

HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

JUDGMENT

Case No: CC 12/2019

THE STATE

versus

THOMAS PIETERSON

ACCUSED

Neutral citation: *S v Pieteron* (CC 12/2019) [2021] NAHCMD 137 (30 March 2021)

Coram: SHIVUTE, J

Heard: 20 – 24 January 2020, 20 - 24 April 2020, 15 - 22 June 2020, 5 – 7 August 2020, 5 – 7 October 2020 and 3 – 7 December 2020.

Delivered: 30 March 2021

Fly note: Criminal Procedure – Accused indicted on charges of murder, robbery with aggravating circumstances, defeating or obstructing or attempting to defeat or obstruct the course of justice and contravening section 6 of POCA. Evidence – Whether accused is bound by the explanation advanced by him in his reply to state’s pre-trial memorandum which contains certain admissions – No fixed or general rule laid down – Each case must be considered on its own facts – Admissions made in reply to plea trial memorandum admitted as evidence – To be considered together with other facts.

Criminal Procedure - Evidence – of pointing out – Admissibility thereof – Pointing out not freely and voluntarily made not admissible in evidence – Pointing out can in appropriate case constitute an extra-judicial admission – As such, common law, as confirmed by provisions of s 219 A of Criminal Procedure Act, requiring that it be made freely and voluntarily.

Criminal Procedure - Circumstantial Evidence – Inference sought to be drawn must be consistent with proved facts – Proved facts should exclude every reasonable inference save the one sought – Accused stating that deceased undergone major heart surgery – Heart attack could be cause of death – Cause of death not determined – Although deceased had undergone heart surgery – Medical evidence indicating that heart surgery cannot cause haemorrhagic around the skull. Accused assaulted deceased with an axe and/or sledge hammer – Deceased suffered skull fracture – Blood around fracture suggesting deceased was alive at the time injury was inflicted - Only reasonable inference to be drawn – Accused caused deceased's death.

Criminal Law – Duplication of charges – Accused charged with robbery with aggravating circumstances – Court convicting accused with competent verdict of theft – State charging accused again in terms of section 6 of POCA of acquiring, possessing or using property derived from criminal activities in respect of property stolen by accused in count 2 – Whilst consequence of theft is that accused will be in possession of property proceeds of unlawful activities – Elements of offence created under section 6 similar to elements of theft – Convicting accused of theft and contravening section 6 of POCA would amount to duplication of charges or convictions.

Summary: The accused person was indicted in this court on charges of murder, robbery with aggravating circumstances, defeating or obstructing or attempting to defeat or obstruct the course of justice and for contravening section 6 of the Prevention of Organised Crime Act 29 of 2004 (POCA). The accused had made extra-judicial statements in his reply to the state's pre-trial memorandum and made pointing-outs as

well as admissions when he was pointing-out. The first question to be decided by this court is whether, the accused is bound by the explanation advanced by him in his reply to the pre-trial memorandum which contains certain admissions.

Held, that there is no fixed rule or general rule laid down. Each case has to be decided on its own facts. In the present matter, admissions made in reply to the pre-trial memorandum are admitted as evidence and will be considered together with other facts.

The second question to be decided is whether pointing out and admissions made during pointing out are admissible in evidence.

Held, the accused made a pointing out therefore, he made a statement by conduct. He also made exculpatory statements incriminating himself. The pointing out which is not freely and voluntarily made is not admissible in evidence. However, the common law as confirmed by the provisions of s219 (A) of the Criminal Procedure Act requires that it be made freely and voluntarily. In the present matter, the accused was warned of his rights to legal representation, to remain silent and the consequences of making an admission or pointing out and he decided freely and voluntarily to make a pointing out or an extra curial admission. Therefore, evidence on pointing out is admissible.

Circumstantial Evidence – For the state to secure a conviction relying on circumstantial evidence, the court must be satisfied with the two cardinal rules namely:

- (a) The inference sought to be drawn must be consistent with proved facts, if it is not, it cannot be drawn.
- (b) The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference to be drawn is correct.

Held, that although the cause of death is not determined and the accused is intimating that the deceased could have died of heart attack, there is evidence that the accused assaulted the deceased with an axe and/or hammer. The deceased suffered a fracture on the head. According to medical evidence, the fracture was surrounded by haemorrhagic stains. Heart surgery or heart attack cannot cause haemorrhagic around the skull fracture. The blood around the skull fracture suggests that the deceased was alive at the time the injury was inflicted. The only reasonable inference that can be safely drawn is that the accused caused the deceased's death. Furthermore, the accused admitted that after he assaulted the deceased, he did not breathe or move.

Criminal Law – Duplication of charges – The accused was charged with robbery with aggravating circumstances and this court convicted him of theft. At the same time the accused was charged with contravening section 6 of POCA of acquiring, possessing or using property derived from criminal activities in respect of property stolen by the accused in count 2. Accused is the author of theft, in other words he committed the predicate offence. It is obvious that if the accused commits theft, he will be acquiring or in possession of the property he stole which is the proceeds of unlawful activities.

Held, that the accused in this matter is the author of theft that includes the motor vehicle that is subject in count 4. Since he is the author of the predicate offence he cannot be charged or convicted under section 6. The offence under section 6 is committed in respect of the proceeds of criminal activities committed by another person. The elements of offence created under section 6 are similar to elements of theft. Therefore, charging or convicting an accused under section 6 of POCA in this matter would amount to duplication of charges or convictions.

ORDER

Count 1: Guilty of murder with direct intent.

Count 2: Guilty of theft

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

Count 4: Not guilty and acquitted.

JUDGMENT

SHIVUTE J:

[1] The accused appears in this court on indictment containing the following counts.

Count 1: Murder

It is alleged that during the period 4 – 12 November 2017 in the Keetmanshoop district the accused did unlawfully and intentionally kill Josef Olifant.

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

It is alleged that during the period as mentioned above, in the same district, the accused did unlawfully and with intent of forcing him into submission assault Josef Olifant by hitting him with an axe and/or hammer and/or other unknown object on the head and /or body and/or neck and did unlawfully and with the intention to steal take from Josef Olifant a jacket; a duvet; a pillow; a Toyota Corolla motor vehicle with registration number BK23363NC; a Nokia cell phone and Sim card; a black modulator and a camping chair, the property of or in the lawful possession of Josef Olifant. And that aggravating circumstances as defined in section 1 of Act 51 of 1977 were present in that the accused was before, during or after the commission of the crime wielding a dangerous weapon, namely a hammer and/or an axe and/or an unknown object and/or inflicting grievous bodily harm to the said Josef Olifant.

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

It is alleged that during the period 4 – 12 November 2017 in the district of Keetmanshoop, the accused did unlawfully and with intention to defeat or obstruct the course of justice:

1. Tie a wire around the deceased's neck and dragged the deceased's body a distance away from where the accused resided; and/or
2. Drag the deceased's body for a second time into a ditch and buried it under stones/rocks, and/or
3. Abandoned the deceased's motor vehicle with registration number BK 23363 NC along the tarred road approximately 12km from Tses.

Whereas when the accused committed these acts he knew or foresaw the possibility that his conduct may:

1. Frustrate and/or interfere with the police investigations into the disappearance and/or death of the deceased and/or
2. Conceal and/or destroy evidence including evidence of an assault perpetrated on the deceased and/or
3. Protect him from being prosecuted for a crime in connection with the death of the deceased and/or robbery of the deceased's property. Wherefore, the accused committed the crime of defeating or obstructing or attempting to defeat or obstruct the course of justice.

Count 4: Contravening section 6 read with sections 1, 7, 8, 10 and 11 of the Prevention of Organised Crime Act, 29 of 2004 – Acquisition, possession or use of proceeds of unlawful activities.

It is alleged that during the period stated in the previous counts, in the same district, the accused did unlawfully acquire and/or use and/or had possession of a Toyota Corolla motor vehicle with registration number BK23363NC whilst he knew or ought reasonably to have known that the said property formed part of the proceeds of unlawful activities and/or the accused used this motor vehicle for his own purposes and/or used the motor

vehicle to transport fare paying passengers whilst he knew; or ought reasonably to have known that the said property formed part of the proceeds of unlawful activities.

[2] The accused pleaded not guilty to all counts. Counsel for the accused did not disclose the basis of the accused's defence in respect of counts 1 and 3. However, he disclosed the basis of the defence case in respect of counts 2 and 4. Counsel stated that count 2, which is robbery with aggravating circumstances, is a duplication of the charge of murder. It was contended that one does not force a dead person into submission because he was already dead. With regard to count 4, counsel stated that it did not disclose any offence.

[3] However, in respect of the reply to the State's pre-trial memorandum handed into evidence, the accused stated the following among other things: That the deceased attacked the accused. Since the accused feared for his life, he grabbed an axe and hit the deceased over his head that resulted in the deceased's death. According to the accused, his life was under imminent threat and he therefore acted in self-defence. He further stated that during the period 4 – 12 November 2017, he tied a wire around the deceased's neck and tied it to the deceased's vehicle and dragged the deceased's body a distance away from the above mentioned farm house and during that period he again shifted the deceased body by dragging it to a spot underneath a cliff and burying it under stones or rocks. Furthermore, the accused did not dispute that during the period 4 - 8 November 2017 he used the deceased's vehicle. However, he further stated that he only used it once when he visited his children in Keetmanshoop. On the said day the accused picked up a hitch hiker who paid a certain fee to the accused, but the vehicle was not used in any way prior to this incident. The accused further stated that during the period 4 – 8 November 2017, he abandoned the deceased's motor vehicle next to the tarred road between Tses and Mariental with the ignition key inside the vehicle. The accused stated that the property listed in count 2 in the indictment is the deceased's property. The accused further admitted that when the deceased visited him at the farm the deceased was driving his motor vehicle with registration number BK23363NC.

[4] During the trial, documents containing evidence that is not in dispute were handed in by agreement between the parties.

[5] I will now proceed to summarise the witnesses' testimonies. Donovan Amunyela testified that on 12 November 2017 whilst he was on the way to Rouplaas, he came across a decomposed body. He also observed that the body was dragged from where it came to that place. He further observed a bag at the scene, but did not check what was inside. He left the body and proceeded with his journey. About 10km from the body, he met the accused. He informed the accused that he saw human remains but the accused just laughed and walked away towards the hill. The witness also walked away. The accused and the witness met again. The accused told the witness that he will be a co-accused in this matter. The witness understood the accused to mean that if he tells people about the deceased he would also be regarded as a co-accused.

[6] The witness reported the matter to one Roman who in turn advised him to report the matter to Mohabi and Swartbooi. After he reported the matter to the above mentioned people, the witness, Mohabi and Swartbooi drove to the place where the witness saw the body. However, they did not find the body. The witness observed drag marks on the ground and they followed the drag marks to the cliff area. They saw some stones that were packed together. The matter was reported to the police through the phone. The witness, Mohabi and Swartbooi went to the road to wait for the police. Whilst they were at the road, the accused came. The police also arrived and they all went to the place where the body was buried under stones. The witness and Sergeant Roos removed the body from where it was buried. It was a male person's body. The witness had also observed a blue bag near the body.

[7] Hansina Mohabi corroborated the version of Amunyela that he took her and Swartbooi to the place where he first saw the body. She observed the drag marks from the initial place where he found the body. They followed the drag marks to the hill where they saw the deceased's body under a pile of stones. She further confirmed that she phoned the police and that the accused came to join them at the roadside where they

were waiting for the police. They all went to the place where the deceased was covered with stones. Her version was also corroborated by Swartbooi.

[8] David Julie, a nephew to the deceased, testified that during November 2017, he and the deceased were supposed to go to Tses on a certain Saturday before he disappeared. The deceased did not show up. He went to look for him the following day but he was informed that he had already left for Tses. After a week, he was informed that the deceased had passed on. The witness further testified that he went to identify the deceased's property namely: Nokia and Samsung cell phones, a duvet cover, a modulator, a camping chair and a jacket with reflectors. The items were removed from a room on a farm where the accused was residing and taken to the police station.

[9] Gwendoline Dreyer, a mother to the accused's child testified that on 5 November 2017 around 02h30 early morning the accused went to pick them up from Standard Bank Mariental. He came with a silver or grey sedan motor vehicle that belonged to his friend. They drove to the farm where the accused was working. They stayed there until the evening around 19h00 when the accused took them back. The witness was with her two children. They drove up to Tses and about 3km from Tses the vehicle broke down. The witness and her two children were not the only passengers on the way to Mariental. The accused had given a lift to a man and his wife. They gave money to the accused to put fuel in the car. After the car broke, the witness and her children got a lift and left the accused and the other passengers at the place where the vehicle broke down. The witness identified the deceased's motor vehicle depicted in photographs 50 – 51 of Exhibit 'P' as the one that was driven by the accused.

[10] Goliath Kooper, an employer of the accused, testified that the accused was working for him on the farm. The accused had his room. However, he had access to other rooms on the farm. The accused was working on the farm temporarily because the permanent employee was on leave from the beginning of November 2017. The farm where the accused was working is called Rouplaas. During November 2017, the accused was staying alone on the farm.

[11] Paul David Goliath testified that during 2016, he was working for Mr Isaack Vries on Farm Rouplaas. He left the job and went to Hoachanas. Whilst at Hoachanas he was approached by the police in relation to the key of a room that was situated on Rouplaas. He went to Rouplaas with the police. When the police opened the room the witness saw items that were not in the room before he left the place. He saw a duvet cover, a pillow, and a jacket. When the witness went to the farm with the police, the room was still locked.

[12] Doctor Mamadi Guriras testified that she conducted a post-mortem examination on the deceased's body. According to the post-mortem report, the findings made were: partially skeletonised male human remains, circular depressed skull fracture with haemorrhagic stains surrounding the back of the head. Brain degeneration C4/C5 and C7/T1 cervical spine separation. No abdominal organs found at the time of autopsy. Features of previous major heart surgery were found. It was concluded that death took place 3 days prior to examination and that the immediate causes of death were undetermined. Schedule of observations inter alia were a 1.8 cm by 1 – 2 cm circular depressed skull fracture at the back of the head with haemorrhagic staining surrounding it. On his chest, there were interrupted surgical wires present along the sternum. The doctor further testified that the blood around the skull fracture means that the person might have been alive at the time the injury was inflicted. She further explained that one would not expect blood stains around this kind of fracture in someone whose heart is not pumping and gets a blunt force trauma.

[13] The doctor further explained that the deceased had a major heart injury because he had a replacement of two valves. This can affect the quality of life. However, she was unable to tell what quality of life the deceased had. It was again the doctor's testimony that heart surgery cannot cause haemorrhage on the skull. However, the fracture on the skull is capable of causing death.

[14] Emerencia Roselinde Plaaitjies, a neighbour to the deceased, testified that she last saw the deceased on 5 November 2017. The deceased came to the witness' house driving his Toyota Cressida which is grey in colour. He was selling fire wood. Emma Kahuure, also a neighbour to the deceased, testified that she also saw the deceased on 5 November 2017 in the morning. Tsei – Tseimou testified that she last saw the deceased on 4 November 2017 when he took the witness to a funeral. The deceased was driving a grey Toyota Corolla. The witness identified the deceased's motor vehicle as depicted in photographs 50, 52 and 53 of the photo plan. Willemina Jossop a neighbour to the deceased testified that he last saw the deceased on 5 November 2017. The deceased informed him that he would be attending a funeral in Noordoewer. He further told her that he was going to spend a night in Keetmanshoop. The deceased was wearing camouflaged trousers.

[15] Johannes Booysen testified that on 5 November 2017, he was given a lift by the accused. The accused was driving a sedan motor vehicle. In that car, the witness recognised a lady from Mariental as a passenger. The accused told the witness that if the witness assisted in paying for petrol, then he would be given a lift. The witness gave N\$100 to the accused for petrol. About 10 kilometres from Tses, the car developed a mechanical problem and got stuck.

[16] The lady from Mariental and her children got a lift from another car when the accused's car broke down. The witness and his family remained with the accused. The accused left the car with the key in the ignition and went back to Tses. At around 03h00 early in the morning the witness and his family got a lift. The witness identified the motor vehicle depicted in photograph 51 as the one they rode in.

[17] Bernadus Booysen testified that on 5 November 2017, between 08h00 and 09h00, the accused and his girlfriend arrived at their shop. The accused was driving a grey or silver Toyota Corolla. The witness recognised the car and asked where the owner was. The car belonged to Mr Olifant. The accused said the owner was in Tses. He borrowed the car to take his girlfriend back to Mariental in the afternoon. The

witness further testified that he is also known as Seun. When he learned that the accused was going to Mariental in the afternoon, he requested the accused to give a lift to Johannes Booyesen and he agreed. The accused went to Rouplaas and returned late in the afternoon to pick up Mr Booyesen.

[18] Douglas Hanze, a Chief Inspector in the Namibian Police, testified that he was instructed to go and conduct a pointing out in relation to an accused who was at Tses. The witness met the accused at Tses holding cells and booked him out. Prior to a pointing out, the accused was informed of his rights to legal representation as follows: that he had the right to remain silent, he was not compelled to do the pointing out. He was further warned that whatever he said would be noted down and photographed and may later be used as evidence in a subsequent trial. He was further informed that he has a right to get a legal representative of his choice and at his own expense prior to the pointing out or if he cannot afford a legal representative at own expense, he can apply for legal aid. The witness used a pro-forma that was admitted in evidence by agreement and marked as Exhibit 'Q'.

[19] According to Chief Inspector Hanze, when they went for a pointing out he was with the accused, Chief Inspector Gomeb who was driving, Warrant Officer Goliath and Constable Hamukwaya. They went to the place where the accused was residing. The accused told him *inter alia* that he was seated when the deceased arrived on the farm driving his vehicle. The deceased was in possession of dagga and was demanding the money accused person owns him. The deceased forced the accused to slaughter two goats because he, the deceased, used his own petrol to come to the farm. They started arguing and the accused person beat the deceased first. The deceased fell down from the bed where he was sitting. After sometime, the accused ran to the kitchen and collected a hammer and beat the deceased with it on the head. After the deceased was assaulted he did not make any movement or breathe.

[20] The accused took a wire, fastened it on the deceased's neck and tied it on the deceased's vehicle and dragged the deceased's body for about 1 km from the house to the field and dropped the body. The accused pointed out the place where he dropped the body. The accused drove the deceased's car up to the house and locked the house. He drove to Tses. He again drove for about 11 km from Tses T-junction on B1 road on the way to Mariental. He left the car with the key in the ignition and walked back to the farm. The accused pointed the place where he left the deceased's motor vehicle.

[21] On Sunday 12 November 2017, the accused went back to the place where he dropped the body and dragged it again to the Fish River bed where the police collected the deceased's remains.

[22] The witness further identified Exhibit 'O' as the photo plan he compiled for the pointing out. He read the content of the photo plan into the record. According to the photo, plan the accused directed the witness and his colleagues to the farm where the incident took place. The photo plan depicts among other things the place where the deceased was assaulted with a hammer, the drag marks where the deceased was allegedly dragged and where his body was initially dropped. The photographs also depict where the deceased's body was further dragged after one week to the place where it was removed by the police. The photo plan further depicts photographs of the place where the deceased's motor vehicle was abandoned by the accused. The photo plan was admitted in evidence by consent.

[23] Detective Constable Hamukwaya testified that he attended the pointing out by the accused on Rouplaas. From the farm they drove to a place which is about 11 km from Tses where the accused pointed out a place where he abandoned the deceased's car.

[24] Police Officer Gerhard Sekgele testified that on 12 November 2017, he attended to the scene of crime at Rouplaas where the accused person was employed. From the

farmstead they observed marks of the vehicle that was pulling something that they suspected to be the deceased's body. The vehicle headed in the easterly direction of the farm. They followed the drag marks up to a place where Mr Amunyela said he initially found the deceased's remains. There were bloodstains and an unpleasant odour at that place. The body was moved from that place. They moved to the banks of Fish River and there they found the deceased's decomposed body bound with a wire on the neck. The body was lying on the cliffs and covered with stones.

[25] Mr Daniel Nicolaas one of the spectators at the scene of crime shouted that he saw one of Mr Gollith Kooper's employees with a wire that looked similar to the one found on the deceased's remains. Nicolaas identified the accused to the witness as the person who had a wire. The accused was also at the scene of crime. The witness introduced himself to the accused and explained to him what was going on. The accused informed the police officer that he did not want to say anything at that place. The witness searched the accused and found him with a Nokia cellphone, a sim card and a modulator. The body was removed from the cliffs and transported to Keetmanshoop.

[26] The witness continued with his investigations. From the river, they went to the farm where the accused was staying. The witness recovered a small axe with blood stains on it at the kitchen area as well as a sledge hammer. The sledge hammer had bloodstains on it. All the items found were seized. The accused was taken to Tses Police Station. The witness warned the accused of his rights. After that the accused made some admissions that were recorded by Sergeant Pohamba.

[27] On 13 November 2017, the witness went back to the farm where the incident took place. There he was shown a blue duvet covet and a pillow case. Both items had bloodstains. The Nokia cell phone, Sim card, a modulator duvet cover and a pillow were later identified in his presence as the deceased's property. All the recovered items were seized and booked in Pol 7 register to be sent to the forensic laboratory for examination.

It was put to the witness that the accused was not aware that he was being recorded. The witness replied that the accused was informed. Concerning the blood spatters that were found in the zinc plate room, it was put to the witness that those were bloodstains of a donkey that was slaughtered by the accused. The witness responded that he was not in a position to tell whether bloodstains were for an animal or a human being.

[28] Concerning the hammer that was found with blood stains, it was put to the witness that the accused slaughtered the donkey with that sledge hammer that was the reason there was blood on it. The witness responded that the accused informed them that, he hit the deceased with a hammer. With regard to the blood on the small axe, the accused said he used it to hit the donkey's neck. The witness was unable to confirm as he did not examine the blood to determine where it came from.

[29] Daniel Isaaks testified that he received a report that a body was found on a certain farm. He and his colleagues went to the farm and were taken to the place where the body was found by Amunyela. They did not find the body at that place. However, they observed drag marks and there was a bad odour at that place. They followed the drag marks to the river bed where they found the body in a cliff covered with stones. The body was removed from the cliff and taken to the mortuary. The witness went to the farmstead. He observed a vehicle mark that was dragging something between the house and where the body was allegedly initial found. The witness further testified that whilst he was at the place where the body was found on 12 November 2017, he observed that the prints of the shoes the accused was wearing were similar to the shoeprints that were found at the cliff where the deceased's remains were found. This version was also corroborated by witness Sekgele.

[30] Police Officer Moyo Mukoya testified that on 8 November 2017, he and his colleagues found the deceased's vehicle parked near Mooi Plaas, Tses area, along the B1 main road. The battery was removed and one of the windows was smashed. They phoned the deceased but his phone was unreachable. They also found the deceased's Foschini card, a white cup and a white jacket. They left the car there and went to report

the matter at Tses Police Station. The car that they found parked along the main road was a Toyota Corolla, 16 valve, grey in colour with plate number BK23363NC. On 12 November 2017, the witness attended the scene where the deceased's body was recovered in the cliffs.

[31] Detective Sergeant Lineekela Nghinyanyelwa testified that he took photographs inter alia of the scene of crime where the murder took place, the place where the deceased's body was initially dumped, the place where the body was later found and the wire that was suspected to have been used to pull the deceased's body. Photographs depicting the deceased's remains after they were collected from the scene; photographs depicting the deceased's alleged camouflage trousers and a red underwear, t-shirt, duvet cover, wheel chair and a camping chair were also taken. Other items depicted in the photographs were an axe and a sledge hammer as well as the deceased's motor vehicle. The photo plan compiled by Sgt Nghinyanyelwa was admitted in evidence and marked as Exhibit 'N'. The witness and Sergeant Roos packed the exhibits for forensic examination purposes. Apart from the photo plan Exhibit 'N', the witness had also compiled a sketch plan that was admitted in evidence and marked as Exhibit 'R'.

[32] Detective Warrant Officer Vaino Pohamba testified that he knew the deceased. He was living with disability and if he went to the shop, he would send people to buy items for him whilst he remained seated in the car. He further testified that he arrested the accused person and informed him of his right to remain silent. The accused said he would not say anything he was going to speak at the police station. At the police station Sgt Sekgele explained to the accused the right to remain silent, the right to legal representation and that the offence was serious. The accused opted to tell the truth. He was informed that since he opted to tell what happened, what he said will be recorded with a cell phone and it may be used as evidence in court at a later date. The accused said he had no problem.

[33] The accused stated among other things that the deceased punched the accused in the face. The accused fell down. He got up and went to collect the hammer to defend himself. When he came back with the hammer he hit the deceased on the head. He took the wire and tied the deceased on the head against the tow bar of the deceased's car and dragged the deceased to a place where the body was initially found. He came back with the car and went to collect his girlfriend from Mariental. When he was taking his girlfriend back to Mariental the car developed a problem and he left it where it was found by the police.

[34] The recorded interview between the accused, Sgt. Sekgele and the witness was sent for translation and it was transcribed by a sworn translator. It was admitted in evidence and marked as Exhibit 'T'. In that statement the accused stated among others things:

'The guy actually jumped on me probably to take me or something then I gave him way then he came past me. I hit him the first fist. And he went down and when he went down that is the time I decided I am going to take a weapon now and then I just hit, you see, the time I took the hammer and is the time I just started beating him.'

The accused was further recorded as having said that he got the hammer from the kitchen.

[35] The accused was reminded by Sgt Sekgele that 'I want to remind you again that you were warned before that, anything you say will be written down and anything you say can later be used as evidence against you, do you understand that.' The accused then decided not to proceed with what he was saying.

[36] Detective Sgt Jean Roos testified that he was the initial investigator in this matter. Together with other investigating officers he went to the farm where the murder took place. From the farm they went to the place where Hamunyela informed them he initially found the body but they did not find it there. He observed drag marks to the cliff where they found the deceased's body covered with stones. The deceased's remains

were removed. The witness confirmed the versions of the police officers who were at the scene with him that a sledge hammer, pillow, grey sheet, black trousers, short sleeved t-shirt and an axe all had bloodstains on them. The witness further testified that a multi-coloured duvet cover identified to belong to the deceased was also found. In front of the main house, some dry bloodstains were observed and also in the road from the house to the place where the body was initially dumped. On the way to the place where the body was initially found, pair of camouflaged trousers and red underpants was found.

[37] The witness collected all the exhibits found at the scene. He was also involved in packing them together with other police officers and they were dispatched to National Forensic Science Institute for analysis. The accused was taken to Tses Police Station. On 13 November 2017, the witness, the accused and the witness' colleagues returned to the farm where the incident took place. The accused was involved in a pointing out conducted by Chief Inspector Hanze. The witness further learnt that the remains found at the cliff were for Josef Olifant. For the deceased to move, he needed the assistance of someone else as he was disabled. The witness had known the deceased for about 7 years and that all those years the deceased was living with disability.

[38] Willem Olifant, a brother to the deceased, testified that the deceased underwent heart surgery during 1991. His two valves were replaced during the surgery. During 2008/2009 he suffered a stroke and got paralysed on the right side of his body. He could not walk on his own. He walked with the assistance of the walking stick. He could only use his left side of the body. The deceased's disability was obvious and anybody who came in contact with him could see it. The deceased was permanently disabled. It was put to the witness that the deceased assaulted the accused. The witness testified that due to the deceased's disability he was not in a position to assault anyone.

[39] At the close of the State's case, the accused decided to remain silent and called no witnesses.

Submissions

[40] Counsel for the State argued that although the accused in his reply to the pre-trial memorandum said he acted in self-defence, he did not testify to explain how he was defending himself. The accused made several admissions in his reply to the pre-trial memorandum. He also made some pointing-outs. Counsel further argued that, although the cause of death could not be determined due to the state of the body in which it was found, there is evidence that the accused assaulted the deceased with a hammer and thereafter, dragged the deceased's body with the vehicle. This is an indication that he intended to kill the deceased.

[41] With regard to the count of robbery with aggravating circumstances, counsel argued that it is not a duplication to the murder charge. These are two separate offences. Counsel argued that since the accused killed the deceased and took the deceased's property it could be said that the accused used force when he killed the deceased. The accused, when he assaulted the deceased, forced him into submission. With regard to the third count, counsel argued the dragging of the deceased's body and the hiding it under stones are indications that the accused intended to defeat the cause of justice. Furthermore, counsel argued that the accused benefited from the proceeds of unlawful activities and therefore contravened section 6 of the Prevention of Organised Crime Act by receiving a reward from the persons he gave a lift to in the deceased's stolen vehicle. It was counsel's argument that the State had proved all the counts beyond reasonable doubt and that the accused should be convicted as charged.

[42] On the other hand, counsel for the defence argued that, since the cause of death is not determined, it could not be said that the accused caused the deceased's death. The doctor who examined the deceased's body testified that the deceased had previously had major heart surgery and this could have contributed to the cause of death. Although the deceased was assaulted with a hammer, it is not definite that the accused caused the deceased's death. With regard to the second count, counsel argued that although they initially said it is a duplication to count 1, the defence was abandoning that proposition.

[43] Counsel went on to argue that although the second count is not a duplication to count 1, the State had failed to prove that the accused committed robbery with aggravating circumstances. The deceased was already dead at the time the accused took the deceased's property. Therefore, the accused can only be convicted of theft from the deceased. Counsel argued that there is no evidence that before the accused hit the deceased with the hammer, the accused demanded the deceased's property. What is on record is that after the deceased died the accused drove away the deceased's motor vehicle.

[44] With regard to count 4, counsel argued that the accused did not contravene section 6 of the Act, because he did not benefit monetarily. As regards count 3, counsel conceded that the State had proved this count against the accused.

Applicable law and analysis

[45] This court is called upon to determine whether the accused did unlawfully wrongfully and intentionally kill the deceased; whether the accused unlawfully and intentionally forced the deceased into submission by assaulting him with a dangerous weapon and did unlawfully and intentionally rob him of his property as stated in the indictment; whether he did defeat or obstruct or attempt to defeat or obstruct the course of justice under the circumstances as stated in the indictment and whether he contravened section 6 of the Prevention of Organised Crime Act 29 of 2004 namely; that the accused did unlawfully acquire, possess or use the deceased's motor vehicle whilst he knew or ought reasonably to have known that the said property formed part of the proceeds of unlawful activities and/or the accused used this motor vehicle for his own purpose as described in the indictment.

Murder

[46] It is logical to first deal with murder, the first count. The accused pleaded not guilty to all counts. He did not disclose the basis of his defence in respect of the murder charge. However, as earlier observed, in his reply to the State's pre-trial memorandum he stated that he hit the deceased with an axe on the head that resulted in the deceased's death. As the trial progressed, the accused through cross-examination stated that the State failed to prove that the accused caused the deceased's death because the deceased had previously undergone a major heart surgery where his two valves were replaced and because the cause of his death was not determined.

[47] Apart from the reply to the pre-trial memorandum, the accused had made a pointing out, the photo plan and notes of which were handed in by consent. In the pointing out note, the accused explained that he was the one who assaulted the deceased first. The deceased fell from the bed where he was lying. After sometime, the accused ran to the kitchen and collected a hammer and beat the deceased with it on the head. After the deceased was assaulted, he did not make any movement or breathe. The State led scientific evidence from Doctor Guriras to the effect that although the deceased had undergone major heart surgery, his skeletonised remains revealed a circular depressed skull fracture with haemorrhagic stains surrounding the back of the head. The doctor further explained that the blood around the skull fracture meant that the person was alive at the time the injury was inflicted. This is consistent with the accused's explanation in the reply to the pre-trial memorandum and notes on the pointing out

Applicable Law

[48] The accused has made extra-judicial statements or admissions in his reply to the pre-trial memorandum as contained in Exhibit 'C'. Whether the accused is bound by the admissions made on his behalf as contained in his reply to the State's pre-trial memorandum, there is no fixed or general rule laid down. Each case has to be decided on its own facts. In the present matter, although the accused intimated that the deceased could have died from heart attack or that he acted in self-defence, it appears

to me that the accused seems not to have had problem with the exculpatory explanations set out in his reply as well as the admissions he made in the pointing out. A sledge hammer and an axe - were found on the farm where the incident took place. Both had blood stains on them. Therefore, it is possible that the accused had used both the axe and the hammer or he had used one of them. The charge contemplates and alleges these scenarios. The admission made in the reply to the state's plea trial memorandum will be admitted as evidence and considered together with the rest of the facts.

[49] Chief Inspector Hanze testified that the accused told him that after he had assaulted the deceased, the deceased did not move or breathe. This evidence was not challenged at all.

Section 219A of the Criminal Procedure Act 51 of 1977 makes provision for admissibility of admissions made by an accused in the following terms:

'(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence...'

[50] With regard to the pointing out made by the accused, s 218(2) of the Act, reads as follows:

'Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence given against such accused at such proceedings.'

[51] Having stated the statutory law above, it is worth reminding, as was stated in *S v Sheehama* 1991(2) SA 860 at 861(A) head note that:

'A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such, the common law, as confirmed by the provisions of s 219A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily. It is also a basic principle of our law that an accused cannot be forced to make self-incriminating statements against his will, and it is therefore inherently improbable that the Legislature, with a view to sound legal policy, could ever have had the intention in s 218(2) of Act 51 of 1977 to authorise evidence of forced pointings-out'

[52] In commentary on the Criminal Procedure Act, 51 of 1977 Du Toit et al at p 24 – 66 M of revision service 24, 2000 the following passage appears.

'Since it has now been accepted that pointing – out fall, in appropriate cases, to be regarded as admissions and even, in some cases confessions, and since it has now also been accepted that there are, in terms of the Constitution, requirements that an accused be informed, in certain circumstances and at certain stages, of various rights including the right to remain silent, the right to be informed of the consequences of making an admission or confession, and the right to legal assistances, it follows that these requirements apply, too to pointing – outs.'

[53] This court has also due regard to the Namibian Constitution, especially Article 12 (1) (a) that deals with the right to a fair trial, (1) (d) the presumption of innocence, (1) (f) the right against self-incrimination and the right to have evidence obtained in violation of Article 8 (2) (b) to be excluded. In the present matter, the accused was properly informed of his rights and the consequences of making an admission or pointing out and he decided to freely and voluntarily make pointing-outs or an extra curial admissions. Therefore, the admissions made by the accused are admissible.

Self defence

[54] Although the accused, in his reply to the State's pre-trial memorandum, stated that he acted in self-defence, he did not testify to explain his alleged self-defence.

However, it must be borne in mind that where self-defence is raised or suggested, the onus remains on the State to prove its case beyond reasonable doubt that the accused acted unlawfully.

[55] Furthermore, the killing of a human being is an act which is *prima facie* unlawful. In order for the accused to justify his defence an evidential burden is placed on the accused to rebut the *prima facie* presumption of unlawfulness, by testifying about the circumstances under which he acted under self-defence.

[56] There is no eye witness to the killing of the deceased therefore, the state rests its case on circumstantial evidence and admissions made by the accused.'

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (b) The proved facts should be such that they exclude every reasonable inference from them save the one sort to be drawn. If they do not exclude other reasonable inference then, there must be a doubt whether the inference sought to be drawn is correct.' *R v Blom 1939 AD 188 at 202 -203*

Since the accused did not rebut the presumption of unlawful killing of a human being, it is not necessary to discuss the requirements of self-defence.

[57] Looking at the evidence as a whole and especially the medical evidence, although the deceased had undergone heart surgery, there is evidence that heart surgery cannot cause the haemorrhage on the skull. The evidence is that the fracture on the skull was capable of causing death. Furthermore, the doctor testified that the blood around the skull fracture meant that the person was alive at the time the injury was inflicted. It is therefore, my considered opinion that in light of all the evidence placed before court, the only reasonable inference that can be safely drawn is that the accused is the one who caused the deceased's death by striking a blow to his head with a sledge hammer and/or an axe. This death is unlawful as the presumption of unlawfulness was not rebutted. Again, if one has to go by what the accused explained in his pointing out note, the accused is the one who assaulted the deceased first and the

deceased fell down. The accused ran to the kitchen and collected a hammer and hit the deceased. The circumstances under which the fatal blow was inflicted does not avail self-defence to the accused at all. Furthermore, the court may determine the accused's intention from the circumstances surrounding the events. The accused by assaulting the deceased with an axe and or a sledge hammer on the head which is a vital part of the body and the injury suffered by the deceased, the only reasonable inference that can be drawn in the circumstances is that he had the direct intention to kill his victim. That puts the first count, murder, to rest.

[58] I will now proceed with the second count. It is common cause that after the deceased's death the accused was found in possession of the deceased's property as stated in the annexure to the relevant charge. It has also not been disputed that the accused had abandoned the deceased's vehicle a few kilometres from Tses.

[59] Robbery has been defined by CR Snyman, Criminal Law 6th edition at 508 as follows:

'Robbery consists in theft of property by unlawfully and intentionally using.

(a) violence to take the property from someone else or

(b) threats of violence to induce the possessor of the property to submit to the taking of the property.'

For the accused to be convicted of robbery the State should prove the following elements, namely (a) the theft of property (b) through the use of either violence or threats of violence (c) a causal link between the violence and the taking of the property (d) unlawfulness and (e) intention.

Violence or threat of violence

[60] CR Snyman on Criminal Law supra states at 508 as follows:

'Robbery is also committed if X injures Y and then deprives him of the property while he (Y) is physically out of action, provided that at the time of the assault X already had the intention of putting Y out of action and then taking the property.' *Mokoena* 1975 (4) SA 295 (O).

[61] According to Snyman, there should be a causal link between violence and the taking of the property. If violence is used to facilitate escape, robbery is not committed. In the present matter, according to the notes on pointing out, after the accused killed the deceased, he took a wire, fastened it on the deceased's neck and dragged the deceased with his own vehicle. The accused dropped the deceased's body in the field and drove home to lock the house. Thereafter, he drove with the deceased's vehicle to Tses. The State did not adduce evidence to establish that at the time of the assault the accused had already the intention to put the deceased out of action and then take the property. It appears to me that initially the accused took the deceased's vehicle in order to dispose of the deceased's body and thereafter, he decided to drive to Mariental.

[62] In the circumstances, this court is not satisfied that the State has proved the offence of robbery against the accused. It is the court's considered opinion that the evidence adduced proves that the accused committed theft.

[63] I will now turn to the third count of defeating or obstructing or attempting to defeat or obstruct the course of justice. There is evidence from Amunyela of the discovery of the body at a place where it was initially dumped. There is also evidence from Chief Inspector Hanze that the accused showed him the place where he dragged the body. After Amunyela reported the finding of the body to the accused, when he went back to the scene he did not find the body there anymore. The accused does not dispute that he dragged the deceased's body from the farm house and disposed it. The deceased's body was found covered with rocks. Counsel for the accused, in his written submissions, also rightly conceded that the accused had disposed of the deceased's body. In the circumstances, this court is satisfied that the State has proved beyond a reasonable doubt that the accused attempted to defeat or obstruct the course of justice.

[64] I will now proceed with the last count, which is a contravention of section 6 of the Prevention of Organised Crime Act (POCA).

Section 6 of POCA provides as follows:

'Acquisition, possession or use of proceeds of unlawful activities

Any person who-

(a) acquires;

(b) uses;

(c) has possession of; or

(d) brings into, or takes out of Namibia, property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering.'

[65] Having stated the above provision, the question to be asked is whether the accused who is the author of the predicate offence namely theft in this matter can also be convicted under s 6 of POCA in respect of the acquisition, possession or use of proceeds of unlawful activities in respect of the same property?

[66] This question was answered in *S v Henock and Others* (CR86/2019) [2019] NAHCMD 466 (11 November 2019) at paras 18-19, a review matter heard by the Full Bench where Liebenberg J at 18-19 cited author Albert Kruger in his book, *Organised Crime and Proceeds of Crime Law in South Africa* (2nd ed.) as having stated the following in respect of s 6 of their POCA which is similarly worded to s 6 of our POCA as follows:

'The offence under section 6 is committed in respect of the proceeds of activities of another person.' (Emphasis added.)

[67] Liebenberg J went on to say:

'This interpretation to section 6 conforms with what is prescribed in the UN Legislative Guides and makes plain that an offence under this section is committed in respect of the proceeds of activities of another person, not the person who committed the actual offence. To this end the actual thief or fraudster when committing the predicate offence does so with a

specific intent i.e to appropriate property in order to sell, use or possess. In deciding whether the thief by so doing commits the further offence of laundering under section 6, it is obvious that the thief cannot acquire, use or possess the very same property he/she already appropriated when committing the predicate offence with such intent. If that were to be the case, then the legislature simply substitute theft and the possession, receiving or use of stolen property with the offence of money laundering; the same offence, only with a different label.' Also see section 6, 7 or 8 Ordinance 12 of 1956 (or common law as regard receiving stolen property.

[68] In applying the legal principles to this matter, the accused was indicted of robbery with aggravating circumstance on count 2 and convicted of the competent offence of theft. In respect of this count he is charged with money laundering in contravention of section 6 read with section 1, 7, 8, 10 and 11 of POCA. The accused in this matter is the author of theft of property that includes a motor vehicle that is the subject matter in count 4. Since he is the author of the predicate offence, he cannot be convicted under section 6. Count 4 amounts to a duplication of charges. It is therefore my finding that the State did not prove count 4 beyond a reasonable doubt against the accused.

[69] In the premises, the following verdicts have been arrived at:

- Count 1: Guilty of murder with direct intent.
- Count 2: Guilty of theft
- Count 3: Guilty of attempting to defeat or obstruct the course of justice.
- Count 4: Not guilty and acquitted.

NN Shivute
Judge

APPEARANCES:

THE STATE:

Mr Itula

Office of the Prosecutor-General

ACCUSED:

Mr Mbaeva

Mbaeva & Associates