

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 08/2022

In the matter between:

THE STATE

and

AZAAN SHANYANGE MADISIA

ACCUSED 1

STEVEN MULUNDU

ACCUSED 2

Neutral citation: *S v Madisia* (CC 08/2022) [2023] NAHCMD 267
(16 May 2023)

Coram: **LIEBENBERG J**

Heard: **6 – 10 February 2023; 6 – 9, 27 March 2023.**

Delivered: **16 May 2023**

Flynote: Criminal procedure – Trial – Charges – Murder, robbery with aggravating circumstances, obstructing or defeating the course of justice and fraud.

Criminal procedure – Robbery – Competent verdict of theft.

Criminal law – Theft – Appropriation – Specific intent required.

Criminal law – Murder – Accessory after the fact – Doctrine finds application only where crime committed by a perpetrator.

Criminal law – Murder – Cause of death unknown – Elements of offence to be proved – Inferences may be drawn from circumstances – Injuries to body indicative of application of force – Intent inferred where cause of death known or inferred.

Law of evidence – Evaluation of – Applicable principles discussed and applied – State's case based primarily on admissions by accused persons – Contradictions and untruthful explanations by accused in earlier statements admitted and explained during testimonies – Versions of accused not truthful in all respects – State seeking rejection of version of accused – Effect thereof – Basis of state's case then falls away – No basis in law to reject evidence and accept part thereof where favourable to the state – No compelling reason to reject evidence of defence in its entirety – Version of accused – Despite court not believing version in all its detail – Accused's version reasonably possibly true.

Summary: The accused persons are charged with murder, robbery (with aggravating circumstances), defeating or obstructing the course of justice and accused 1 with two counts of fraud. The accused pleaded not guilty to murder and robbery and guilty to remaining counts. The state only accepting the pleas tendered by accused 1 as regards charges of fraud and led evidence to prove the remaining charges. The state has led no evidence in proving the murder and robbery charges and based its case on conflicting statements made by the accused persons during the police investigation which was aimed as frustrating the police in their investigation of the disappearance of

the deceased. The making of false statements was to cover up the death of the deceased consequential to an altercation between accused 1 and the deceased and the undisclosed burial of the body by the accused persons. The state relies entirely on the false statements by the accused when submitting that their actions are indicative of their unlawful killing of the deceased which may be inferred in circumstances where the cause of death is unknown. Because of their earlier falsehood, their evidence to be rejected as false. The state conceding that robbery was not proved and relies on the competent verdict of theft. On charge of defeating or obstructing the course of justice the state's position is that the accused persons attempted to do so.

Held that, the testimony of accused 1 of events preceding the falling down of the deceased to the floor not credible and reliable in all respects. Untruthful evidence or a false statement does not always justify the most extreme conclusion. There is no basis for a finding that her evidence is entirely false and to be rejected.

Held further, where evidence of accused 1 falls to be rejected as false, that would equally plunge the state's case on the murder and robbery charges into falsehood as it is entirely based on the evidence of accused 1. The state's approach to selectively rely on the evidence of accused 1 when favourable to the state is not permissible.

Held further, despite shortcomings in the evidence of accused 1, her version of events that led to the death of the deceased stands unrefuted and to be considered. Based on all the evidence adduced the version of accused 1 as to what led to the deceased's death is reasonably possibly true. Accused 1's actions not found culpable.

Held further, for the doctrine of accused 2 being an accessory after the fact to find application, accused 1 (as the perpetrator) must have committed the crime of murder. This had not been proved.

Held that, regarding the charge of robbery there is no evidence that the accused persons committed such offence. As for the competent verdict of theft, there is no evidence showing that accused 1 had the intent to

appropriate the deceased's belongings. Accused 1 had intent to get rid of the properties to avoid same to be linked to her after the deceased's disappearance. The actions of the accused were already covered by the charge of defeating or obstructing the course of justice to which the accused pleaded guilty.

Held further, the offence of defeating or obstructing the course of justice was completed because due to their actions, the body of the deceased was in an advanced stage of decomposition when discovered. As a result thereof the cause of death could not be determined. The offence was thus completed and not merely an attempt.

ORDER

Count 1 – Murder:

Accused 1 – Not guilty and discharged.

Accused 2 – Not guilty and discharged.

Count 2 – Robbery with aggravating circumstances:

Accused 1 – Not guilty and discharged.

Accused 2 – Not guilty and discharged.

Count 3 – Defeating of obstructing the course of justice:

Accused 1 – Guilty.

Accused 2 – Guilty.

Count 4 – Fraud:

Accused 1 – Guilty.

Alternatively – Theft:

Accused 1 – Not guilty and discharged.

Count 5 – Fraud:

Accused 1 – Guilty.

Alternatively – Theft:

Accused 1 – Not guilty and discharged.

JUDGMENT

LIEBENBERG J:

Introduction

[1] The accused persons, being adult siblings, stand jointly charged with murder, robbery with aggravating circumstances and defeating or obstructing or attempting to defeat or obstruct the course of justice. Accused 1, in addition, is charged with two counts of fraud. Both the accused pleaded not guilty to the murder and robbery charges (counts 1 and 2) and tendered pleas of guilty on the charge of defeating or obstructing the course of justice (count 3). Despite making substantive admissions in their respective plea explanations, the state did not accept the pleas and elected to lead evidence in proving the allegations set out in the charge. With regards to the fraud charges against accused 1 (counts 4 and 5), the state accepted her plea of guilty on the main charge of both counts, as tendered.

[2] The state, represented by Mr Muhongo, led the evidence of eight witnesses while the accused persons testified in their defence. Mr Titus appears for accused 1 and Ms Klazen for accused 2.

The charges

[3] On the charge of murder, it is alleged that the accused persons on 10 April 2020 at Walvis Bay, unlawfully and intentionally killed Shanon Ndatega Wasserfall (hereinafter ‘the deceased’), a 21 year old female person. Further,

that the accused persons acted with common purpose when killing the deceased. The charge of robbery relates to the same date, place and victim when the accused persons allegedly, with the intention of forcing her into submission, assaulted the deceased in a manner unknown to the state with intent to steal her cell phone (and accessories), a watch, one pair of shoes and a jacket. The aggravating circumstances relate to the wielding of a dangerous weapon before or during the commission of the robbery.

[4] In the charge of defeating or obstructing the course of justice or an attempt to do so, it is alleged that the accused persons intentionally and unlawfully defeated or obstructed the course of justice when (a) they transported the body of the deceased from her place of residence (the flat) in Kuisebmond, to an open area in the vicinity of the Dunes Mall in Walvis Bay, where they buried the body; (b) they threw away, hid or destroyed the deceased's personal belongings robbed from her earlier; (c) cleaning blood of the deceased inside the flat of accused 1 and the covering of the floors inside the flat with vinyl; and (d) making false reports to the police regarding the disappearance of the deceased on 10 April 2020.

[5] The counts of fraud relate to false insurance claims accused 1 submitted to Old Mutual Short Term Insurance Co. Ltd, the first being during 25 February to April 2020 for the loss of an insured Acer laptop with an estimate value of N\$9000. The second claim was during 22 September to October 2020 for the loss of an iPhone cellular phone to the value of N\$14290. On the first claim she was paid N\$6500 whilst in the second claim the phone was replaced.

Accused 1's plea explanations

Count 1 – Murder

[6] In amplification of her plea of not guilty, accused 1 in a statement prepared in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the CPA), explained that she and the deceased had become friends through her friend, Petrus Shoopala (Peter), with whom the deceased was in a romantic relationship at the time of her death. From this relationship a boy was born

who was still a baby at the time. They planned that the deceased and her son would visit accused 1 on Friday 10 April 2020 and she collected them from their house during the morning whereafter they leisurely spent time together at the accused's flat; they also drank some wine. At some point the deceased left and when she returned, she appeared visibly upset and questioned accused 1 about her relationship with Peter. Whilst contemplating that they both might have had too much to drink, she suggested to the deceased that she would take her and the baby home, but the deceased refused and wanted to continue the discussion. The deceased resisted when the accused tried to take from her the wine bottle she was holding. They started to argue which was escalated in the back-and-forth pushing of one another and the deceased at one point swinging a blow at her which she blocked. In the process her finger ended up in the deceased's mouth and she got bitten. By then they had moved into the bedroom and when the accused pushed the deceased one final time to get away from her, the deceased tumbled over the bed and remained down, motionless. When she felt no pulse or breathing on the deceased, she started to panic. The accused disputes having had the intention to kill the deceased or that she foresaw her death when pushing her. She further disputes that she had acted with common purpose with accused 2, whom she claims was not present at the time.

Count 2 – Robbery

[7] Accused 1 disputes the allegations contained in the charge, particularly that when pushing the deceased in the manner set out in count 1, that she had done so with the intent to steal the deceased's property from her.

Count 3 – Defeating or obstructing the course of justice

[8] As already stated, accused 1 tendered a plea of guilty on this charge and admitted committing the offence. In amplification of her s 112(2) statement she admitted, in summary, the following:

Upon coming to realise that the deceased had probably died after she tumbled over the bed and hit her head, accused 1 phoned accused 2 and summoned him to her flat. With his arrival he enquired what had happened

and after learning what transpired, he suggested that the police be called. Fearing her arrest, accused 1 said they need to do something with the body and it was her idea that they dump the body somewhere. After loading the body in the loading box of her employer's pickup, she and accused 2 drove around in search of a secluded area where the body could be dropped off. She decided on a spot at the side of town near the Dunes Mall, where accused 1 dug a shallow grave with her hands and they laid the body into the grave. She covered the body with sand and left the deceased's jacket at the scene. Their vehicle got stuck in the sand as they were driving back and had to rely on the assistance of family and friends to free the vehicle.

Back home accused 1 noticed the deceased's cell phone, scarf, watch and sandals still in her flat and, fearing that these could link her to the deceased's death, decided to get rid of it by throwing it into an outside rubbish bin.

In order to explain the deceased's disappearance from her flat, accused 1 made up a story that the deceased had earlier left the flat to go somewhere and had since not returned. She subsequently made a statement to the police in which the fabricated version of the deceased's disappearance was repeated.

With regards to allegations about accused 1 having 'removed' the blood of the deceased from the flat and had new vinyl flooring laid with intent to defeat or obstruct the course of justice, these were disputed.

Counts 4 & 5 – Fraud

[9] As regards these counts, accused 1 admitted all the elements of fraud and the particulars set out in the charge. She admitted filing false insurance claims with her insurer, Old Mutual, who paid out both claims. Although the estimated value of her laptop at N\$9000 was claimed, a lesser amount of N\$6500 was paid out. As for her iPhone, the amount of N\$16 500 was claimed and the phone was replaced. The accused further admitted that she in fact did not lose her phone as reported to the police and Old Mutual, but sold it for the amount of N\$4000.

Accused 2's plea explanations

Count 1 – Murder

[10] In amplification of his plea of not guilty to this charge, the accused in his s 115 statement denied having caused the death of the deceased acting either on his own, or in common purpose with anyone. He confirmed that accused 1 called him to come to her flat where he found the deceased unresponsive, not breathing and with no pulse. He disputes having planned the killing of the deceased or that he discussed her killing with accused 1.

Count 2 – Robbery

[11] The accused's defence on this charge is a blunt denial of the allegations set out in the charge.

Count 3 – Defeating or obstructing the course of justice

[12] In amplification of his guilty plea on this charge, accused 2 admitted the following in the s 112(2) statement:

Upon his arrival at the flat of accused 1 he observed that her whole body was shaking and that she was panicky and nervous. When enquiring what was wrong, she directed him to the bedroom where he found the motionless body of the deceased lying on the floor. He observed no breathing on her and she had no pulse. He noticed a discoloration of the skin on the neck, chest, forearms and thighs and blood smear on the wall. After accused 1 explained to him what had happened, he admitted to assisting her in the loading and burial of the deceased's body, acting with intent to defeat or obstruct the course of justice. His narrative of how this was done is consistent with that of accused 1. On the strength of what accused 1 told him about what had happened between her and the deceased, he claimed to have believed her when saying that the deceased's death was merely an accident and unintentional.

He further admitted to making a false statement to the police on 9 October 2020 in which he falsely stated that he did not meet with accused 1 in her flat on the day of the incident, but that she directed him to where the vehicle got stuck near Dunes Mall where they met.

The undisputed facts

[13] From the evidence adduced by both state and defence witnesses, it is common cause that the deceased and accused 1 were friends and that the purpose of the deceased visiting accused 1 on the day of the incident was for them to spend more time together as Peter and the deceased decided that they would ask accused 1 to assist in weaning their baby boy. This probably explains why Peter, the baby's father, left the baby with accused 1 even after learning that the deceased had left the flat and had not returned. Also undisputed is that accused 1 during October 2020 sent anonymous text messages to the police and the deceased's family directing them as to where the deceased's remains could be found, which led to the discovery of the remains. Due to the advanced stage of decomposition of the body, the cause of death could not be determined. As to the circumstances that led to the death of the deceased, there is no evidence, either supporting or contradicting the narrative of accused 1.

The state's case

[14] Sergeant Tjikumise was on standby duty on 11 April 2020 when a report was received about a missing person. Emma Shipala, a friend to the deceased and Peter, came to the police station to make the report. Statements regarding the disappearance of the deceased were obtained, inclusive of a statement by accused 1 in which she stated that the deceased left the flat at around 18h00, saying that she quickly had to meet a friend at 'the old independence shop' and would be back soon. When she did not return, accused 1 became worried and tried to contact her but got no response. She texted Peter to enquire whether the deceased was at home but learned that she was not. She was therefore unable to say what had happened to her.

[15] According to Tjikumise accused 1 assisted the police with the printing of posters of the missing person and from time to time would come to his office to enquire about progress made with the investigation. The anonymous text messages were sent to his phone and after reporting this to Chief Inspector Mwatongwe, he was instructed to go to the area described in the text message. Accompanied by sergeant Haidula, they found the remains of a human body at the designated place. His testimony further relates to the acquisition of printouts from the service provider (MTC) and his realisation that both text messages were sent from the same cell phone, belonging to accused 1. He fetched accused 1 from work and interviewed her about the text messages sent from her phone. She gave an explanation as summarised in her testimony. She explained that the cell phone from which the text messages were sent is at home from where he collected it.

[16] Inspector Mwatongwe, Head of the Serious Crime Unit at Walvis Bay, only became involved in the investigation on 6 October 2020, but had assisted sergeant Tjikumise who was initially assigned to the tracing of a missing person. He confirmed that interviews were conducted with family members of the missing person and accused 1, as she was the last person to have had contact with her. She was not a suspect as, by then, the police merely acted on the explanation given by accused 1 that the deceased left her flat on 10 April 2020 to go somewhere and never returned.

[17] In October 2020 a text message was forwarded to the witness by Commissioner likuyu which contained information about the missing person and directions on where to go. The sender was anonymous. This was the same text message sent directly to Tjikumise. A search conducted in the area resulted in the finding of human bones. The investigation then shifted to the tracing of the number of the phone from which the same message was sent on the 1st and 2nd of October 2020. From the MTC printouts it was discovered that, although both messages were sent from the phone belonging to accused 1, different SIM cards were used during the sending of the messages. When confronted by Tjikumise with this new information she explained that, whilst walking in the street in Narraville, an unknown person randomly asked to use her phone to send a message and inserted his own SIM card into her phone.

As to the second message sent, she explained that she decided to get a new SIM card and resend the messages this person had earlier sent as she thought it was the right thing to do. She thereafter destroyed the SIM card.

[18] The sending of both text messages from accused 1's phone led to her arrest on 7 October 2020. After speaking to her lawyer on the phone, she indicated her willingness to co-operate and agreed to answer questions by the police. She gave an explanation which was subsequently repeated before Chief Inspector Viljoen who reduced her statement to writing.

[19] The investigation continued and the forensic examination conducted on the skeletal remains revealed that it was the body of the deceased. With regards to the cell phone of the deceased, accused 1 said it was buried somewhere but she and accused 2 declined to point out the scene. A thorough search of the flat of accused 1 was conducted on 16 October 2020 in search of evidence that could possibly be linked to a crime and in search of the properties of the deceased, but all in vain. This was followed up by two further searches of the flat in an attempt to find DNA evidence, but was equally unsuccessful to the extent that no traces of blood linked to the deceased could be found. No proof could be found showing that accused 2 was involved in the killing of the deceased.

[20] The evidence of Chief Inspector Viljoen (Viljoen) exclusively deals with the sworn statement obtained from accused 1, starting on the evening of 5 November and continuing into the early hours of 6 November 2020.¹ The accuracy of the statement is not disputed; neither the typed copy thereof handed up into evidence.² It is further common cause that the accused's erstwhile lawyer, Mr Kasper, was in attendance up to some point when he left and the accused's parents then joined her. At all times the accused was aware of her rights and that she was a suspect in a murder case. The statement made by accused 1 was reduced to writing and signed by her. The accused gave the statement in the Afrikaans language which Viljoen translated into English. Viljoen considered the statement as 'a continuation of the warning statement'.

¹ Exhibit 'J-1'.

² Exhibit 'J-2'.

[21] With regards to the content of the statement, it was Viljoen's testimony that during his recording of the statement, Mr Kasper asked him to leave the office to allow him to privately speak to his client. When Viljoen returned, he was informed that the accused on one aspect of her statement (as recorded), was not truthful and that she wished to speak the truth from that moment on. This resulted in paras 6 and 7 being partly struck out and rewritten. During his testimony Viljoen was able to re-count the deleted part which essentially turns on the back-and-forth pushing between accused 1 and the deceased. Initially the accused had said that they moved towards the garage where the deceased bit her on the finger and when she pushed her away, she lost her balance and hit her head on a table where she died on the spot. This version was changed to state that they in fact had moved into her bedroom (not the garage) where the physical altercation ended when the deceased bumped her head and was thereafter unresponsive. The latter version is as per the typed copy (Exhibit 'J-2') and has been repeated in the accused's plea explanation and during her testimony.

[22] During cross-examination it was put to Viljoen by counsel for accused 1 that the statement was wrong where it reads: that the deceased bit accused 1 on her ring finger and not her pinky (little finger) and that she afterwards 'cleaned up' the room as opposed to her having 'tidied up' the room. Viljoen, however, was adamant that the statement reflects the words used by the accused and that she had read through the statement before appending her signature to the statement.

[23] The evidence of Peter Shoopala basically corroborates the version of accused 1 regarding the events of 10 April 2020 and, besides admitting to a sexual relationship he had with accused 1 while he and the deceased were partners, nothing further turns on his evidence. He also confirmed the friendship and good relationship between the deceased and accused 1 at time. I pause to observe that it is not the state's position that the relationship between Peter and accused 1 could have been a motive for the killing of the deceased.

[24] Although neither Peter nor accused 1 ever told the deceased about their sexual relationship, the accused during 2020 called Toivo Neliwa, a colleague of Peter, to whom she complained about the friendship between accused 1 and Peter. He did not consider the deceased's concern to be serious, as he saw the deceased and accused 1 together in town after a few days; he also knew that Peter and accused 1 were close friends.

[25] Sergeant Robert from the Criminal Investigation Department was instructed on 28 October 2020 to approach accused 1 at work and to conduct a search of her laptop. When browsing through her e-mails and browsing history, he came upon searches of interest to the investigation. Photos of e-mails were taken from screen shots captured on the laptop and printed out (Exhibit 'N 1-3'). In one of the searches dated 7 October 2020 it was enquired into 'how long does it take to know a forensic report in namibia' while in another, the enquiry was about 'how do mtc trace a number' (*sic*). A second screen shot reflects a search on 'What's the temperature needed to burn human bones to ash?' The date on which the latter search was conducted is 5 April, though the year is not reflected. The date reflected in the screenshot merely relates to the time when an article, related to the search, was sent via e-mail to accused 1. The third printout is an expenditure sheet reflecting the name 'Spyker' who did the vinyl flooring in the flat of accused 1. The witness was unable to refute defence counsel's contention that the laying of vinyl in the accused's flat was done during August/September 2020 and was part of the renovations done by her grandmother on the main house.

[26] Inspector Geiseb (Geiseb) from the Serious Crime Sub-Division, Walvis Bay, testified on three distinct aspects relating to the investigation. On 6 October 2020 he attended the scene where the remains of the deceased was unearthed and he compiled a photo plan from the photos taken at the scene (Exhibit 'O'). The witness furthermore on 9 October 2020 took a witness statement from accused 2 in which he explained his involvement with accused 1 on 10 April 2020 (Exhibit 'P'). What the statement essentially boils down to is that he was called by accused 1 and directed to a place near the Dunes Mall where her vehicle got stuck. When he reached her, she explained that she took a short cut to get to the rubbish dump when the vehicle got stuck

in the sand. He elaborated extensively on how they in the end managed to free the vehicle with the help of friends. They returned to the flat of accused 1 where he saw two big boxes in the loading box of the pickup; he did not know what was inside. On 6 November 2020 Geiseb took a second statement of accused 2, this time his warning statement, in which he gave a detailed account of his involvement in the matter (Exhibit 'Q'). With regards to his earlier statement accused 2, during the trial, admitted that the statement is false.

[27] In cross-examination Geiseb was confronted by counsel for accused 2 regarding several alleged irregularities in the statement as regards: the wrong cell phone number; the time he was called by accused 1; that he never said that the deceased was covered with a dark blanket after loading the body into the loading box; that he never mentioned about bloodspots on the bed sheets but only about a blood smear on the wall; that he did not mention about him seeing blood on the deceased; that he never mentioned about accused 1 saying she would make a plan with the body; and lastly, that he did not mention about the loading of boxes in the loading box in order to cover the body. Geiseb's response was that he merely recorded what he was told by accused 1 and denied having inserted additional information. He was adamant that the accused could have corrected the alleged mistakes when going through the statement afterwards and before appending his signature to the statement. He further disputes allegations that the accused was required to sign the statement without having sight of what is contained therein.

[28] The last witness testifying for the state was Dr Kabanje who conducted a medico post-mortem examination on the skeletal remains of the deceased (Exhibit 'E'). The gist of the report is that, from an examination of the bones alone, it was not possible to determine the cause of death. There were no signs or marks on the flat bones which would be indicative that 'tools' were involved. At a later stage more skeletal bones were brought but the cause of death remained undetermined.

[29] Dr Kabanje was asked to comment on observations made by accused 2 on the body (as per his warning statement) about discoloring of the skin on

the arms and legs. In the doctor's opinion this is normally caused by asphyxia due to a lack of oxygen and that the intake of alcohol has no bearing on discoloration of the skin. Dr Kabanje did not rule out the possibility of death in an instance where the head makes contact with a blunt object – like falling down hitting the floor – without causing skull fractures. Injury to the head would be sufficient to cause intra-cranial bleeding which could result in death. In the doctor's opinion, based on what he was presented with, there was no cause of death that he could possibly rule out.

[30] When the version of accused 1 was put forward as a possible cause of death, the doctor could not dispute that possibility. With regards to the discoloration of the skin Dr Kabanje further explained that 'liva mortis' was a possibility (opposed to bruising). In such instance it will largely depend on the position of the body at the time of death, as the lowest area of the body would discolor. Where the person died face down with asphyxia as a possibility, it would also show up in the limbs.

[31] After the evidence given by Dr Kabanje, the state closed its case. Ms Klazen then lodged an application for the discharge of accused 2 on the murder and robbery charges which the state opposed. After hearing argument for and against the application, the court dismissed the application and both the accused were put on their defence.

The defence case

[32] Before I set out to summarise the evidence of the defence, it seems necessary to mention that, where the testimonies of the accused persons are mere repetitions of their detailed and comprehensive plea explanations already incorporated in the judgment, it would be unnecessary and superfluous to summarise their evidence in any detail, except where that would be required on a particular aspect.

[33] The accused persons were the only witnesses for the defence.

Accused 1

[34] Prior to her arrest, the accused was employed as an administrative officer at Konica Minolta, Walvis Bay, and resided alone in a flat situated in the back yard of her grandmother's house in Kuisebmond, Walvis Bay. Accused 2 is her younger brother who stayed with their parents, also in Kuisebmond. She met the deceased through Peter during 2019 and knew that he and the deceased were in a relationship from which a boy was born. She and the deceased became good friends. At no stage did she mention to the deceased that she and Peter were having a sexual relationship on the side as she felt it was his duty to inform his partner and not for her to tell the deceased.

[35] On 10 April 2020 she fetched the deceased and the boy from home and came to the flat where they spent the day relaxing and enjoying each other's company. After lunch they drank liqueur and later changed to drinking wine. During the late afternoon the deceased said she briefly wanted to go somewhere and jokingly hinted that she was going to party ('lau-lau'). Before leaving, she asked accused 1 to watch over the boy who had fallen asleep on the couch. With the deceased's return some 20 minutes later, the mood had changed as the deceased appeared to be upset, from which the accused deduced that it was because of her and Peter's friendship. Accused 1 decided that it was time to take the deceased and the boy home and when she tried to take a wine bottle from her, she resisted. The altercation became physical when the deceased pushed her and escalated into a back-and-forth pushing of one another during which they ended up in the bedroom. During the scuffle the accused got bitten on her pinky. This caused a bleeding wound which, according to her, explained the blood smear on the bedroom wall. When she managed to free her finger, she pushed the deceased once more to ward her off. This caused the deceased to tumble over the bed, hitting the back of her head against the wall whereafter she fell to the floor between the bed and the wall.

[36] The accused during her testimony elaborated on the last push, saying that she merely pushed the deceased away from her and, apart from the force

it required to do so, she did not apply any (additional) force. With regards to the first push by the deceased, she said she merely pushed her back, 'unconsciously retaliating'. Her intention at that stage was merely to stop the altercation and prevent an uncontrollable situation. She claims not to have had the intent to kill the deceased, neither had she foreseen her ensuing death when pushing her back.

[37] She had called out at the deceased who remained motionless, thinking that she was joking. This soon changed when discovering that the deceased had no pulse and was not breathing. She went into a panic not knowing what to do and decided on calling her brother, accused 2, to come over. She particularly embraced the idea that she might not be believed as to what had happened. When accused 2 turned up, she apologised for dragging him into the situation and directed him to see for himself what was in the bedroom where the deceased was still lying in the same position and unresponsive. As mentioned, she explained what had happened, whereafter accused 2 suggested they contact the police or call an ambulance but accused 1 dismissed the idea, anticipating a lot of questioning as to what happened and the possibility of her arrest. She then proposed that they load the deceased's body in the loading box of the pickup, which they proceeded to do. After leaving the boy in the care of her cousin in the main house, she and accused 2 drove off with the body with accused 2 driving.

[38] After driving around aimlessly for some time, she directed accused 2 towards some dunes in the area of the Dunes Mall where they stopped. With her hands she dug a shallow grave in the (dune) sand and after laying the body down, she covered the body with sand. She fetched the deceased's jacket from the vehicle and dropped it at the scene, not wanting to be in possession of something that could link her to the deceased. When they tried to leave the scene, the vehicle got stuck in the sand. There is no need to summarise this part of the evidence in any detail. Suffice it to say that calls were made for assistance and, with the help of others, they managed to leave and return to the flat. I pause to observe that, in the end, it was their rescuers on the night who linked the accused to the scene where the skeletal remains were unearthed six months later.

[39] Back at the flat she tidied up the flat and the bed. The personal belongings of the deceased that remained behind in the flat she discarded by throwing them in an outside rubbish bin. Accused 1 explained that this was done to avoid being linked to the deceased.

[40] The accused's testimony as to what happened in the following days and weeks is a mere reprise of her earlier plea explanation following the plea of guilty tendered on count 3 and therefore need not be repeated. She admitted having made false statements to Peter, family and friends and ultimately to the police in which she fabricated a story about the deceased having left the flat and that she did not know what happened to her after that. She went on to say that since April until October 2020 she did not reveal the truth about the disappearance of the deceased but kept it to herself. During that period the search for a missing person was still ongoing.

[41] By October 2020 the sense of guilt became too much for her as she took pity on the deceased's parents for not knowing what happened to their child. She bought a SIM card without disclosing her identity and sent an anonymous text message to Peter, sergeant Tjikumise and other numbers displayed on the missing person poster that was put out. The message was about the location of the deceased's body. At work there was another unused SIM card which she used to resend the same message from her cell phone. She said this she did whilst still not willing to disclose her identity and involvement.

[42] On 7 October 2020 she accompanied sergeant Tjikumise to the police station for further questioning in connection with the disappearance of the deceased. She was then arrested and after being informed of her rights, she elected to remain silent. It was only in November of that year that she gave a statement to Chief Inspector Viljoen with her lawyer in attendance. In her testimony she confirmed what Viljoen had testified about changes made to the initial statement, at the insistence of the accused, who expressed the desire to forthwith speak the truth about what happened. This primarily turned on the deceased not hitting her head on a table in the garage, but against the wall in the bedroom. She was unable to explain why she decided not to speak the

truth from the beginning, except for saying that the garage was closer and of a more open area than the bedroom. Besides the issue as to on which finger she was bitten; blood spatter or a blood smear on the wall being that of the accused; and that she tidied up the room and shook the bed, there is basically no challenge to the statement.

[43] Accused 1 during her testimony submitted a medical examination report (J88)³ pertaining to the injury she sustained to her finger during the altercation. The examination was done on 10 November 2020 by a Dr Kiama at Narraville clinic who noted down that there was a healed scar on the little finger of the left hand and discoloration of the palm.

[44] With regards to the investigation being extended to her computer at work, accused explained the purpose of the searches she conducted and which were found of interest to the murder investigation. She explained that these e-mails were sent to her subsequent to TV programs like Discovery and National Geographic which she was keen on watching. Though not at first admitting that the searches found on her computer were of her doing, she later admitted but stated that, although unable to recall the year, it must have been way before the date of Sunday, 5 April (the year unknown), as reflected in the e-mail. She further denied having had the intention to burn the body of the deceased or any human bones for that matter – despite the search conducted on that topic.

[45] Regarding the Google searches conducted on 7 October 2020 pertaining to 'forensics', the same explanation was given that it was prompted after a program she watched and wanted to know more about the situation in Namibia. As for the tracing of MTC calls, she could not remember having conducted the search. However, after some pressure from her counsel to come up with an explanation for the search, she conceded that, in light of the anonymous text messages she had sent, she wanted to know whether it could be traced back to her or not.

[46] As for the covering of the floors of the flat with vinyl, accused 1 disputed that this was done in an attempt to cover evidence that could be

³ Exhibit 'R'.

linked to the deceased and said that it was solely for decorative purposes. With regards to the cleaning up of the flat (as recorded in her statement), she said that there was no blood of the deceased to be cleaned up as she never bled. The only blood was the blood smear on the wall which was caused by her bleeding from her finger which she wiped off afterwards.

[47] On the charge of robbery, the accused disputed having acted with common purpose or that she perpetrated an assault on the deceased in order to steal her properties. She reaffirmed her earlier explanation that the disposal of the deceased's properties was solely done in order not to be linked to the deceased and that she at no stage intended keeping these items for herself. She further stated that accused 2 was not present during the altercation and neither was he involved in getting rid of the deceased's properties. She admitted knowing that it was wrong of her to bury the body, but denied that this came about because of a crime she had committed.

[48] During cross-examination the state prosecutor took accused 1 to task to explain her earlier false statements made to the police and others which she had admitted. She denied that the altercation between her and the deceased was about her friendship with Peter. She further denied that the pushing which started in the lounge/kitchen area had seized before the deceased was pushed backwards into the bedroom; also that there was any need at that stage to go and look for help. During a demonstration by the accused in court on the position of the bed in relation to the wall, the distance initially testified to by the accused increased from 5 to 40 cm. This variation was undoubtedly made to be consistent with her earlier version that the deceased ended up on the floor between the wall and the bed. She maintained the position that she had told accused 2 that the deceased became unconscious after first hitting her head on the wall and thereafter on the floor as she fell down. The accused's evidence on the position of the deceased's body as to where it came to rest, is vague and inconsistent with that of accused 2.

Accused 2

[49] The accused's version of the events of 10 April 2020 was largely captured in the summary of his plea explanation on count 3 as summarized above. His testimony is basically a repetition of that version but amplified in some respects. He said he was called by accused 1 at around 17h00 when urgently summoning him to her flat. When he arrived he noticed that she appeared nervous and shaky and upon enquiring about what was wrong, she directed him to her bedroom. He observed a blood smear on the wall and the body of the deceased on the floor. The explanation by accused 1 was that she and the deceased had an argument which turned physical when pushing one another. During this altercation the deceased fell over the bed and hit her head on the floor, rendering her unconscious. He found the deceased unresponsive and observed discoloration of the skin. When he suggested that the police or an ambulance be summoned, accused 1 responded that it could lead to her arrest and that the body could not remain in her flat. At her request they loaded the body onto the pickup with the intention of dropping it off somewhere.

[50] They drove to a secluded area near the Dunes Mall and according to him this was the time the vehicle got stuck. Whilst he was trying to free the vehicle, accused 1 was busy digging a grave with her hands. He helped her to offload the body and lay it in the grave whereafter he returned to the vehicle. He explained how the vehicle was retrieved with the help of others and them returning to the flat. He saw accused 1 removing bed sheets. He took a shower and after getting dressed he left and went back to his friends. Between 01h00 and 03h00 he returned to the flat where he slept until the morning and then returned to his parents' home.

[51] After the arrest of accused 1 and statements obtained from the persons who saw him with his sister at the place where human remains were found, accused 2 was contacted by the police on 9 October 2020 to give a statement. At that stage he was considered a witness and not a suspect. He subsequently admitted that the statement he had made was false as far as it exonerates him in having assisted accused 1 to dispose of the body.

[52] Subsequent thereto, he made a further statement to Inspector Geiseb on 6 November 2020. This came about after a meeting with his family during which he decided to come clean and disclose what really happened. Acting on the advice of his father, he approached the police and made a statement. As for the content of the statement he claimed that it was partly incorrect (as earlier stated) and that he was never afforded the opportunity to correct it as the statement was never read back to him.

[53] He explained that the reason for changing his mind from initially involving the police to assisting accused 1 to get rid of the body, was because he could see his sister was wretched and took pity on her. He also did not want her to be arrested as he (subjectively) believed, from what he was told, that the deceased's death was accidental. He disputes having been present at the time of the altercation; neither did he assault the deceased with intent to rob her.

[54] In cross-examination he said that accused 1 had no blood stains on her clothes when he arrived at the flat – only that she mentioned about an injury to her little finger. He also did not observe any wounds or blood on the body of the deceased, except for discoloration of the skin, as mentioned. He disputes accused 1's version that he drove the pickup from the flat to where the body was buried, but admits driving the vehicle from the site up to a service station. According to him there was no discussion between them about the disposal of the deceased's properties. Contrary to what is stated in his statement dated 6 October 2020, he testified that there were no bloodspots on the bed sheets and denies having given that information to Geiseb when taking his statement. He testified that it's possible that he mistakenly assumed that accused 1 removed the bed sheets whilst she only tidied up the bed, thus accepting the version of accused 1 on this point to be correct. Despite his earlier statement reading that he saw blood on the back of the deceased's head, accused 2 disputed this in cross-examination, now saying that the deceased did not bleed from any injuries sustained. When put to the accused that Geiseb was not privy to information mentioned in his statement about the blood and the blanket with which the body was covered, accused 2 could not say why this information was included in the statement.

Closing submissions by counsel

Submissions by the State

[55] On the charge of murder (count 1), it is the state's contention that accused 1 gave contradicting and inconsistent versions of how the deceased disappeared and died. In essence, the state's case basically relies on the accused's deliberate making of false statements in that regard viz. the deceased's unexplained disappearance from the flat; that an unknown person used her phone from which the anonymous text messages were sent and when admitting to Viljoen that she wished to make changes to the statement as she had not been honest in some respects. The state argues that these contradicting explanations or versions must be considered against the accused's testimony in court which shows that accused 1 is unreliable and not credible, hence her version should be rejected as false.

[56] With regards to the cause of death, it is submitted that the deceased died after an assault by accused 1 and, when considered together with accused 2's earlier statement about him having seen blood marks on the wall and blood on the deceased's head, it could be inferred that a serious assault was perpetrated on the deceased. Counsel, however, conceded that accused 2 during his testimony disputed that he was the source of that information and that he distanced himself from that part of the statement during his testimony.

[57] During oral argument, the state referred to and relied on the *dicta* in similar cases where the cause of death was undetermined but, notwithstanding, the accused persons were convicted of murder.⁴ These judgments will be discussed *infra*.

[58] Counsel further argued that the evidence of accused 1 about her having been attacked by the deceased should be rejected as she, during the back-and-forth pushing of one another, actually followed the deceased into the bedroom instead of leaving the flat to seek help elsewhere. This argument is based on the assumption that the initial pushing, which started in the

⁴ *S v Orina* CC12/2010 (NAHCNLD) delivered on 28 April 2011; *S v Pieterse* CC 12/2019 delivered on 20 April 2021; and *S v M A* Case no 082/2017 delivered on 19 December 2018 (Gauteng Local Division).

lounge/kitchen area, had seized before the deceased was pushed into the bedroom. It was also submitted that accused 1 was vague as to the extent of the fighting in the bedroom; this supports a finding that she was not under attack.

[59] Support is further to be found, as argued, in contradictions in the version of accused 1 pertaining to: whether the fight started over the deceased's bag or a wine bottle; whether the deceased hit her head against the wall or on the floor when she fell down; her demonstration in open court as to how the bed was positioned in relation to the wall, being unconvincing. The court should therefore reject the accused's version about how the deceased fell and died as being false. The state particularly relies on *S v Shaduka*⁵ where the court endorsed the *dictum* in *S v Mlambo*⁶ where it was held that, if an accused unlawfully causes the death of somebody and only the accused is able to explain the circumstances of the fatal incident and he/she gives an explanation which the court rejects as false, then the court can infer that the accused had acted with intent to kill, rather than with any other less serious form of *mens rea*.

[60] In light of the above-stated reasons, it is submitted by state counsel that the explanation of accused 1 about how the deceased fell and died should therefore be rejected as false and the accused to be convicted of murder with direct intent. Such finding would also be consistent with accused's 1 report to accused 2 that 'she did something wrong', and inconsistent with her claimed innocence.

[61] Turning next to accused 2, the state clearly shifted the goal posts from alleging that the accused person acted with common purpose when unlawfully killing the deceased. It submitted that by involving himself in conduct that was calculated to enable accused 1 to escape criminal liability, his actions rendered him sufficiently liable as an accessory after the fact to murder.⁷ The contention is primarily based on accused 1 having told the accused that she has done something wrong, without providing details on how

⁵ *S v Shaduka* Case no SA 71/2011 (unreported) delivered on 13 December 2012 (SC).

⁶ *S v Mlambo* 1957 (4) SA 727 (A) at 738B-D.

⁷ *C R Snyman* Criminal Law 6th edition at p 271 – 272.

the physical altercation occurred. Accused 2 could therefore not have believed that it was a mere accident. It is common cause that they joined forces to dispose of the body.

[62] As regards the charge of robbery (count 2), the state diverted from proving that the accused persons acted with common purpose when robbing the deceased of her properties, to relying on the competent verdict of theft.⁸ Support for the state's contention that both the accused were involved in the disposal of the deceased's properties and therefore guilty of theft, is found in this court's judgment in *S v Hoebe*⁹ to which I will return shortly. Suffice it to say that the question of the accused persons' intent to steal has not been addressed in state counsel's argument.

[63] On the charge of defeating or obstructing the course of justice or attempting to defeat or obstruct the course of justice (count 3), it is submitted that, based on the guilty pleas tendered by the accused persons, the court may reach a verdict for attempting to defeat or obstruct the course of justice.

[64] As for the charges of fraud (counts 4 and 5) against accused 1 only, it is submitted that the admissions contained in the pleas of guilty tendered on both counts, are sufficient to convict the accused of fraud, based on the potential prejudice the insurer stood to lose as a result thereof.

Argument on behalf of accused 1

[65] The mainstay of submissions by counsel for accused 1 is that the state did not lead evidence independent from the evidence adduced by accused 1 on the surrounding circumstances which resulted in the deceased's death, or as to the cause of death. Whereas it was impossible for the medical examiner to determine the cause of death from the skeletal remains subjected for examination, the actual cause of death is thus unknown. It is submitted that the entire case of the state relies on only two factors: (a) contradicting statements made by accused 1 at different stages of the investigation and her testimony; and (b) the disposal of the deceased's body and properties being indicative of a guilty mind and consistent with the intent to kill.

⁸ Section 260 of the Criminal Procedure Act 51 of 1977.

⁹ *The State v Hoebe* (CC 13/2016) [2017] NAHCMD 218 (10 August 2017).

[66] With regards to the drawing of inferences relied upon by the state, it is submitted that the established principles set out in the leading case of *R v Blom*¹⁰ and what was said in *S v HN*¹¹ apply. It is further submitted that no onus rests on the accused to convince the court of the truth of any of the explanations she had given, even where the explanations are found to be improbable. What is required is that, in light of all the evidence presented, the court must be satisfied that the accused's evidence is false beyond reasonable doubt.¹²

[67] Though conceding that there are contradictions between the various statements accused 1 made relating to the charge of murder and for that reason is open to criticism, it is submitted that, despite these contradictions, it remains to be decided whether it renders the accused's version, as testified to, false beyond reasonable doubt. To this end reliance is placed on the remarks made in *Shaduka* (supra) where the court said that 'it is possible that an innocent person may give a false explanation because he or she may think that the truth is unlikely to be sufficiently plausible'.

[68] Counsel submitted that it could be accepted that the deceased indeed died as a result of a physical altercation with accused 1 in the bedroom and that her version on this score should be accepted as the truth. Moreover, where corroborated by accused 2 regarding the circumstances the body was found in shortly after the incident. In addition, the medical evidence of the doctor who performed the post-mortem examination on the deceased's remains testified that the circumstances which led to the deceased's death, as narrated by accused 1, would be consistent with the suffering of brain injury and subsequent death, even in the absence of a skull fracture. Also absent from the medical evidence is that a sharp object was used to inflict injury which, in turn, explains the absence of blood traces found on the deceased's clothing when her remains were discovered.

¹⁰ *R v Blom* 1939 AD 188.

¹¹ *S v HN* 2010 (2) NR 429 (HC).

¹² *S v Jaffer* 1988 (2) SA 84 (C).

[69] As for the authoritative case law relied on by the state, this is countered by showing how each of the cases are distinguishable. The assertion will be discussed in more detail later.

[70] Counsel submitted that, although accused 1 accepts the wrongfulness of her actions when disposing of the deceased's body and her personal belongings, this does not translate into her having the intent to kill the deceased. Sight should equally not be lost of the accused's state of mind at the time as she was shocked and panicked and not in the frame of mind to make a rational decision. This was exacerbated by her subjective belief that her version of the incident would not be believed and would result in her arrest. It was further submitted that the state thus failed to prove beyond reasonable doubt that accused 1 intentionally and unlawfully caused the deceased's death; it was neither caused through any negligence on her part as she had not foreseen the ensuing death when pushing the deceased away from her.

[71] Regarding the charge of robbery, it was argued that, although the accused did have the intention to permanently deprive the deceased's relatives of her property, the intention was never to steal the properties, but rather to dispose of it in order not to be linked with the deceased. What she did thus ties in with the charge of obstructing the course of justice and not theft. It was said that a conviction of the competent verdict of theft, in these circumstances, would constitute a duplication of convictions.

[72] As for the remaining counts, accused 1 abides by her plea explanations and admits guilt to the charges preferred against her.

Argument on behalf of accused 2

[73] Counsel for accused 2 echoed the submissions made on behalf of accused 1 that the state failed to adduce evidence which proved the guilt of accused 2 beyond reasonable doubt, and that the only evidence before court are the testimonies of the accused persons. It was submitted that accused 2 during his testimony told a consistent story that was in all material respects in line with his warning statement and plea explanation. Furthermore, that his

version was materially corroborated by accused 1. Consequently, the state failed to prove the involvement of accused 2 in the commission of the alleged murder and robbery, or that he acted with common purpose with accused 1. It is further submitted that in the absence of objective medical evidence relating to the cause of death of the deceased, there is no act that can be imputed on accused 2. The versions presented by both accused should therefore be accepted as reasonably possibly true.

[74] Regarding the state's contention that accused 2 was guilty of murder as an accessory after the fact, based on an admission by accused 1 that she did something wrong, counsel contends that the contention is not supported by the facts. Not only did accused 1 say she did something wrong, but also gave a detailed account of what had happened and, based on her physical appearance at the time, accused 2 believed that the deceased's death came about accidentally and that her actions were not criminal; that's why he was willing to assist her. Consequently, it was argued, absence of knowledge of the main crime negates intent and, in such instance, the accused may escape liability as an accessory after the fact.¹³ Only when found that accused 1 did commit murder and accused 2, seized with that information continued providing assistance, would the doctrine find application. It is submitted that these requirements have not been met as far as it concerns accused 2; equally, regarding the charge of robbery.

[75] On the charge of obstructing the course of justice, the accused stands by his plea of guilty as set out in the s 112 (2) statement filed with the court.

Evaluation of evidence

[76] In the court's assessment of the evidence given by state witnesses and the accused persons, there appears to be no material differences on the facts. The only discrepancies in the respective versions turn on the irreconcilable statements made by both accused at different stages of the murder investigation. These were subsequently admitted and in some respects explained during their testimonies. What needs to be decided is not which of these versions are to be believed or not, but rather whether the

¹³ *Nakandjembo v The State* SA 12/2007 [2016] NASC 25 (29 November 2016).

accused persons' evidence, considered against the totality of the evidence presented, is credible.

[77] It is not in dispute that accused 1 gave several false statements pertaining to the disappearance of the deceased and even after she decided to give her warning statement. These discrepancies formed the platform from which she was cross-examined and required to give answers, particularly on events leading up to where the deceased died. On this aspect of her testimony she clearly contradicted herself and was unable to satisfactorily give a clear account of what actually happened. There was simply no reason for her to initially lie about where the incident took place – in the garage or the bedroom – particularly after she was willing to give a statement in the presence of her lawyer. Her demonstration in court in addition to her testimony as to how the deceased tumbled over the bed and how she knocked her head, raised more questions than providing answers. Her description of what transpired was vague and unconvincing, moreover when she was unable to satisfactorily explain contradictions in her version on how the deceased ended up on the floor. The accused's explanation as to how her injured finger got in contact with the wall leaving a blood smear, is equally unconvincing in light of her own explanation on how the fight ended. I am accordingly not convinced that her testimony of events preceding the deceased's falling onto the floor in all its detail is credible and reliable.

[78] The same applies to her explanation of researches she conducted at a time she was unable to recall. There could be little doubt that in view of the dates on which these searches were made, that they relate to the deceased's death and skeletal remains and the accused's concern whether text messages she had sent from her phone, could be traced back to her. Her belated admission in this regard ultimately adversely impacts on her credibility.

[79] With regards to the false statements made by accused 1 about the deceased's disappearance, the reason for making these should be seen in context. At that stage she had to come up with some explanation which could possibly explain the disappearance of the deceased who had been with her

before her disappearance. This continued for the next six months and even after the text messages were traced to her phone and until her arrest. Throughout this period she had no intention of coming clean and own up; despite wishing for the body to be discovered to sooth her own feelings of guilt.

[80] As for accused 2, his initial statement to the police concerning him being with accused 1 at the scene where the deceased's skeletal remains were found was, admittedly, false. He further partly challenged his warning statement, taken by Inspector Geiseb following his arrest, which partly contradicts accused 1's version. Although accused 2 disputes the accuracy of the statement and blames it on him not having had the opportunity to familiarise himself with what was recorded before signing the statement, it is evident that the nature of the information is such that it could only have come from the accused himself and not the person who recorded the statement. Accused 2's belated challenge to parts of the statement adverse to accused 1, has the making of an afterthought in an attempt to protect his sister. It has neither been shown that Geiseb was not a credible witness.

[81] Against the background where the accused persons admittedly lied and wittingly misled the police in their investigation, the question arises as to what weight should be accorded to the fabricated exculpatory explanations of the accused persons? The answer to this vexed question is that their evidence must be considered with full regard to the prevailing circumstances when made and in light of their testimonies.¹⁴

[82] Where the accused persons later during the trial distanced themselves from their earlier lies and admitted having told untruths to protect themselves against arrest, the trier of fact is bound to accept it to have been lies and therefore unreliable, except where evidence to the contrary is adduced which would then impact on the veracity of the corrected version. The fact that the accused made false statements to cover-up their involvement is, however, a factor to be taken into consideration when assessing their credibility in light of the evidence as a whole. In the present

¹⁴ *S v Mtsweni* 1985 (1) SA 590 (A).

circumstances it seems apposite to repeat what the court in *S v Mtsweni*, approved in *S v HN*,¹⁵ said. The headnote reads:

'Although the untruthful evidence or denial of an accused is of importance when it comes to the drawing of conclusions and the determination of guilt, caution must be exercised against attaching too much weight thereto. The conclusion that, because an accused is untruthful, he therefore is probably guilty must especially be guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case. In considering false testimony by an accused, the following matters should, inter alia, be taken into account: (a) the nature, extent and materiality of the lies and whether they necessarily point to a realisation of guilt; (b) the accused's age, level of development and cultural and social background and standing insofar as they might provide an explanation for his lies; (c) possible reasons why people might turn to lying, eg, because, in a given case, a lie might sound more acceptable than the truth; (d) the tendency which might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an admission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth.' (Emphasis provided)

[83] Besides the mentioned shortcomings in the evidence of both accused, their respective versions, where overlapping, corroborate one another on mutual facts and stand uncontroverted when considered against the state's case.

[84] I am alive to the fact that no onus rests on the accused persons to convince the court of the truth of any of the explanations they had given, even if that explanation is improbable. What is required is for the court to be convinced that it is not only improbable, but false beyond reasonable doubt (*R v Difford*).¹⁶ It was also said that the test remains whether there is a reasonable possibility that the accused persons' evidence may be true and, in applying that test, the court need not even believe them. It is sufficient if the

¹⁵ *S v HN* 2010 (2) NR 429 (HC).

¹⁶ *R v Difford* 1937 AD 370 at 373.

court is satisfied that there is a reasonable possibility that it may be substantially true (*S v Jaffer*).¹⁷

[85] In turn, the approach the court must follow is to decide whether the defence case, considered with the entire body of evidence, is reasonably possibly true. In *S v Radebe*¹⁸ 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.'

Discussion

Count 1 - Murder

[86] It seems to me apposite to stress that the state's case on the murder charge primarily rests entirely on the testimony of accused 1. As admitted by the accused, she made false statements in an attempt to explain the deceased's disappearance and to divert attention away from her. In the state's view, this makes her the proverbial 'self-confessed liar'.

[87] The problem for the state with its reasoning is that, if the evidence of accused 1 on this score is rejected as false, then the entire state's case on the murder charge equally plunges into falsehood as no other evidence was presented from which the alleged criminality of accused 1's actions could remotely be inferred.¹⁹ In the absence of evidence other than that of accused 1 which, as argued by the state, must be rejected, the court would be required to speculate *in vacua* on possible circumstances which could or might have caused the deceased's death. To do so is obviously impermissible. Contrary to the *Khoza* case (*infra*) where the appellant did not give evidence, both accused in the present matter testified in their defence. The approach proposed by the state is to selectively accept as truthful some parts of the

¹⁷ *S v Jaffer* 1988 (2) SA 84 at 89D.

¹⁸ *S v Radebe* 1991 (2) SACR 166 (T).

¹⁹ *S v Khoza*, 1982 (3) SA 1019 (AD).

defence's evidence favorable to the state's case – including their confessed false extra-curial statements and contradictions – from which the court is then required to draw inferences to prove the accused's criminal responsibility. But, at the same time, to disregard their evidence as false and reject it.

[88] There is no basis in law that would justify a selective acceptance or rejection of the same witness's evidence in the absence of other compelling evidence justifying such course. This might come in the form of corroboration or contradicting evidence from an independent source. However, in this instance there is no *aliunde* evidence that either corroborates or refutes the evidence of accused 1 on the interaction between her and the deceased. To this end, the testimony of accused 1 stands unchallenged.

[89] Although the accused persons' offering of false information in their extra-curial statements pertaining to crimes they stand charged with would, in itself, be sufficient reason to approach their evidence with a measure of caution, there would be no legal basis for rejecting it entirely. The Latin maxim of *falsus in uno falsus in omnibus* finds no application in our law. This means that the testimonies of the accused persons cannot be made out as being untruthful merely because of false statements made by each in the past. Where no evidence was presented by the state that refutes the evidence of accused 1, then her testimony, despite its shortcomings and contradictions, cannot be rejected as false. The court at the same time must equally consider the corroborative evidence of accused 2 as regards certain aspects of accused 1's evidence, albeit to show some form of consistency in her narrative shortly after the incident of what happened. It then seems settled that the criminal responsibility of the accused persons will primarily turn on their own evidence.

[90] The undisputed evidence is that the deceased's death was consequential to a physical altercation between her and accused 1. Accused 1 maintained her position that she did not assault the deceased in any manner other than pushing her away from her during the ongoing struggle. In doing so, she had no intent to kill or did she foresee that pushing the deceased under these circumstances could likely result in death. It is however

not in dispute that there is a causal link between the final push causing the deceased to fall over and her ensuing death. The cause of her death however, to this day, remains unknown.

[91] In deciding whether the final push is culpable, the following surrounding circumstances are taken into account: The physical altercation was started by the deceased who first started pushing the accused and she then reacted by pushing her back. This was followed by further pushing between the two which does not appear to have been serious or violent. The situation was one of two friends disagreeing and neither wanting to budge; even when it became physical. It would thus appear that this was not an instance where accused 1 came under attack and acted in self-defence; neither was it raised in her defence. The state's argument that the complainant during the altercation – when moving from the lounge/kitchen area into the bedroom – should have 'fled' the scene to find help, in my view, ignores the existence of a friendly relationship between them and exaggerates the nature of the altercation. Another fact is that both girls consumed liquor during the day, prompting accused 1 to realise that both of them actually had too much to drink, a factor which probably impacted on the mindset and actions of both.

[92] In light of the cause of death not having been determined, it cannot be said that the act of pushing, *per se*, was of such serious nature that it caused the deceased's death. There is simply no evidence proving that the force used to push the deceased away and her falling onto the bed was such that the accused must have foreseen her ensuing death.

[93] The state's contention that a conviction for murder may still follow where the cause of death was undetermined, is based on the fact that the deceased was buried (and therefore must have been dead). It was not submitted that the deceased was still alive when buried; neither is there evidence to that effect. Counsel cited the cases listed in footnote 4 (*supra*) as authority where the accused was convicted, despite the cause of death of the victim remaining undetermined. Counsel for the defence countered by pointing out that the authorities referenced by the state are materially different

from the present circumstances as in each of those cases the court was able to deduce from the proved facts that death of the victim was consequential to an unlawful act by the accused.

[94] Although a court in principle may convict an accused for murder in circumstances where the cause of death is undetermined, the elements of the offence must still be proved to wit: (a) causing the death (b) of another person (c) unlawfully and (d) intentionally.²⁰

[95] In *Orina (supra)* the accused's defence was a bare denial of any involvement in the killing of his wife, despite conclusive evidence of his fingerprint found on a bag containing the dismembered head of the deceased. In this instance a post-mortem examination report was before court from which inferences could be drawn. In the end, the circumstantial evidence was so overwhelming that it led the court to the drawing of only one reasonable inference, namely, that the accused killed the deceased.

[96] In *Pieteren (supra)* there was evidence of an assault with a dangerous weapon and the post-mortem revealing a fractured skull and brain haemorrhage from which the court deduced that the deceased, when hit in the head being a vital part of the body, was still alive and that the blow caused the victim's death.

[97] In the South African case of *S v M A (supra)* the court, when convicting the accused, drew inferences from a multitude of circumstantial evidence ie the deceased's blood in his house and on his clothing at the time of the victim's disappearance and scratch marks on the accused which he was unable to satisfactorily explain. The court was satisfied that the circumstantial evidence evinced an assault on the victim which could only have been perpetrated by the accused.

[98] Based on the facts of each, the above stated cases are clearly distinguishable from the present matter in that in each of these cases the circumstantial evidence was such that the court could infer from the

²⁰ *CR Snyman Criminal Law Sixth edition at 437.*

established facts that the victim died as a result of an intentional unlawful act on the part of the accused.

[99] In the present instance there is no clear evidence from which the court could justifiably infer that the killing of the deceased was intentional. The state submits that the intention of accused 1 could be inferred from her feeling of guilt and the accused persons' actions subsequent to the passing of the deceased by keeping it a secret, and by getting rid of the body. For the court to draw this inference, it must be satisfied that the cardinal principles as set out in *R v Blom* (supra) have been met ie firstly, that the inference sought to be drawn is consistent with all the proved facts. Secondly, that the inference drawn must be the only inference to be drawn and excludes every other reasonable inference from the one sought to be drawn.

[100] Accused 1 testified that she was shocked when she realised that the deceased was dead after falling onto the floor and went into a panic, calling on the assistance of her brother. The evidence is that she was not in a clear state of mind and simply accepted culpability. Also that she acted irrational by fearing that she would not be believed when saying that it was an accident and would be arrested if the body were to be discovered in her flat.

[101] It appears to me that the circumstances that led to the death of the deceased could be described as a freak accident and not something accused 1 could likely have foreseen. Her reaction thereto appears to be reasonable in the circumstances and, as admitted, prompted the making of wrong decisions to keep it a secret and to rather dispose of the body. When applying the principles set out in *Blom* to these facts, I am not convinced that the only inference reasonably to be drawn is that accused 1 unlawfully and intentionally killed the deceased. Thus, I am not persuaded that the accused persons' actions and intent after the passing of the deceased translates into proof that accused 1 acted with intent to kill.

[102] On the same basis, neither does the evidence support a finding that accused 1 should reasonably have foreseen the possibility of the deceased's ensuing death when pushing her away when bitten on her finger. Her actions could therefore neither be found to have been negligent. As regards the

competent verdicts to murder, there is no evidence from which it may be inferred that the accused either acted with the intent to cause grievous bodily harm, or common assault.

[103] In the absence of evidence to the contrary, it seems to me that this is an instance where there is a reasonable possibility that the version of accused 1 may be substantially true and that the state failed to prove beyond reasonable doubt the charge of murder against accused 1, or any of the competent verdicts as provided for in s 258 of the CPA.

[104] With regards to accused 2 being charged with the same offence of murder, having acted with common purpose with accused 1, there is no evidence that either proves his presence or involvement in the incident that led to the death of the deceased. Divergent arguments were advanced in this regard by both sides. When deciding whether accused 2 was an accessory after the fact to murder, based on his assistance to accused 1 to dispose of the body, his culpability depends on (a) whether a crime was committed by accused 1; (b) his knowledge about it at the time; and (c) notwithstanding, assisting her to escape justice.

[105] The learned author *Snyman* (supra) at 272 on the liability of an accessory after the fact states that 'There can only be an accessory after the fact if somebody else has committed the crime as perpetrator' (Emphasis provided). The court having found that accused 1 was not liable for the death of the deceased, it then follows that the principle of an accessory after the facts finds no application as regards accused 2.

[106] Consequently, the guilt of both accused on the charge of murder has not been proved beyond reasonable doubt and they stand to be acquitted.

Count 2 - Robbery

[107] As mentioned, the state changed course and prayed for a conviction on the competent verdict of theft for both accused and relies on the *Hoebel* matter (supra) as authority. The facts in that case are, however, clearly distinguishable from the present in that the court was able to deduce that the accused unlawfully appropriated the victim's cell phone after she was

murdered. In the present instance the unrefuted evidence of accused 1 is that she discarded the deceased's belongings and had no intention of keeping any of it to herself. With regards to the requirement of intention in respect of the act of appropriation, *Snyman* (supra) at 485 reads:

'To qualify as theft, X's state of mind must encompass something more than mere knowledge, ... relating to the property and the unlawfulness, and something more than knowledge relating to the act in the sense "that X knows that he is handling an article or is in the process of gaining control of it" or something similar. This additional intention refers to the objective which X aims to achieve by means of his act; ...' (Emphasis provided)

[108] From the evidence of accused 1 it is evident that her intention was to get rid of any evidence that could possibly link her with the disappearance of the deceased and not to steal the property. The accused's intention as regards the deceased's personal belongings is thus no different from her intention to defeat or obstruct the course of justice, similar to the charge set out in count 3. In fact, the same properties relied on in count 2 to have been robbed or stolen, form the subject matter of the charge of defeating or obstructing the course of justice (count 3). It must then be concluded that the competent verdict of theft to the charge of robbery, was not proved. This would equally apply to accused 2.

Count 3 – Defeating or obstructing the course of justice

[109] Despite both the accused having tendered pleas of guilty on this count, this was declined by the state. It would appear that the sole reason for this decision was because the accused did not admit to one of the allegations in the charge ie that the blood of the deceased was 'cleaned or removed' from inside the flat. The alleged presence of blood of the deceased in the bedroom of accused 1's flat emanates from an earlier statement by accused 2 who claimed to have seen blood on the bed sheets and head of the deceased. During his testimony he however denied his earlier statement. Similarly, accused 1 also made reference about blood spatter on the wall which later changed to a blood smear of her own blood.

[110] Though the evidence of the accused persons on the issue of blood is unsatisfactory and doubtful, the presence or not of blood in the flat does not mar the basis of the guilty pleas tendered by both the accused. The inclusion of this allegation in count 3 appears to have been done to strengthen the state's assertion that the assault on the deceased was of a violent nature. In the end, there is no evidence proving that the flat was cleaned of the deceased's blood. Neither, that any damage was done to the floor as a result thereof, or that vinyl flooring was laid as a cover up for the alleged damage.

[111] The admissions made by each accused as set out in their respective s 112(2) statements satisfactorily explain their intention to defeat or obstruct the course of justice, well knowing that their actions were unlawful. Although the state on this count submitted that the accused persons should be convicted of attempting to defeat or obstruct the course of justice, the evidence established that the act was completed in that the cause of death could not be determined. Consequently, both stand to be convicted of defeating or obstructing the course of justice and not for merely attempting to do so.

Counts 4 and 5 - Fraud

[112] As mentioned, accused 1 pleaded guilty to both counts and, the state having accepted the pleas as set out in the s 112(2) statement, I am satisfied that accused 1 admitted to both offences when pleading guilty. On these charges she stands to be convicted.

Conclusion

[113] In the result, it is ordered:

Count 1 – Murder:

Accused 1 – Not guilty and discharged.

Accused 2 – Not guilty and discharged.

Count 2 – Robbery with aggravating circumstances:

Accused 1 – Not guilty and discharged.

Accused 2 – Not guilty and discharged.

Count 3 – Defeating or obstructing the course of justice:

Accused 1 – Guilty.

Accused 2 – Guilty.

Count 4 – Fraud:

Accused 1 – Guilty.

Alternatively – Theft:

Accused 1 – Not guilty and discharged.

Count 5 – Fraud:

Accused 1 – Guilty.

Alternatively – Theft:

Accused 1 – Not guilty and discharged.

JC LIEBENBERG
JUDGE

APPEARANCES

STATE: M H Muhongo
Of the Office of the Prosecutor-General,
Windhoek.

ACCUSED 1: A Titus
Of the Directorate Legal Aid,
Windhoek.

ACCUSED 2: T Klazen
Of the Directorate Legal Aid,
Windhoek.