being on a Sunday and from experience, it would have been very difficult to find a magistrate for the issuing of a warrant. They firmly held the view that there were reasonable grounds to believe that a search warrant would be issued, had they applied for one but that the finding of the barrels required immediate action. Defence counsel's insinuation that the alleged collection of the accused persons' belongings was merely a guise to conduct a further search, was disputed.

[58] When applying the requisites set out in s 22(b) of the CPA to the circumstances the two police officials were facing at the time, the following is taken into consideration:

58.1 It is not disputed that the room formerly occupied by the accused person during their stay at the guesthouse was cleared out of their personal belongings by the two officers on the Sunday. Also that these were taken to the police station where it was booked in as exhibits. Defence counsel's bold assertion that the sole purpose for going to the guesthouse by the officers was to conduct a further search is not supported by evidence; neither was it challenged during the testimonies of the witnesses. Although

the accused persons did not claim ownership of the gun barrels at the police station, they did not dispute it being among the properties collected from their room. Furthermore, the presence of these gun barrels was not known to the police prior to their arrival to collect the properties of the accused. I accordingly find defence counsel's assertion to be without merit.

58.2 In light of the unforeseen discovery of the gun barrels in a briefcase belonging to the accused persons, this prompted a further search of the room because, as De Klerk testified, it was obvious to him that previous searches conducted during the preceding two days, were not properly done. Against this backdrop, I am also satisfied that there were sufficient grounds on which a search warrant would have been issued. Moreover, the mere possession of the gun barrels was likely to be unlawful and whereas the accused persons were suspects in a murder case, the mere find thereof was of incriminating nature and required further investigation. To this end the requisites stated in the first leg of subs (b) has been met.

58.3 The further inquiry is to determine whether the delay in obtaining a search warrant would have defeated the object of the search (s (b)(ii)). In support of their belief that it would, the officers said that they could not just leave the gun barrels in the room and reasoned that the guesthouse was a public place and, there was a real risk of interference with whatever evidence was inside the room. I am unable to see what reasonable grounds existed at the time that could support such belief. As with the preceding days, they had indirect control over who may or may not enter the room and there is no evidence from which it could be inferred that the object of the intended search would be defeated if it were briefly delayed in order to obtain a search warrant. The situation then was different from the first search on Friday when the accused persons were still in the room and where they could easily have destroyed incriminating evidence during a delay before the search could get started. I am therefore not persuaded that the officers had reasonable grounds to believe that a delay in obtaining a search warrant would defeat the object of the search, as was required by ss (b)(ii). Based on their oral evidence, it does not appear to me that they even

entertained this possibility, as they were set on conducting a search without even considering an application for a search warrant. The evidence of the state on this score thus falls short of satisfying the fundamental principle of the accused persons' right to privacy and the subsequent search conducted on the day was therefore irregular. This however, as submitted by counsel for the state, is not the end of the matter.

[59] Where the court, as in this instance, is required to consider the admissibility of evidence that was obtained in conflict with the constitutional rights of the accused persons, regard should be had to the approach adopted by the Supreme Court in *S v Shikunga and Another*[13] where the court balanced the equally compelling claim that society has, namely, that a guilty person should be convicted, opposed to the claim that the integrity of the judicial process should be upheld. The court as *per* Mahomed concluded at 170I-171A that:

> 'It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity.'

[60] In the same vein the court in *Key v Attorney-General, Cape Provincial Division and Another*[14] stated the following at 195F-196B:

> 'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale.
>
> … But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require

[13] *S v Shikunga and Another* 1997 NR 156 (SC).
[14] *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC).

that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

[61] What is evident from the above authorities is that there is no absolute exclusion of evidence obtained in conflict with the constitutional rights of an accused. Even in such cases, the trial court is vested with a discretion to determine whether or not those irregularities would result in a failure of justice and thus to be excluded, based on the facts of the case. The evidence of the witnesses who testified for the state must be approached holistically and evaluated in the context of the entire body of evidence before the court and in the light of the inherent probabilities and improbabilities of the case.[15] Inclusive of the fact that the accused persons elected not to testify or to place any version before the court with regard to the inquiry to determine the admissibility, or otherwise, of evidence seized after searches conducted on the room they occupied before their arrest.

[62] It is against this background that I next turn to consider the admissibility or otherwise of the evidence discovered on 9 January 2011.

[63] Evidence concerning the purpose of the police to return to the guesthouse on the Sunday and to vacate the room of the accused persons' belongings, was not refuted by the accused and was, in some respect, confirmed by earlier evidence given during the main trial. There is thus no reason to believe that officers De Klerk and Ndikoma did not act in good faith when they stepped inside the room. De Klerk was aware of earlier searches conducted on the previous two days and did not expect to find evidence that could be linked to the investigation. It was only when he found the gun barrels that he decided to conduct a further search. As was stated, up until then, they were not even aware of the existence of these barrels as no mention was earlier made thereof. The officers were thus taken by surprise when finding same in a briefcase.

[64] I am accordingly satisfied that the two police officials acted in good faith when they decided to conduct a further search of the room and that it was not part of a deliberate ploy of the police to trample on the suspects' rights during their investigation.

---

[15] *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426d.

[65] Notwithstanding, Article 12 of the Constitution demands that the accused be given a fair trial. As already stated, when seized with unconstitutionally obtained evidence, the issue of fairness has to be decided upon the facts of the case. At times such evidence will be excluded but there will be times when fairness will require that such evidence be admitted, albeit unconstitutionally obtained. Looking at the degree of prejudice suffered by the accused persons if the evidence were to be admitted, it seems to me to rather lie on the lower end and not to cause severe prejudice to the accused persons. The present matter is not an instance where self-incriminatory acts by the accused persons followed upon the infringement of their rights. This was the case in *S v Engelbrecht*[16] where the making of a confession by the accused was consequential to him not duly been informed of his right to legal representation which was a violation of his fundamental rights that rendered the trial unfair.

[66] Though the right to privacy is a fundamental right under the Constitution, it is settled law that it is equally subject to reasonable and justifiable limitation. This requires the making of the value judgment envisaged by Article 12 which guarantees a fair trial. It seems apposite to refer to the judgment of Pickering J, in *S v Ndlovu*[17] where the learned judge at para 59 endorsed the sentiments expressed in *S v Pillay*[18] at para 89 where stated 'that real evidence derived from conscripted evidence, i.e., self-incriminating evidence obtained through a violation of an accused's constitutional rights, would be excluded on grounds of unfairness if it were found that, but for the conscripted evidence, the derivative evidence would not have been discovered'. When compared to the present facts where certain real evidence, namely, gun barrels and documents, were discovered in consequence of an illegal search without a search warrant, I am satisfied that, had the police officials obtained a warrant, these items would in any event have been discovered. In *S v Gemede*[19] the following as regards the unlawful discovery of real evidence appears at 264H-265B (para 32):

'The illegality of the search is therefore beyond question and that much was conceded by the state. The firearm was obtained by means of the search which, because

[16] *S v Engelbrecht* 2017 (3) NR 912 (HC).
[17] *S v Ndlovu* CC90/2017 [2018] ZAECGHC 123 (26 November 2018).
[18] *S v Pillay* 2004 (2) SACR 419 (SCA).
[19] *S v Gemede* 2017 (1) SACR 253 (SCA).

of its illegality, violated the appellant's right to privacy. But the fact that the evidence of a firearm was obtained in that manner did not, in my view, affect the fairness of the trial. <u>This is so because the firearm is real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant's right to privacy. The existence of the firearm would have been revealed independently of the infringement of the appellant's right to privacy. Consequently, the fact that the evidence of a firearm was unfairly obtained did not necessarily result in unfairness in the actual trial</u>. I am satisfied therefore that the admission of the evidence of the discovery of the firearm under the pillow did not render the appellant's trial unfair.' (Emphasis provided)

[67] What must be decided next is whether the discovery of real evidence in the present matter should notwithstanding be excluded on grounds that its admission would be detrimental to the administration of justice. This essentially required a value judgment where the court must decide on the one hand, between the admission of derivative evidence 'relevant and vital for ascertaining the truth' but detrimental to the administration of justice, and on the other hand, the refusal of such evidence on grounds of some technical infringement with little consequence which 'would be no less detrimental to the administration of justice.[20] As pointed out in the judgment, the difficulty lies in the grey area between these two extremes. This obviously need to be determined on the facts and circumstances of the case.

[68] Plasket J, in *Zuko v S*[21] at para 22 enumerated issues relevant for the making of a value judgment in circumstances where real evidence was discovered consequent upon an unlawful search. These are (a) whether [in this instance the police officials] acted in good faith; (b) whether their conduct may be justified on the basis of public safety and urgency; (c) the nature and seriousness of the violation of the fundamental rights of the [accused persons]; (d) whether lawful methods would have secured the evidence; and (e) the nature of the evidence obtained.

[20] *S v Pillay* (*supra*) at para 11.
[21] *Zuko v S* 2009 [4] All SA 89 (E).

[69] I already alluded to the fact that, based on the evidence before court, the two officials in this instance acted in good faith when going to the guesthouse to collect the accused persons' belongings when they stumbled upon gun barrels, the discovery in itself, prompting a further search of the room. Also that their conduct was justified with regards to public safety and urgency in circumstances where a search warrant would have been issued, had they applied for one based on the new facts, considered against the background of the murder investigation. As stated, the violation of the accused persons' right to privacy, when considered in circumstances where real evidence was discovered which could probably be linked to the murder investigation, is of less serious nature.

[70] I am accordingly satisfied that the admissibility of real evidence consequent upon the search conducted at African Sky Guesthouse (Room 5) on 9 January 2011 will not render the trial of the accused persons unfair; neither would it, in my view, be detrimental to the administration of justice.

[71] In the result, I make the following findings:

(a) Evidence consequent upon searches conducted on 7 & 9 January 2011 is ruled admissible.

(b) Evidence consequent upon the search conducted on 8 January 2011 is ruled inadmissible.

____

JC LIEBENBERG

JUDGE

APPEARANCES:

COUNSEL FOR THE ACCUSED 1:	Ms Pack Instructed by the Directorate of Legal Aid, Windhoek.
COUNSEL FOR ACCUSED 2:	Mr M Siyomunji Siyomunji Law Chambers, Windhoek.
THE STATE:	Ms A Verhoef Office of the Prosecutor-General, Windhoek