



CASE NO.: CC 18/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

AND

MUUAMUHONA KARIRAO

CORAM: SHIVUTE, J

Heard on: 05 – 13 July 2010

28 July 2010

27 October 2010

Delivered on: 18 November 2010

JUDGMENT

SHIVUTE, J: [1] The accused was jointly charged with one Steve Kasaraera who pleaded guilty and following the conviction of the latter, the Court ordered a separation of trials. The accused pleaded not guilty to an indictment containing 6 counts, namely murder; robbery with aggravating circumstances; defeating or obstructing or attempting to defeat or obstruct the course of justice; theft; contravening section 2 read with sections 1, 8, 10, 38 and 39 of Act 7 of 1996 (possession of a firearm without a licence), and contravening section 33 read with sections 1, 8, 10, 38 and 39 of Act 7 of 1996 (unlawful possession of ammunition).

The particulars of the charges read as follows:

Count 1: Murder

It is alleged that the accused on or about 21 June 2006 at Gobabis district together with one Steve Kaseraera did unlawfully and intentionally kill Jan Hendrik Joubert, an adult male.

Count 2: Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977.

It is alleged that on 21 June 2006 at or near Gobabis in the district of Gobabis the accused together with one Steve Kaseraera did unlawfully and with intent to force into submission assault Jan Joubert by shooting him in the chest with a firearm and with intent to steal and take from him the goods listed in Annexure "A" to the indictment, the property of or in the lawful possession of the said Jan Hendrik Joubert and that aggravating circumstances as defined in

section 1 of Act 51 of 1977 are present in that the accused together with one Steve Kaseraera were before or during or after the commission of the crime wielding a firearm or a dangerous weapon, namely an assegai/spear and inflicting grievous bodily harm to the said Jan Hendrik Joubert by shooting him in the chest.

Count 3: Defeating or obstructing or attempting to defeat or to obstruct the course of justice.

It was alleged that on 21 June 2006 in the district of Gobabis the accused together with Steve Kaseraera did unlawfully and with intent to defeat or obstruct the course of justice removed the deceased's body of Jan Hendrik Joubert and his motor vehicle from the scene where he died and dumped it some distances away. Whereas these acts were perpetrated whilst the accused knew or foresaw the possibility that their conduct may:

- i. Frustrate or interfere with police investigations into the disappearance and death of the deceased; and /or
- ii. Protect one or both of them from being prosecuted for a crime in connection with the disappearance or death of the deceased; and /or
- iii. Conceal or destroy or hide the physical evidence of an assault on the deceased.

Wherefore the accused is guilty of the crime of defeating or obstructing or attempting to defeat or obstruct the course of justice.

Count 4: Theft

On 4 June 2006 in the district of Gobabis the accused did unlawfully and intentionally steal a firearm, namely a .308 Parker Hale rifle with serial number 1050 and unknown amount of .308 bullets the property of or in the lawful possession of Edward Kaseraera.

Count 5: Contravening section 2 read with sections 1, 8, 10, 38 and 39 of Act 7 of 1996.

It is alleged that during the period 04 – 23 June 2006 and at or near Gobabis in the district of Gobabis the accused did unlawfully and intentionally have in his possession an arm namely a .308 Parker Hale rifle with serial number 1050 without having a licence to possess such an arm.

Count 6: Contravening section 33 read with sections 1, 8, 10, 38 and 39 of Act 7 of 1996.

It is alleged that during the period 04-23 June 2006 in the district of Gobabis the accused did unlawfully and intentionally had in his possession ammunition namely one live bullet of .308 calibre without his being in the lawful possession of an arm capable of firing such ammunition.

[2] Mr Eixab appears on behalf of the State while Mr Muluti represents the accused on the instructions of the Directorate of Legal Aid.

[3] After the accused pleaded not guilty to all the counts contained in the indictment the following documents were handed in by consent namely:

Plea trial memorandum which was marked as exhibit "B"; Accused's reply to the State's plea trial memorandum marked exhibit "C"; record of proceedings in terms of section 119 of Act 1977 (Act 51 of 1977) marked as exhibit "D"; affidavit in terms of section 212 (4) of Act 51 of 1977 together with the post mortem report marked as exhibit "E"; Affidavit in terms of section 212 (7) of Act 51 of 1977 marked as exhibit "F"; application for scientific examination marked as exhibit "G"; affidavit in terms of section 212 (4) (a) and 8 of Act 51 of 1977 marked as exhibit "H"; Scene of Crime photo plan marked as exhibit "J"; statement by the accused titled "confession" in terms of section 217 of Act 51 of 1977 dated 26 June 2006 marked as exhibit "O"; "confession" in terms of section 217 of Act 51 of 1977 by the accused dated 27 June 2006 at 09:58 marked as exhibit "P"; warning statement marked as exhibit "L", and photo plan no 1 marked as exhibit "M". I will refer to some of these documents at a later stage.

[4] The State called several witnesses and I now wish to proceed with the summary of their testimony.

[5] Melba Tjozongoro testified that on 21 June 2006 she was on duty with her colleagues at Tallismanus area in Omaheke Region. They observed a white Raider double cab vehicle parked in the riverbed near the farm where accused person was staying. The witness and the nurses she was transporting proceeded to the accused person's farm. They had to go through certain gates to go to the posts. On their way back their

vehicle was stopped by the accused person and one Steve Kaseraera. The witness informed Steve Kaseraera and the accused that he was looking for them to give them polio drops. Steve Kaseraera (whom I shall henceforth refer to as "Steve" to distinguish him from other persons with a similar surname who featured in the trial) went on the other side of the vehicle to receive his drops. The accused remained at the driver's side of the vehicle the witness was driving and requested the witness to give him cigarettes. The witness knew the accused person and Steve before. According to Ms Tjonzongoro the accused did not appear to be "normal"; he seemed to be scared or nervous as he was looking around. The accused and Steve had nothing in their possession. After the accused had a conversation with the witness, he went to receive his polio drops. After the accused and Steve were given polio drops the witness drove away. Whilst they were driving she met the vehicle that was parked in the riverbed. She stopped the vehicle and told the driver that they wanted to give him polio drops. Whilst she was speaking to the driver of the double cab vehicle she realised that she met him the previous day whilst he was asking for the direction to Dorsland route. Ms Tjonzongoro and the driver of the double cab vehicle drove in opposite directions. The place where the witness met the driver of the white double cab was about 2 kilometers from the place where they were stopped by the accused and Steve. The driver of the white double cab drove to the direction where Steve and the accused were. Ms Tjonzongoro described the double cab

vehicle which they met as a white Toyota with bluish and greyish colours. The following day she learned that the driver of the double cab was killed.

- [8] It was put to Ms Tjozongoro by Counsel for the accused that the reason why the accused appeared to be nervous and scared was because he was forced by Steve to go to a certain place where Steve saw a motor vehicle; that the accused refused to go there because he did not know the reason why they should go there and that Steve had threatened to kill or assault the accused if he did not go with him.

The witness responded that she had no knowledge of the alleged threats. It was further put to the witness that the accused wanted to tell the witness about Steve's threats but he was afraid for his life, because if he had told the witness concerning Steve's threats the witness might enquire and when the accused is left alone with Steve he might carry out his threats since Steve was allegedly in possession of a firearm. The witness responded that she did not see Steve with a firearm.

- [9] Blondie Kaseraera testified that the accused's mother was married to her uncle Edward Kaseraera. There was a time they were both staying at Edward Kaseraera's house. On 21 June 2006 the accused came to Edward Kaseraera's house in the company of Steve who is the cousin to Blondie Kaseraera. When they came they were travelling by a "bakkie" pick up motor vehicle. The vehicle which came with the accused and

Steve was loaded with goods namely; luggage, bags, chairs and mattresses. The witness, Maria Nduvatie, Blondie Kaseraera, the accused and Steve took the goods to a certain room after they were off loaded. After they put the goods in the room the accused drove away with the motor vehicle.

[10] Before the accused drove the vehicle away Ms Kaseraera had the opportunity to see the accused. According to her observations, he appeared to be normal and did not complain of anything. After the accused drove away he did not come back that day. The next morning Steve asked Ms Kaseraera and Maria to hide some of the goods in the bush, which they did. After Steve gave instructions he left the house and he later came back in the company of the accused and the police. They collected all the goods including the one which the witness hid in the bush.

[11] In cross-examination the witness was asked whether she was able to look and see clearly the condition in which the accused and Steve were since there was no electricity or any light. The witness responded that it was not possible. It was further put to the witness that the goods which were offloaded from the motor vehicle and the vehicle itself were robbed from a white man by Steve after he had killed him, and that Steve threatened to assault or kill the accused if the accused did not go with Steve to Mr Kaseraera's house to offload the goods. The witness responded that she did not know what happened.

- [12] Again it was put to the witness that the accused was threatened by Steve not to tell anyone of what happened and that was the reason why the accused did not say anything to the witness because he was afraid of Steve. The witness was not able to comment as she was not aware of the alleged threats. Furthermore, it was put to the witness that the accused was already instructed by Steve that after dropping the goods he must go and drop the motor vehicle in Gobabis. The witness could not comment.
- [13] Maria Nduvatie in her testimony essentially confirmed what Ms Kaseraera testified about and stated that during June 2006 she was staying at Mr Edward Kaseraera's house with Blondie Kaseraera. On 21 June 2006 she found the accused and Steve at home. They had a motor vehicle loaded with goods. She inquired as to whose motor vehicle was. Steve and the accused told her not to ask. The witness testified that at the time she did not see Steve armed with a firearm or threatening the accused. She further corroborated the evidence of Ms Kaseraera that herself, the accused, Steve and Blondie Kaseraera put the goods that were offloaded from the motor vehicle into the house. She furthermore confirmed that after the goods were put in the house the accused left with the motor vehicle and that the following day Steve told her and Blondie to hide some of the goods in the bush. In cross-examination similar questions to the ones put to Ms Kaseraera concerning the alleged threats against the accused by Steve were put to the witness and the witness did not comment on what was put to her in this regard.

- [14] Edward Kaseraera testified about the theft of his firearm. His testimony is that on 4 June 2006 he went to his cattle post at Steenboklaagte where the accused and Steve were staying. When he went to the cattle post he was in possession of a firearm namely .308 Parker Hale rifle with serial no 1050 which was put behind the driver's seat of the vehicle he was driving. When he went back to Gobabis he realized that the firearm was missing. According to him the firearm had no ammunition at the time it was stolen because all the ammunition were with him in the pocket.
- [15] Janie Daniel Verster gave evidence to the effect that on 22 June 2006 at around 06h30 in the morning he was on duty at Karoo in the district of Gobabis. Whilst on duty he came across a motor vehicle parked in the bush. It was a Toyota Hilux double cab with registration no. CL 12006. He and his colleague went close to the motor vehicle. The key to the motor vehicle was lying in front of the vehicle under the grass. He inspected the vehicle and observed blood at the back of the car. He testified that he saw the same motor vehicle on the 21 June 2006 at the service station. The driver of the vehicle had a jacket on which was khaki brown in colour with blue jeans with stripes on the arm and he was drinking coffee at the service station. He spoke to the owner of vehicle briefly. Verster asked him where he came from and he told him that he was from South Africa and that he was busy drawing maps for tourists. The witness identified a jacket in Court similar to the one that

was worn by the driver of that motor vehicle. The witness was shown a photo plan depicting a motor vehicle and he identified it to be the motor vehicle he saw on 21 and 22 June 2006.

[16] The State wanted to call a witness to testify about the identity of the deceased as well as the goods that were indicated in the indictment that they belonged to the deceased. The defence counsel made formal admissions in terms of section 220 of Act 51 of 1977 that the defence does not dispute the identity of the deceased and that the goods that are listed in Annexure "A" of the indictment are the property of the deceased.

[17] The next witness called by the State was Petrus Swartz a Deputy Commissioner in the Namibian Police based at Omaheke Region. His evidence was to the effect that on 26 June 2006 he was an Inspector in the Namibian Police. On the same day the accused was brought to him to make a "confession" which is referred to as exhibit "O". The Inspector (as he then was) called constable Katjiue to act as an interpreter during the taking of the alleged confession. Katjiue is an Otjiherero speaking person who speaks the same language as the accused. Katjiue translated from Otjiherero to English and vice versa. Deputy Commissioner Swartz explained the accused's rights to legal representation and the right to remain silent. He used a pro forma which had questions to determine whether the accused was giving a statement freely and voluntarily. I do not wish to repeat the questions contained in the pro forma as it is not an issue that the statement was not given freely

and voluntarily. When the accused gave his statement on 26 June 2006 at 11h00, he stated that he had already given a statement on 25 June 2006 but he had omitted a lot of things concerning what exactly happened at Steenboklaagte, Rietfontein.

[18] In his statement he stated the following and I quote verbatim:

“On Monday 2006.06.19 I was at my place of residence Steenbokslaagte in the area of Rietfontein. I am living together with Steve Kaseraera and Vekohasena Kaseraera at that post. Steve was not present and returned home on 2006.06.20 late during the night with his horse from Post Vasbyt. On Wednesday 2006.06.21 I wake up early and started to make a fire whereafter I observed that one cow is missing and not at home. When Steve wake up I told him about the missing cow and we went to the field to seek for the missing cow. We went up to the gate of Eiseb and we met with the vehicle from the Ministry of Health visiting that area to distribute and give the polio drops. We received our drops close to that gate whereafter that vehicle left and drove away. Short after that we observed a bakkie of those of the tourists approached the gate which were closed. The vehicle got stucked in the sand and the driver struggle to remove it from the sand whereafter he went to open the gates. Steve then went towards the driver who did not saw us and I followed Steve slowly from behind. Steve met with the driver, who was alone close to his vehicle whereafter I saw that Steve stabbed the driver with an “assegai”, selfmade, in the chest and grabbed him from behind whereafter he called me to come and assist him. I came closer and saw that Steve was pulling the driver, who was full or blood, to the backside of the vehicle. I was so shocked and decided to ran back home and what I did. At about 30 minutes later Steve arrived at home with the bakkie of that tourist and told me to come and drive the bakkie further. I first refused but then he treat me that he will beat me up whereafter I

decided to do what he told me to do and we drove off back to the side where Steve stabbed the tourist but we never stopped there again. We continued driving to the side of the Katumba gate and took the road leading and passes the farm of Mr Jacobs up to the post Rooibult. Whilst driving Steve told me that he killed the tourist and dumped him somewhere and that I must not worry. When arriving at post Rooibult, we went to the house of Edward Kaseraera, an uncle to Steve where we offload all the luggage and belongings of the tourist. These items were expensive and includes a computer, cans of fuel, bag with clothers, radio tape of the vehicle, small freezer, other items with electronic metres not known to me, crates of food supplies, a camera and a lots of other items which I cannot remember. Steve also removed some items from behind and lossen them.

After we offload the luggage and a lots of items Steve told me to drive up to Gobabis and leave the vehicle somewhere in the bushes which I did. Also to mention is that at the house of Edward where we offload the staff, there were two ladies present Maria Kaseraera and Nanguri at the house.

I then drove off the Gobabis at about 19h00 and arrived in Gobabis at about 23h00 where I stopped and leave the vehicle behind Epako in the bushes. I overnight in Gobabis on Wednesday 2006.06.21 and on Thursday 2006.06.22 I leave back to Tallismanus with the taxi minibuses and met with Steve there. We overnight in Tallismanus and on Friday 2006.06.23 we left back to Steenbokslaagte where we live. We were there up to Saturday 2006.06.24 when we were arrested by the police. I never told anyone about the whole incident and just kept it for myself. Also to mention is that it was a white 4x4 Toyota bakkie, a Raider dubblecap with a canopy and camping equipment on the roof with spotlights and a bushbar in front”(Sic).

- [19] The statement was read back to the accused before he signed it. It was also signed by the interpreter and Deputy Commissioner Swartz.
- [20] Again on the 27 June 2006 at 11h00 the accused was brought to the then Inspector Swartz to give another confession. Before the accused gave a statement he was informed of his rights to legal representative and his rights to remain silent. He was further asked questions which were contained in a pro forma used to take a confession. These are standard questions relating to the voluntariness of the statement. I propose not to repeat the questions asked as the record speaks for itself and the voluntariness of the statement is not in issue. In this statement referred to as exhibit "P" the accused stated that he wanted to give another statement and tell the truth as he did not tell the truth on 26 June 2006 during his first visit to the Inspector. It is again necessary to quote the statement *verbatim* and it reads as follows:

"On Tuesday 2006.06.20 late that night Steve, my friend and I am staying with him, arrived at our place of residence, Steenboklaagte with his horse after he left on Monday 2006.06.19 to Post Vasbyt. After he arrived we never talked I only asked him some tobacco to smoke, which he gave to me. On Wednesday 2006.06.21 Steve woke up early and started a fire outside. He also took out the rifle of his uncle which was also with us for protection. I later woke up and joined Steve outside. Steve then told me that one cattle is missing and that we must go and look for it, after which we went. Later when we reached the Eiseb gates we saw nothing and sit under a nearby tree. At that time Steve was having the rifle and me was having a self made assegai. A certain vehicle

then approached the gates and we later saw that it is the vehicle which was busy distributing the polio drops. As we were not so close to the road nobody could have observed us, and so they passed to the side Eisebblock . This vehicle returned very shortly thereafter and we then decided to stop the vehicle and receive also our polio drops which we did. The officials then left to the side of Tallismanus. Not long after that a bakkie of the tourist also approached the gates and got stuck close to the gates. The tourist then got out and deflated the wheels and then went to open the gates. Steve then told me to take the rifle and to go and shoot the tourist after which I first refused but he threaten to kill me but then took the rifle from Steve and went towards the tourist bakkie. That time the tourist was still busy opening the gates. When the tourist turned back towards the bakkie from the gate I shot him in the chest and the tourist fell down. That time Steve was close to me.

After that Steve went towards the tourist and searched the tourist pockets for money and the keys of the bakkie which he just found a few dollars and the keys. We then assisted each other and loaded the body of the tourist into the back of the bakkie and drove off and dropped the body in a nearby camp. From there we drove back via the place where I shot the tourist and the Katumba gate up to "Bolinks post" where we stopped and bought dagga with the money of the tourist. From there we drove up to Post Rooibult and stopped at the house of the uncle to Steve where we offloaded the belongings from the bakkie. These items include a computer, machines I don't know the name of, bags of clothes, cans for water and petrol and a lot of other stuff. That time two sisters of Steve were present and they assisted us as we were in a hurry. After we offloaded the stuff me and Steve agreed that I must take and drive the bakkie up to Gobabis to drop the bakkie somewhere. I overnight that Wednesday night in Gobabis.

On Thursday 2006.06.22 I took back a taxi minibus to Tallismanus to meet with Steve as agreed. We met late on Thursday and decided to overnight in Tallismanus.

On Friday 2006.06.23 we decided to go back to our place Steenboklaagte. On our way back we observed police vehicles patrolling the area and we reached home late. On our arrival at home nobody was there and we observed that the rooms were tampered with but we were tired and just went to sleep.

On Saturday 2006.06.24 we woke up and discovered that the rifle is not there. When we came out the police were outside after which they started to question us and interrogate us. First we argued with them but later stated that we committed that murder” (Sic).

[21] The above statement was translated by Constable Katjiue who interpreted from Otjiherero to English and vice versa. After it was completed it was read back to the accused and he signed it. Constable Katjiue and Inspector Swartz also signed. There were no communication barriers during the taking of the statement.

[22] Upon cross-examination it was put to the witness that the accused does not dispute that he gave the alleged confessions but he is disputing the correctness of the information contained in the confessions because firstly he gave wrong information to the Inspector and secondly there was wrong information due to wrong translation. The witness responded that he wrote what was translated to him.

Concerning the statement that was taken on 26 June 2006 it was put to the witness that Steve threatened the accused to accompany him to the

place where he saw a motor vehicle the previous day and the accused resisted. The officer's response was that he wrote down what he was told. It was further put to the witness that Steve shot the deceased and did not stab him and the fact that he shot him was consistent with the post-mortem report. The witness confirmed that the deceased was shot and not stabbed.

[23] Concerning the statement given on 27 June 2006, it was put to the witness that the statement was wrongly translated especially where it was stated that the accused is the one who shot the deceased, it was supposed to read that Steve shot the deceased with the firearm. The witness again responded that he wrote what was translated to him. It was again put to the witness that Steve threatened the accused and instructed him to go to the place where the deceased was; at that place the accused observed Steve shooting the deceased, the accused was surprised and shocked. The witness answered that if the accused was threatened he could have reported it earlier he had the opportunity to go away from Steve. He only came to say it on 26 and 27 June 2006 despite the fact that he was arrested on 24 June 2006.

[24] Ranny Katjiue a constable in the Namibian police testified that he interpreted when the accused was giving a statement to Inspector Swartz. The witness understands Otjiherero very well and he communicated with the accused clearly. There was no

misunderstanding. He truly and correctly interpreted for the accused from Otjiherero to English and vice versa.

During cross-examination it was put to the witness that the accused gave wrong information to the witness when he told him that the deceased was stabbed by Steve with a spear and because Steve did not kill the deceased with a spear the accused decided to give another statement to correct what he said earlier. The witness did not comment about that. It was again stated to him that the accused told the investigating officer that the deceased was shot by Steve with a firearm and the accused wanted to relate the information to Inspector Swartz. The witness said he interpreted what he was told by accused that he, the accused, shot the deceased with the firearm. The witness was further confronted that in the statement it was written that "we agreed that I (the accused) should take the motor vehicle to Gobabis." Counsel put it to the witness that his instructions were that there was no such agreement as the accused was instructed by Steve to take the motor vehicle to Gobabis. The witness persisted that he translated what he was told.

[25] Rudolf Julius Isaak, a Chief Inspector in the Namibian Police, testified that on 22 June 2006 he discovered an abandoned vehicle in Gobabis. He and Detective Warrant Officer Jantjies, the investigating officer in this matter, inspected the scene around the vehicle. On 23 June 2006 they went to Eiseb, Steenboklaagte where the deceased person was shot and killed. They looked for the body of the deceased and they found it at

Marenga Post. The deceased was killed in Steenboklaagte in Tallismanus area about 2 kilometres from the place where the body was found. The information which led to the discovery of the place where the deceased was killed was given by Steve. The accused did not say more he said that when Steve killed the deceased he ran away. The distance from Edward Kaseraera's house to Gobabis is about 145 km.

In cross-examination the witness was asked what the accused told him. The witness said the accused told him that Steve killed the deceased and Steve was saying the accused killed the deceased. The accused and Steve were blaming each other. It was disputed through cross-examination that the accused never said that after Steve killed the deceased he ran away, because it was not stated in the witness's statement. The witness stated that although it was not in the statement the accused said it. Through re-examination the witness said the body was first discovered before Steve pointed out the place where the body was found.

[26] Dawie Jantjies, as previously stated a Detective Warrant Officer and the investigating officer testified that on 22 June 2006 he was summoned to a vehicle that was abandoned in the bush about 800 metres from Epako township. It was a Toyota Hilux 4x4 double cab with registration No. CL 12006. Upon examining the vehicle, he noticed the keys of the vehicle lying next to it. Around the vehicle there were shoe tracks of a person that appeared to have disembarked from the driver's side of the motor

vehicle and moved into the direction of Epako Township. He also observed bloodstains on the loading box floor. He searched the vehicle and found a passport that belonged to one Jan Hendrik Joubert, a South African. He later came to know that Mr Joubert is the deceased. According to his investigations he discovered that the deceased was equipped with GPS map data, satellite modems as well as laptops. According to the GPS data the deceased was around Tallismanus and Steenboklaagte areas. On 23 June 2006 the witness with his colleagues decided to follow the direction in which the deceased was driving. Whilst they were busy looking for the deceased they came across the accused and Steve. By then the witness was not aware that the two persons were involved in this matter. They proceeded to search until they came across some vehicle tracks. Those trucks looked similar to the vehicle that was found abandoned in Gobabis. They followed the tracks up to Marenga's Post; the tracks went into the bush. The witness followed the tracks on foot and came across the deceased's body. The body was lying on its back. It had dry bloodstains on the face and on the shirt. The body was barefoot. The deceased's body had a bullet wound. According to the witness's observations the body was off loaded from the vehicle of the tracks that they were following.

[27] The witness and his colleagues continued to follow the tracks of the motor vehicle from the deceased's body into the bush. The vehicle drove back to the gate where it came from. They followed the vehicle tracks up

to a tree where it stopped. There they observed two pairs of shoeprints. From shoeprints it appeared as if people went back into the vehicle and drove away. The witness and his colleagues went back to the place where they found the deceased's body. There the witness drew up a rough sketch plan and took some photos depicting the body of the deceased. An arrangement was made to remove the deceased's body.

[28] On 24 June 2006 the witness in the company of other police officers returned to Steenboklaagte in order to search for the culprits. They went to a cattle post where they found the accused and Steve. The accused person and Steve appeared nervous. They were interviewed in connection with the deceased and the vehicle. Both of them denied any knowledge and said they were in Tallismanus on 21 June 2006. The witness searched the house and found bloodstained trousers and two bloodstained jackets. The accused and Steve were taken to Tallismanus where they were further interrogated separately. They were both implicating each other saying the other killed the deceased.

[29] The next morning on 25 June 2006, accused person was warned and asked whether he wanted to point out anything. The accused said he could not point out anything, because he said at the time Steve killed the deceased he ran away. On 25 June 2006 the witness again drove to Steenboklaagte with Sergeant Pietersen, Sergeant Kankameni, the accused and Steve. Steve pointed out places and led the police to a place where the deceased's goods were recovered. Among the property

recovered were clothes, foodstuff, petrol jelly cans, camping equipment, 2 laptops, and a GPS. Some of these goods were found in a steel trunk belonging to the deceased. The steel trunk was hidden in the bush. The items were seized and on 27 June 2006 were identified by the brother of the deceased. He also identified the deceased's body during the postmortem examination.

After the investigation the accused indicated that he wanted to make a confession. The witness referred him to Inspector Swartz. After he gave a statement to Inspector Swartz, the accused went back to the witness. The witness took a warning statement from the accused. The accused then told the witness that there was something in the statement he made to Inspector Swartz that he wanted to rectify. He said he lied in that statement by saying that the deceased was stabbed with a spear. The truth was that the deceased was shot with a rifle. The accused allegedly stated that when he made the first statement he was scared because the firearm that was used to kill the deceased belonged to his uncle Edward Kaseraera. The accused was again sent to Inspector Swartz to make another "confession".

[30] The rifle that was used to kill the deceased was recovered from the house where the accused and Steve were staying. The rifle was produced before this court. Furthermore the witness testified that on 23 June 2006 when they were investigating, at the time they met Steve and the accused the accused was wearing one of the jackets found at the accused's place.

The jacket was similar to the deceased's jacket. It was the Warrant Officer's further testimony that at the time the accused was arrested he did not mention to him that he was forced to commit the crime. When the accused was first approached and interviewed in connection with this matter, he denied any knowledge.

[31] During cross-examination it was put to the witness that the accused was found wearing a khaki jacket which was confiscated by the police. The witness was asked whether he was able to produce the jacket before Court and he responded that he was not able to produce it. It was further put to the witness that the fact that he did not state in his police statement that the accused was wearing a jacket similar to that of the deceased was a fabrication, which assertion the witness denied. It was again put to the witness that it was Steve who fired the firearm and shot the deceased. The witness's comment was that he was not in a position to tell the Court who fired. It was further put to the witness that based on medical evidence, the deceased died from a gunshot wound. The witness agreed. A further question put to the witness was that when the accused person reached the point where the deceased was shot by Steve, it happened so quickly that the accused only saw Steve firing a shot which killed the deceased, he had no knowledge that Steve intended to kill the deceased. The witness could not comment.

[32] Another version put to the witness was that after Steve killed the deceased, he instructed the accused to help him dispose of the

deceased's body, take away his belongings and drive away the deceased's motor vehicle. The accused resisted. However, since he witnessed the deceased's killing he succumbed to the threats and carried out the instructions. The witness declined to comment since he was not there.

[33] Apart from the testimonies of witnesses certain documents were handed in by consent as I indicated earlier. Among such documents was a report on a medico-legal post-mortem examination. According to this report the chief post-mortem findings made on the deceased's body were:

A gunshot wound of the chest; a gunshot wound on the right shoulder, which shoulder was severely lacerated; severely lacerated upper and middle lobe right; multiple rib fracture; the sternum and the heart, with signs of previous open heart surgery. According to the report the cause of death was gunshot injuries of the chest.

[34] Another document handed in was an affidavit in terms of section 212 (4) (a) and (8) of the Criminal Procedure Act, No 51 of 1977 by Chief Forensic Analyst who examined one .308w rifle with serial No 1050w and one .308w spent case and concluded that the spent case was fired from rifle with serial No. 1050w.

[35] Apart from the aforementioned documents there was another affidavit in terms of section 212 (7) of Act 57 of 1977 by Constable Gotlieb Shituleni Nangolo indicating that the body was identified to him as that of Jan Hendrick Joubert by Albertus Erasmus Joubert. Constable Nangolo in

turn pointed out and identified the body to Dr E H Shangula who conducted the post-mortem examination on the deceased's body.

[36] At the end of the State case counsel for the accused applied for a discharge in terms of section 174 of the Criminal Procedure Act, 1977 (Act 51 of 1977). The application was in respect of all counts. The State opposed the application in respect of counts 1 – 3, but conceded that the application in respect of counts 4 – 6 be granted. The Court discharged the accused on counts 4 – 6. It placed the accused on his defence on counts 1 – 3. I indicated that full reasons for my ruling would be provided in the main judgment.

[37] The following are my reasons and I propose first to deal with the law regarding section 174.

Section 174 of the Act provides as follows:

“If at the close of the case for the prosecution at any trial the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or offence of which he may be convicted on the charge it may return a verdict of not guilty.”

The court has discretion to discharge the accused at the end of the State case. See *R v Kritzenger and Others* 1952 (2) SA 401 (W) at 402.

This Court pointed out in *S v Kapika and Others* (2) 1997, NR 290 G:

“The test to be applied is whether there is sufficient evidence on which a reasonable Court could convict the accused. Even if

there is insufficient evidence, the Court can still refuse to grant the application. It must be borne in mind that the Namibian Constitution provides for the protection of the fundamental rights of accused persons and that the Court must bear these provisions in mind when exercising its discretion in terms of section 174.”

[38] There cannot be a single and all inclusive formulation in respect of the discharge of an accused in terms of section 174 of the Criminal Procedure Act, but certain guidelines can be suggested *inter alia*, the Court has discretion to discharge at the end of the case. Where there are multiple charges, an accused may be discharged on one or more of the charges. The criterion at this stage is whether there is no evidence on which a reasonable Court, acting carefully, may convict. Credibility of witnesses plays only a very limited role at this stage; it is a consideration whether there is a reasonable possibility that the defence evidence may supplement the state evidence; certain factors may have an impact on a consideration whether the accused may provide evidence to substitute that of the State like the type of the offence alleged; the manner of questioning and putting statements to witnesses during cross-examination and allegations or admissions during pleadings. The rights of the accused as entrenched in the Namibian constitution should always be kept in mind and every case should be considered on its own merit and circumstances. *S v Nakale and Others* 2006 (2) NR 455 (HC).

[39] Another point of consideration is whether the Court’s discretion in terms of section 174 to discharge or not is affected by Article 12 (f) of the

Namibian Constitution which affords protection to an accused in a criminal trial not to be compelled to give evidence against himself. Fundamental rights of an accused person enshrined in the Namibian Constitution do not affect the discretion to be exercised by the Court in terms of section 174. See *S v Nakale and Others supra*.

[40] As far as credibility of State witnesses is concerned, there are conflicting views whether and to what extent consideration should be given to the credibility of a witness at the closing of the state case. Brand AJA writing on behalf of the Court in *S v Teek*, Case No SA 44/2008 (unreported) delivered on 28 April 2009 stated the following:

“Somewhat more controversial is the question whether credibility of the State witness has any role to play when a discharge is sought under this section. But the general accepted view, both in Namibia and in South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge an application for a discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (See S v Mpetha 1983 (4) SA 262 (C) at 265; S v Nakale supra at 458). Put differently the question remains; is there, having regard to the credibility of the witness, evidence upon which a reasonable court may convict?”

[41] It was argued on behalf of the accused that no witness called by the state gave direct or circumstantial evidence implicating the accused. Therefore no inference could be drawn that the accused committed the offences

charged. The only evidence that might come closer to implicating the accused is the alleged confessions or statements. It was further argued by the defence that the state failed to establish a *prima facie* case against the accused that he acted with a common purpose with Steve to commit the offences on which he is indicted. The defence argued furthermore that the State has failed to satisfy the requirements regarding common purpose as set out in the case of *S v Safatsa and Others* 1988 (1) SA 868 (A) to which I shall return at a later stage.

At this juncture I do not intend to deal with this issue of common purpose as I intend dealing with it when considering the evidence after the close of the defence case.

[42] On the other hand counsel for the State argued that if the accused was threatened to commit the offence he would have alerted Ms Tjozongoro who met the accused and Steve before the commission of these offences. The state further argued that it is of no consequence whether Steve pulled the trigger or it was the accused. They both shared the common purpose the accused was aware of the plan to kill the deceased. He helped Steve to load the body of the deceased in the vehicle as well as the goods. He is the one who abandoned the deceased's vehicle in the bush. Looking at all the circumstances of the case the court may draw an inference that the accused acted in common purpose with Steve. Therefore the defence of compulsion is not applicable to him, so it was argued.

[43] It is clear from questions put to State witnesses through cross-examination that the accused was present when the deceased was shot with a firearm. After he was shot the accused was allegedly threatened to load the body of the deceased in the vehicle as well as the goods. The accused drove the motor vehicle in the company of Steve and disposed off the deceased's body by dumping it in the bush. It is also not in dispute that from there they proceeded to Edward Kaseraera's house where they off loaded the deceased's goods. That the accused drove the deceased's vehicle alone for more than 100 km from Edward Kaseraera's house to a place where he dumped the vehicle is also not disputed. He was later arrested on 24 June 2006.

[44] The accused person gave more than one so-called confessions which are contradicting each other. I do not wish to deal with the weight to be attached to these statements at this stage. Apart from the so called confessions; proceedings in terms of section 119 Act 51/77 were produced in which the accused pleaded not guilty. His reasons for pleading not guilty were that, he was allegedly forced by Steve and that he had no intention to do what he did.

[45] The accused person stated that he allegedly acted under compulsion.

In S v Teek 2009 (1) NR 127 at 133 B – C Brand AJA stated as follows:

“I will accept without deciding, that the exculpatory parts of an accused's section 115 statement form part of the evidential material before the court at the end of the state case. See e.g. S v

Tjiho (2) 1991 NR 266 (HC) at 271 E; S v Shivute 1991 NR 123 (HC) 1991 (1) SACR 656 (NM) at 127 (C). But it must be self-evident that very little if any weight can be attached to an unsworn statement, not tested in cross-examination, which amounts to no more than the accused's self-serving ipse dixit that his intentions were honourable."

[46] For the foregoing reasons and without considering what was contained in the accused's several statements, I found that the State had established a *prima facie* case against the accused on counts 1 – 3 and I decided to place the accused on his defence. As far as counts 4 – 6 were concerned, I am satisfied that the concessions by the State were correctly made.

[47] After the court ruled that the accused will be placed on his defence the accused exercised his constitutional right, as he is entitled to do, to remain silent and called no witnesses.

[48] It was argued on behalf of the State that the Court should find the accused guilty as charged on counts 1 – 3. The State based its argument on the grounds that the accused did not act under duress or compulsion, because he could have informed Ms Tjozongoro; or disassociated himself from Steve when he arrived in Gobabis after he drove the vehicle from Mr Kaseraera's house or he could have reported the matter to the police when he drove the vehicle alone or he could have reported to the police at the time he was arrested. The State argued that the accused was a willing and active participant. The defence of compulsion was a fabrication because if he was threatened he was not going to tell the

police that he did not know anything at the time he was interrogated by the police. The State further argued that the accused acted in a common purpose with Steve, because according to section 119 of Act 51 of 1977 proceedings he stated that shortly after the deceased was killed he and Steve looked for the keys to the deceased's motor vehicle. They loaded the body of the deceased and drove with the deceased's car. Counsel for the State has also referred to the admissions made by the accused in the so-called confessions.

[49] On the other hand it was argued by counsel for the defence that the State did not prove the case against the accused beyond a reasonable doubt in respect of counts 1 – 3 because there is no direct evidence implicating the accused. It was further submitted that no circumstantial evidence has been adduced before Court upon which the Court can draw a reasonable inference about the accused's guilt. According to counsel for the defence, the only evidence that might come closer to implicating the accused was the alleged admissions. It was furthermore submitted on behalf of the defence that the accused was seen driving the deceased's vehicle but that was after the murder and robbery had already been committed. This factor, so counsel argued, could only be considered in respect of the attempting to defeat or obstruct the course of justice. It could not be considered in respect of the murder and robbery charges.

[50] The defence further argued that the State did not prove the causal connection between the accused and the death of the deceased;; that the

State had failed to prove that there was an agreement between the accused and Steve to commit the offences because no witness testified that he or she heard the accused and Steve planning to rob the deceased and shoot him in the process. The Court was again referred to the requirements concerning common purpose in *Safatsa* case supra. I do not wish to restate these requirements as I have already indicated them earlier herein but I will deal with the submissions regarding the alleged lack of agreement between Steve and the accused to commit the crimes under consideration at a later stage.

[51] Counsel for the accused continued to argue that the accused had no prior knowledge of the shooting. He was forced by Steve to go with him; he never intended to act in common purpose with Steve and that he lacked *mens rea* to commit the offences.

[52] This Court is called upon to determine whether the State had proved beyond reasonable doubt that the accused acted with a common purpose with Steve to commit counts 1 – 3. Before I attempt to answer this crucial question, I propose to state facts which are common cause. It is common cause that the accused was present when the deceased was killed. It is also common cause that after the deceased was killed the accused and Steve loaded the deceased's body in the vehicle, the vehicle was driven in the bush where the deceased's body was dumped. It is also common cause that the accused and Steve loaded the deceased's goods and took some of the goods to the house of Edward Kaseraera

where Maria and Blondie assisted the accused and Steve to put the goods in a certain room. These goods were recovered from Edward Kaseraera's house and some of them were recovered from the bush where they were hidden.

[53] It is also not in dispute that the deceased was shot with a rifle and sustained injuries described in the post-mortem report and that the cause of death was gunshot wound.

[54] Issues in dispute are whether the accused pulled the trigger to kill the deceased or whether he acted in common purpose with Steve. Whether by allegedly assisting Steve to load and offload the body and belongings of the deceased and to drive the deceased's motor vehicle he acted under threat or compulsion and whether he lacked the intention to commit the crimes he is charged with.

[55] The accused made three statements two of which are styled "confessions" whilst one of them is a warning statement produced before court and admitted as part of the evidence. It will be recalled that in his statement dated 26 June 2006 the accused *inter alia* stated that he saw Steve stabbing the driver with a self-made "assegai" or spear in the chest and grabbing him from behind whereafter Steve called the accused to come and assist him. The accused came closer and saw that Steve was pulling the driver who was full of blood. The accused was shocked and decided to run back home.

- [56] In his warning statement dated 27 June 2006 he stated that on 26 June 2006 he made a statement but some of the things he said therein were not true and that he wanted to correct that statement. He proceeded to say that what he told the Police Inspector that Steve stabbed the deceased with the spear was not true. Steve shot the deceased with a .308 rifle which was taken by the police from their house at Steenboklaagte. The reason why he said that Steve stabbed the deceased was because the accused was scared and that the rifle belongs to his stepfather who is the owner of the cattle he was taking care of.
- [57] In the statement dated 27 June 2006 also called a confession, he said *inter alia* that on 21 June 2006 when he and Steve reached the Eiseb gates, they saw nothing and sat under a tree. Steve had a rifle and he had a self-made spear or “assegai”. After they received their polio drops the officials left to the side of Tallismanus. Not long after that a vehicle for a tourist approached the gates and got stuck in the sand. The tourist got out of the car and deflated the wheels. He went to open the gates. Steve then told him to take the rifle and to go and shoot the tourist after which the accused refused but Steve threatened to kill him. The accused then took the rifle from Steve and went towards the tourist’s vehicle. The tourist was still busy opening the gates. When the tourist turned back towards the vehicle the accused shot him on the chest and the tourist fell down.

[58] From the above statements it is clear that the accused gave versions which are contradicting each other. In the so called “confession” dated 26 June 2006 it appears to me that the accused decided to lie or to give wrong information to the Inspector deliberately. In the second “confession” dated 27 June 2006 the accused decided to tell his what he then said was the “truth”. I have great difficulties in determining which one of the statements contains the correct version. By giving conflicting versions the accused proved to be an unreliable source. Therefore this Court will attach very little weight if any to these statements. I referred to some of the statements made by the accused as ‘so-called confessions’. I did so advisedly for the statements are in my view not confessions at all. For a statement to amount to a confession it must be an unequivocal admission of guilt.

[59] I now wish to discuss the crucial issue of common purpose. In *S v Safatsa and others* 1988 (1) SA 868 it was stated in the headnote that:

“The principle applicable in cases of murder where there is shown to have been a common purpose is that the act of one participant in causing the death of the deceased is imputed as a matter of law, to the other participants (provided of course, that the necessary mens rea is present). A causal connection between the acts of every party to the common purpose and the death of the deceased need not be proved to sustain a conviction of murder in respect of each of the participants.”

See also *S v Gurirab and Others* 2008 (1) NR 316 (SC) where this principle was authoritatively stated to be part of our law.

[60] In *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705 – 706 it was stated that in cases where the State does not prove a prior agreement and where it was also not shown that the accused contributed causally to the wounding or death of the deceased, an accused can still be held liable on the basis of the decision in *Safatsa supra* if the following prerequisites are proved, namely:

- (a) The accused must have been present at the scene where the violence was being committed;
- (b) he must have been aware of the assault being perpetrated;
- (c) he must have intended to make common cause with those who were actually perpetrating the assault;
- (d) he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others;
- (e) he must have had the requisite mens rea; so in respect of the killing of the deceased, he must have intended them to be killed; or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. . The above dictum was approved in *S v Gurirab and Others supra*.

[61] It must follow from the above authorities that the submissions from counsel for the defence to the effect that the State did not prove that there was an agreement between the accused and Steve to commit the crimes and that there was no evidence of a causal connection between the accused and the death of the deceased cannot be correct in law. I am satisfied that prerequisites (a) and (b) set out in *S v Mgedezi (supra)* have been met in that from what has been put to State witnesses the accused was placed at the scene where the violence was being committed and was aware of the assault being committed. Prerequisite (c) was also met in that the accused made common cause with Steve who was perpetrating the assault except that he says that he was forcefully instructed by Steve to participate in the commission of the crimes. I will deal in due course with the alleged compulsion but let me continue with the consideration of the elements of common purpose. Prerequisite (d) was in my view also met in the sense that the accused helped Steve again allegedly under duress to dispose of the body of the deceased and to take away his property after the deceased was killed. As regards the intention which is the last requirement set out in *Mgedezi supra*, it will depend on how the issue of compulsion will be resolved and I propose to consider it at later stage.

[62] I turn to consider the issue of alleged compulsion. Although there was no eye witness in this case most of the facts are common cause or are not

disputed. Some of the facts were established through the cross examination of State witnesses.

[62] Through his counsel the accused put it to State witnesses that he was threatened to participate in the commission of the crimes. He also stated this in the explanation of his plea in terms of section 119 of the Criminal Procedure Act, 1977. Informal admissions contained in the accused's statement in terms of section 115 of the Criminal Procedure Act given in an explanation of the accused's plea of not guilty stand on the same footing as extra-curial statements in that they are items of evidence against the party who made them, but which such party may contradict or explain away. They are not evidential material which counts in favour of the accused. Such exculpatory statement must be repeated by the accused under oath as a general rule for them to have any value in favour of the accused. One possible exception to the general rule is that when a defence is raised in the exculpatory part of an explanation of plea, it may be necessary for the state to negative that defence to the extent of a *prima facie* case. Furthermore, the exculpatory portion of an incriminating statement should also be considered, although a Court can reject the exculpatory part in its discretion, particularly when it was not made under oath and not subject to cross-examination. *S v Shivute* 1991 NR 123 at 124B-C.

[63] The accused did not testify in his defence. He, of course, has a constitutional right to decide to remain silent. However, in cases where a

prima facie case is made against him and where he raises a defence and he did not go to the witness box to explain his defence he takes a risk. See also *S v Haikele* 1992 NR 54 at 63D-E on the effect of silence of an accused in the face of a *prima facie* case.

- [64] In this case the accused's defence is that of compulsion. Compulsion is a state of mind. As stated before, the accused did not testify to explain to the Court how the alleged threats towards him by Steve affected his mind to act the way he says through his counsel he did. Where the accused's state of mind is involved the court may find difficulty in finding in his favour where he has not given evidence. *S v Haikele, supra at 63E-F* and the cases cited thereat. In the absence of the accused's explanation this Court cannot determine veracity of the defence and the extent to which the accused may have been affected by the alleged threats for him to do what he said he did. Assuming, however, that he was threatened, from what was put to State witness Tjonzongoro in cross examination, before the commission of the crimes, the accused was already threatened by Steve and was asked to accompany him to a place where Steve had seen a motor vehicle. If it was indeed so that he was threatened he could have reported to Tjonzongoro. He had an opportunity to be with Tjonzongoro while Steve was receiving his polio drops on the other side of the vehicle. Moreover, if the accused could not tell Tjonzongoro because he felt that his life was in danger, he had every opportunity to report to the police when he drove the vehicle alone from Edward Kaseraera's house to where he

abandoned it which was approximately 145 kilometres away from where he had left Steve. Furthermore, when he was asked whether he knew something about the crimes, he stated that he did not. Upon further interrogation, he and Steve accused each other of having committed the crimes. He did not tell the police at that early opportunity of the alleged threats. In all probabilities the claim of threats is a fabrication. I therefore reject the defence that the accused was threatened. I find furthermore that the State has proved beyond reasonable doubt that the accused intended to kill the deceased; that he acted with a common purpose with Steve by murdering the deceased and robbing him of his belongings. He, again in the furtherance of the common purpose, attempted to defeat or obstruct the course of justice by disposing of the deceased's body. On the murder charge, my finding is that the accused had direct intention to murder the deceased.

[65] In the result, the accused is found guilty and convicted as follows:

1st count: Guilty of murder with direct intent.

2nd count: Guilty of robbery with aggravating circumstances.

3rd count: Guilty of attempting or obstructing to defeat the course of justice.

ON BEHALF OF THE STATE

Mr Eixab

Instructed by:

Office of the Prosecutor-General

ON BEHALF OF DEFENCE

Mr Muluti

Instructed by:

Directorate: Legal Aid

