REPORTABLE

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 06/2020

In the matter between:

THE STATE

and

SIMON SHIDUTE JEROBEAM **1st ACCUSED**

FABIAN HIPUKULUKA TANGE-OMWENE LAZARUS **2nd ACCUSED**

Neutral citation: *S v Jerobeam* (CC 06/2020) [2021] NAHCMD 548 (12 October 2022)

Coram: LIEBENBERG, J.

Heard: **8 – 12 February; 31 May; 1, 2, 4, 7, 8, 23 June; 23, 24, 25 August; 11, 12 October; 15, 17, 18, 19, 24 November 2021; 17, 18 February; 4, 5, 6, 7 April; 12, 16 September 2022.**

Delivered: **12 October 2022**

Flynote: **Criminal Procedure** – Murder – Accused indicted on two counts of murder, housebreaking with intent to rob and robbery with aggravating circumstances – Theft – Conspiracy to commit housebreaking with the intent to rob and robbery/murder in contravention of section 18(2)(*a*) of the Riotous Assemblies Act 17 of 1956 – Defeating or obstructing or attempting to defeat or obstruct the course of justice.

Circumstantial Evidence – Cumulative effect of all the circumstances to be considered – Only thereafter, the accused is entitled to the benefit of any reasonable doubt – Court must decide whether the inference of guilt is the only inference which reasonably can be drawn.

Criminal Procedure – Mutually destructive versions – Court must have good reason to accept one version over the other and not only consider the merits and demerits of the testimonies of witnesses – Court also to consider the probabilities present – Evidence must neither be assessed in isolation but be looked at holistically – *S v Radebe* 1991 (2) SACR 166 (T).

Common Purpose – Prior agreement – Not necessarily to be proven – Causal connection between act of accused and death of deceased – Conduct of one accused imputed to the other – Established principles of law restated and applied - *S v Gurirab* 2008 (1) NR 316 (SC).

Alibi – No burden of proof on the accused person to prove his alibi – Regard must be had to totality of evidence and impression of witnesses on the court – *S v Kandowa* 2013 (3) NR 729.

Summary: The accused persons are charged with six counts and pleaded not guilty on all counts. These comprise two counts of Murder (counts 1 and 2); Housebreaking with intent to rob and robbery with aggravating circumstances (count 3); Theft (count 4); Conspiracy to commit housebreaking with the intent to rob and robbery/murder in contravention of section 18(2)(*a*) of the Riotous Assemblies Act 17 of 1956 (count 5); and Defeating or obstructing or attempting to defeat or obstruct the

course of justice (count 6). Initially there were three accused but the one named Daniel absconded before the matter proceeded to trial and is still at large.

Both the accused were placed on their defence with only accused no.2 electing to give evidence. Counsel for accused no.1, acting on the instruction of his client, elected to remain silent and had no witness to call. Their warning statements made to the police were ruled admissible.

Held that on the forensic evidence viewed in context with other evidence relating to the crimes perpetrated against the deceased couple, the evidence is conclusive when making the following findings: (a) That Daniel and accused no. 2 are directly linked to a sandal which was removed from the crime scene on the day of the incident; (b) both Daniel and accused no. 2 are linked to the bodily characteristics (DNA) of the first deceased.

Held that although accused no.1 disputes his involvement in the assault on the first deceased, his plea explanation places him at the scene of the crime. Furthermore, the content of the warning statement by accused no. 1 has not been refuted and may be taken into consideration during the court's assessment of the evidence. In the statement it is evident that accused no. 1 made common cause with Daniel during the planning and commission of the crimes.

Held further that from the statement it can reasonably be inferred that Daniel acted with direct intent when murdering the first deceased. Having been in cahoots with Daniel, the same inference of intent is to be drawn against accused no.1.

Held that the evidence adduced by the state undoubtedly proves that accused no. 2, prior to the murder, expressed a desire to gain access to the deceased couple's home and to take money from a safe. Such evidence adduced by the state undoubtedly shows a direct link between Daniel, accused no.1 and accused no. 2 as regards the planning of the crime.

Held that the onus is on the state to show that the alibi defence raised by accused no. 1 is false beyond reasonable doubt and not to prove the converse ie that it is

truthful. Once the totality of evidence led by the state establishes *prima facie* proof that the alibi is false, then the onus of rebuttal shifts to the accused.

Held further that the evidence, considered in its totality, is of such nature that it proves the alibi defence not only being improbable, but false beyond reasonable doubt.

Held that whereas there is no direct evidence showing the intent of the attacker(s) at the time of the assault and the court thus having to infer the accused persons' intent from circumstantial evidence before court, one need to look at factors such as (i) where a weapon or instrument was used the nature thereof; (ii) the way it was used; (iii) the degree of violence or force applied; (iv) the part of the body aimed at; (v) the persistence of the attack; and (vi) the nature of the injuries inflicted.

Held further that when deciding whether there was a causal link (nexus) between the assault and subsequent death of the second deceased the courts have laid down certain broad principles regarding the determination of a causal link, and confirmed that two requirements must be met: (i) whether there was a factual causation; and (ii) whether there was a legal causation (*S v Daniels en 'n Ander*). In this instance regard is had to the cause of death being cerebrovascular aneurism. In the absence of evidence to the contrary, when looking at the medical history and the cause of death, the second deceased's ensuing death cannot be linked to the assault and therefore no legal causation proved.

Held that the evidence did not establish an actual break in, but that the deceased couple was robbed by their attackers who included the accused before court. Both the accused persons stand to be convicted of robbery of the property listed in the annexure to the charge only.

Held that there is no direct evidence as to who had stolen the key. The evidence proves that accused no. 2 assisted with the handling of the property which could have presented him with an opportunity to steal the key – this however was not established through evidence. He is further linked to the crime scene where the key was found. The most incriminating evidence against accused no. 2, is his admission

to a state witness about him having the key in his possession. Whereas the accused's version to the contrary has been rejected as false, the only reasonable inference to draw from these facts is that accused no. 2 knew that the key in his possession was stolen. Our law recognises the principle that theft is an ongoing crime and on that basis, accused no. 2 would be guilty of the predicate offence of theft.

Held that as for accused no.1, there is no evidence that suggests that he was involved in stealing the key. Neither has the evidence proved that theft of the key at the time was already part of their common purpose to achieve a shared unlawful purpose. Accused no.1 is therefore to be acquitted on count 4.

Held that on the charge of conspiracy the only reasonable inference to be drawn is that the accused persons and Daniel were in cahoots and conspired to aid or procure the commission of the robbery. Therefore, accused no's 1 and 2 are to be convicted on count 5.

Held that on the charge of defeating or obstructing the course of justice accused no. 1 in his warning statement admitted the elements of the offence which was not refuted. *Held that* the only reasonable inference to draw from the proven facts is that accused no. 2 indeed defeated or obstructed the course of justice by soaking his shoes and clothes in water. *Held further* on this count, both accused no's 1 and 2 are to be convicted for defeating or obstructing the course of justice.

ORDER

Count 1 – Murder: Accused no.1 – Guilty.
Accused no.2 – Guilty.

Count 2 – Murder: Accused no.1 – Not guilty, but in terms of s 258 of the Criminal Procedure Act 51 of 1977, guilty of the competent verdict of Common Assault.

Accused no.2 – Not guilty, but in terms of s 258 of the Criminal Procedure Act 51 of 1977, guilty of the competent verdict of Common Assault.

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

Accused no.1 – Not guilty, guilty of robbery with aggravating circumstances.

Accused no.2 – Not guilty, guilty of robbery with aggravating circumstances.

Count 4 – Theft: Accused no.1 – Not guilty and discharged.

Accused no.2 – Guilty.

Count 5 – Conspiracy to commit housebreaking with intent to rob and robbery (C/s 18(2)(*a*) of the Riotous Assemblies Act 17 of 1956:

Accused no.1 – Guilty.

Accused no.2 – Guilty.

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

Accused no.1 – Guilty of defeating/obstructing the course of justice.

Accused no.2 – Guilty of defeating/obstructing the course of justice.

JUDGMENT

LIEBENBERG J:

Introduction

[1] The accused persons are charged with six counts and pleaded not guilty on all counts. These comprise two counts of Murder (counts 1 and 2); Housebreaking with intent to rob and robbery with aggravating circumstances (count 3); Theft (count 4); Conspiracy to commit housebreaking with the intent to rob and robbery/murder in contravention of section 18(2)*(a)* of the Riotous Assemblies Act 17 of 1956 (count 5); and Defeating or obstructing or attempting to defeat or obstruct the course of justice (count 6). Initially there were three accused but the one named Daniel absconded before the matter proceeded to trial and is still at large.

[2] At the time of this judgment Mr *Kaurivi* appears for the first accused, Mr *Engelbrecht* for the second accused, while Mr *Iitula* represents the state.

The pleas

[3] When proceedings commenced on 10 February 2012 accused no.1's erstwhile legal representative, Mr. *Nhinda,* informed the court that his client intended on pleading guilty on two of the counts and sought an adjournment in order to draft the section 112(2) statements.[1] However, the next day, no such statement was forthcoming and he pleaded not guilty to all counts.

[4] Accused no.1 elected not to disclose his defence in the plea explanation in respect of counts 1, 2, 4 and 6. As regards count 3 he stated that on the 2nd of August 2017 he went to the house situated at Erf 33 Swakopmund where he attempted to enter the house with intent to steal money from the safe. He denies having been involved in any altercation with the deceased in count 1 (Roswitha Sieglinde Strzelecki); neither that he threatened, nor hurt, the deceased in count 2 (Siegfried Paul Helmuth Strzelecki), as alleged. He admitted that on his way out of the house, he took one camera lens.

[5] On count 5 accused no.1 explained that during the month of July 2017 he was approached by one Daniel who, allegedly employed by the Strzelecki's, proposed

[1] Section 112(2) of the Criminal Procedure Act No. 51 of 1977.

that they should steal money from the couple's safe. It was agreed that they would go during the early hours of the morning of the 2nd of August 2017 and, in view of their victims being elderly persons, there would have been no need to use weapons during the execution of their plan; neither had they intended hurting anyone in the process. He did not elaborate as to what actually happened.

[6] Turning to accused no. 2, he specifically instructed his counsel not to disclose any plea explanation in respect of all the counts.

Documentary evidence admitted into evidence by agreement

[7] In order to curtail trial proceedings a number of documents were received into evidence by agreement. These included the respective replies to the state's pre-trial memorandum; the medico-legal post-mortem examination reports and accompanying photo plans in respect of both deceased; police photo - and sketch plans; the record of court proceedings held in the lower court; and a copy of bail proceedings. The content and relevance of these documents will be referred to and considered only as far as it becomes necessary for the determination of issues in dispute.

[8] A report on a medico-legal post-mortem examination compiled by Dr Amir on the body of Roswitha Sieglinde[2] ('the female deceased') states the chief post-mortem findings as follows:[3]

- Multiple bruises in the face, neck and head
- Adhesive tape attached to the mouth
- Rope mark around the neck
- Lacerated cut wound in occipital part of scalp
- Blood in face, neck, mouth and nose
- Multiple hematomas in the brain tissue.

The cause of death was *asphyxia* due to rope tied [on the neck] and multiple head injuries.

[2] Strzelecki surname omitted.
[3] Exhibit 'C'.

[9] In addition, the accompanying photo plan as *per* photos 4 – 7 depict bruises to the left hand; while the legs of the victim are tied together at the ankles. As for the laceration in the head, this was a penetrating wound resulting in multiple hematomas of the brain.

[10] Subsequent to the passing of Siegfried Paul Helmut Strzeleki (hereinafter 'the male deceased') some days later, Dr Stroyev compiled a medico-legal post-mortem report on the body and noted the following chief post-mortem findings:[4]

- History of assault on 02.08.2017, admitted to Cottage Hospital; discharged on 03.08.2017
- On 07.08.2017 brought back to Cottage Hospital – confused, not responding in a normal manner – diagnosed middle cerebral artery stroke (CT Scan brain done – confirmed)
- Old ligature abrasion on the neck
- General visceral congestion
- Meningovascular congestion and mild brain oedema.

The cause of death was due to CVA (Cerebrovascular aneurism).

[11] The report as regards external appearance of the body and limbs further reads that haemorrhagic blisters were observed on the right upper - and forearm; as well as the left forearm. Though no evidence has been presented as to what caused these injuries, it would appear from the testimonies of the witnesses who were first at the scene that the injuries were likely sustained during the same incident that led to the death of the first deceased.

<u>The State Case</u>

Events preceding 02 August 2017

[12] Mr Christian Hall is the son in law of the deceased couple and married to their daughter Siglinde. It is common cause that in February 2017 the deceased couple relocated from Walvis Bay to the house next door to that of Mr Hall at 33 Richthofen

[4] Exhibit 'D'.

street, Swakopmund where the incident took place. It is further not in dispute that when Mr Hall effected some renovations to his house during 2015, he relied on the contractual and *ad hoc* services of accused no. 2. Also that accused no. 2 normally did not work alone, but sub-contracted workers of his choice to assist him. Accused no. 2 and his workers assisted with the relocation of the deceased persons, a process that took about four weeks to complete. When put to the witness in cross-examination that accused no.1 never worked for accused no. 2 during the renovation period at the deceased couple's house, he conceded that it was possible as he was not certain about the identity of accused no.1. To his mind it was a certain Daniel; clearly not accused no.1. This Daniel was also involved in helping the Strzelecki's during their relocation. In May, Mr Hall decided to no longer make use of the services of accused no. 2 and he was not allowed access to the premises as before. This was consequent upon a report made by their domestic worker, Daphne.

[13] According to Mr Hall, Daphne reported that accused no. 2 contacted her to say that she must remove the alarm and access remote from the house of the deceased as 'they' had a spare key to the safe, which contained money. This much Daphne confirmed during her testimony. Mr Hall said that they shared this information with the deceased persons at which stage it was discovered that cash had been taken from the safe. The key usually kept by the second deceased went missing during their relocation to Swakopmund sometime earlier. In light of Daphne's report it was decided to have the locks of all three safes changed. Mr Hall never confronted accused no. 2 with the information obtained from Daphne and simply decided to no longer employ him. According to Mr Hall the missing safe key was found lying on the floor in front of the one safe on the morning of the incident. Because the locks had been changed, no access was gained to any of the safes.

[14] Daphne !Nawases (Daphne) was employed as a domestic worker for Mrs Hall when she met accused no. 2 during the period renovation work was done on the deceased couple's house next door. In May 2017, accused no. 2 called her to set up a meeting and when they met at a bar later that day, accused no. 2 told her about him having seen a large sum of money in the safe of the second deceased when the latter took some money out during the time they were relocating to Swakopmund. Also that he then managed to steal the key to the safe. He asked of her to help him in

getting the keys/alarm remote to their house in Swakopmund. Although she initially said she would assist the accused, it bothered her to the point where she first told her brother about accused no. 2's request and later met with the Halls and told them what the accused planned on doing. She then learned that one key to the safe was already missing. During this period the accused regularly called to enquire whether she managed to get hold of the keys. This continued until she refused to take his calls whereafter they had not met again. In cross-examination she said she had a good relationship with accused no. 2 as a colleague and that they occasionally socialised together at bars.

The events of 02 August 2017

[15] Mr Johannes Pieterse worked in the construction business and the morning of 02 August 2017, at around 07h00, he was on site at the erf next to that of the deceased couple where they were building a new dwelling. At around 08h55 he was called to attend to an elderly person who seemed to have been injured. He approached the elderly man who stood at the boundary wall and when asked whether he could help, he heard a mumble about him having fallen down. He saw blood on the person. Upon asking whether he could call for help, the elderly man said that they were 'overpowered' (attacked). They entered the house together and the witness initially observed nothing untoward until the second deceased motioned him to come closer where he discovered the body of the first deceased lying on her stomach in the scullery area. He turned her over and saw adhesive tape covering her mouth (face), and nylon rope, normally used for strapping, tightly tied several times around her neck. He got a pair of scissors and cut loose the tape and rope. He tried to resuscitate her but realised that she was no longer alive as he could feel no pulse. He went outside and called for assistance. When he re-entered the house, he found the second deceased seated with tears running down his cheeks. When Mr Hall arrived, he told him what had happened and withdrew from the scene.

[16] Mr Hall and Inspector Litoto attended to the safes and observed that someone tried to dismantle the door handle of the one safe but without success. He recognised the safe key and key holder lying on the floor as the one that went missing. With the earlier report made by Daphne in mind, he directed the police to the residence of

accused no. 2, which was known to him. There they observed prints made by tackies which appeared to be that of a person running from the front entrance of the property to the accused's house. They knocked on the door and after a while accused no. 2 opened. Upon entering, Inspector Litoto found tackies submerged in a bowl of water. The accused was then taken to the scene of the crime. Mr Hall said he noticed that the first deceased's diamond ring was removed from her finger. Other than that, he did not at first miss anything.

[17] The following day Inspector Gariseb showed him a camera lens and a pair of running shoes which he identified to have been the property of the first deceased. The police later returned the cell phone of the second deceased but that of the first deceased was never recovered. As depicted in photo 32 of the photo plan, a pair of 'slip-ons' were found in a basin next to the room where the safes were.

[18] The testimony of Mrs Hall essentially recounts the frailty of her father after the attack and the passing of her mother. Also that he had a stroke while in frail care and that he died on 10 August 2017. Nothing further turns on her evidence.

[19] Mr Fillemon Shikongo, employed with Emed Rescue as an intermediate life support paramedic and his colleague, Ms Victoria Ithete, attended the crime scene where they met with the second deceased who appeared to be in shock. After attending to a laceration on his left forearm and monitoring his vitals, he was transferred to the hospital by ambulance. They found the first deceased lying on her back in a pool of blood but having found no life movement on the body, she was declared dead. These witnesses played no further part in the events of that day.

The Police investigation

[20] Sergeant Kandjimi of the Crime Intelligence Division (CID) at Swakopmund visited the crime scene and observed shoe imprints at the main gate of two persons leaving the house which were pointed out to him by a colleague. These prints he described as 'diamond shaped' made by Adidas sandals. During an interview with the gardener[5] working at the said house, he mentioned the names of Lazarus and

[5] Sakaria Ngwedha.

Daniel. Sgt Kandjimi learned that Lazarus was already apprehended and the gardener (Sakaria) then accompanied them to the DRC informal settlement to point out the residence of Daniel. According to Sgt Kandjimi he observed the same two sets of shoeprints in front of the shack, pointed out to be that of Daniel. Upon receiving further information from a neighbour regarding the whereabouts of Daniel, they set out looking for him. Reacting on a report about a person walking next to the railway line, Sgt Kandjimi, with the help of his colleagues, apprehended this person who was then arrested by Chief Inspector Litota. It turned out to be Daniel. After retrieving his bag with belongings from the taxi rank, they proceeded to their offices.

[21] Sgt Kandjimi testified that upon Daniel's arrest he observed blood stains on his jersey and shorts. In the bag they found a remote, a Huawei cell phone and wallet. His explanation as to how he came in possession of these items was that it had been taken from the victims' house. Also that he was with one Simon and offered to take the police to this person's residence. The officer did not form part of the investigating team beyond what is set out above.

[22] Chief Inspector Litota from the CID branch Swakopmund was involved at the early stage of the investigation and also obtained a warning statement from accused no.1 on 3 August 2017, one day after the incident. He confirmed having met with Mr Hall at the crime scene and the report made about a certain Lazarus. Before their departure in search of Lazarus C/Insp Litota checked for shoeprints and found three sets of shoeprints which he described as (a) tackies (diamond shaped); (b) Adidas sandals; and (c) those made by tackies but was unable to describe the imprint. Directed by Mr Hall and accompanied by Sgt Immanuel they proceeded to Oketuweni informal settlement to the house of Lazarus.

[23] In the yard C/Insp Litota observed diamond shaped shoeprints as it entered the yard. He followed these leading to the back of the shack and out of the yard towards other nearby shacks. He then joined Sgt Immanuel and Mr Hall standing with a person, identified as Lazarus (accused no. 2). Sgt Immanuel communicated with accused no. 2 in the Oshiwambo language and after identifying themselves as police officers, he explained the purpose of their visit and sought permission to search the house. Accused no. 2 gave permission and upon entry C/Insp Litota found a white

pair of trousers and tackies soaked in a bowl of water. They seized these for possible evidence of blood stains and upon looking at the soles of the shoes, C/Insp Litota observed that the prints were diamond shaped and similar to the ones they had seen earlier. There were however no distinctive mark(s) on the soles itself. C/Insp Litota then arrested accused no. 2 and explained his rights to him which were interpreted by Sgt Immanuel. It is common cause that none of the alleged stolen items were either found on the person of accused no. 2 or at his home. They went to their offices with the accused where after C/Insp Litota and Mr Hall returned to the crime scene. There he met with the gardener Sakaria Ngwedha (Sakaria) who was on the premises during the incident and he was taken in for questioning as a possible suspect. Without having seen Sakaria at the offices, C/Insp Litota asked accused no. 2 whether he knew such person which he confirmed. Sgt Immanuel then reported that Sakaria mentioned the name of Daniel and was willing to direct the police to the latter's residence.

[24] Sakaria directed them to a shack in the DRC informal settlement where C/Insp Litota found a padlock on the door and observed Adidas shoeprints entering and exiting the shack. Armed with information they received from the neighbour, they proceeded to the home of Daniel's former girlfriend and she established contact with him by cell phone. On their way to the office, this lady pointed out Daniel walking and he was then arrested. When Daniel was brought to him at the office, he was wearing shorts (with visible bloodspots), Adidas sandals and a jacket. Daniel then mentioned the name of Simon Shidute whereafter instructions were given to look for this person. On 03 August 2017 C/Insp Litota learned that this person (accused no. 1) was arrested.

[25] Members of the Serious Crime Unit took over the investigation and, besides obtaining a warning statement from accused no 1, C/Insp Litota had no further part in the investigation. Despite objections having been raised by accused no. 1 as to the admissibility of the warning statement into evidence, the court ruled the statement admissible after evidence was heard from both sides.

[26] In view of the detailed explanation given by the accused and to place same in context with the rest of the evidence, it seems necessary to quote the statement in full. It reads (*verbatim*):

'Last week Daniel called me that he want to tell me something important so I have to go to his ghetto. At his [ghetto] Daniel told me that he saw a lot [of] money at his boss house. On Tuesday 01/08/2017 Daniel came to my ghetto and we decided the day to go to his boss house that we the next day on Wednesday 02/08/2017 we will go. On Wednesday around 04h00 in the morning I woke up and I went to Daniel's house or ghetto. Before left to Daniel Boss House Daniel took a [rope] like built he carring it. +- 5h00 we arrived at Daniel's Boss house. We claim the whole jump inside the yard from the site where the people was busy construction there we hide in the yard.

We hid +- 2 hours. While we were hiding I saw the garden man was raking in the yard but he did not see us. While we were hiding the old woman came and opened the door of the house. I and Daniel immediately grabbed the old woman for her not to come out of the house. We pushed her back in the house, I was holding her on the arms and Daniel was busy taking [rope] then when we put her down he tied her first on the arms then when the old woman started scream Daniel took out cello tape try to seal the woman on the mouth he could not succeed then he decide to take [rope] and put around her neck. Daniel was holding that [rope] in the neck +- 2 to 3 minutes then I saw old woman got weak no more moving. Then I stood up and went into the house for the old man and to grab the old man also not to see what we were busy with. I found the old man in the toilet sitting then I grab him on his arm. Daniel did not do anything. I release him on the hands and I pick up [clothes] which was around then I put on his mouth then I tied. While I was there Daniel left and told me that he going to look for safe keys in few minutes and I also followed Daniel I left the old man in the toilet then I found Daniel in the room where the safe is. Daniel was trying to open the safe but he failed to open because the key could not open the safe. Then I told Daniel that we must leave the place. Before we left I pick up camera lences in the sitting room which on the sofa. Then Daniel went and look for the house key to the gate. We [passed] through two exit and we went to the beach to [wash] our hands and also our clothes. While we are walk to go to the beach I saw Daniel was having remote and cell phone. After washing our hands we run back DRC whereby we separated everyone go to his house or ghetto.'

[27] I pause to observe that reference by accused no.1 and Daniel having entered the backyard of the deceased couple's house is consistent with the evidence given

by Sgt Shivute who testified about his earlier observation in the backyard of two sets of different shoeprints, though he was unable to describe these.

[28] The evidence of Sgt Immanuel as regards the events leading up to the arrest of accused no. 2 corroborates that of C/Insp Litota in material respects. He explained how Mr Hall led them to the house of accused no. 2 and that similar shoeprints earlier observed at the crime scene were also seen at this house. Also that Mr Hall positively identified accused no. 2 as being Lazarus; that he was informed of the nature of the investigation; and explained to him his rights. He confirmed having acted as an interpreter for C/Insp Litota who was leading the investigation at that stage. As regards the white shoes (with diamond pattern on the soles) and trousers found soaked in water, accused no. 2 explained that he had put them there the previous afternoon. The shoes were seized and handed over to W/O Gariseb, the investigating officer. C/insp Litota gave instructions that accused no. 2 must be questioned and after Sgt Immanuel again explained the accused's rights to him and he indicated that he understood same, he responded that he had nothing to hide.

[29] During the follow-up interview accused no. 2 explained that he suspected that Daniel could have committed the offences under investigation as Daniel had called him during the previous weeks and mentioned about him having seen money inside the safe when opened by the first deceased. According to Daniel, this happened when they were still doing renovations on the house. He asked that accused no. 2 must assist him to steal the money but he did not take Daniel to be serious and considered his remark as a joke. This however changed when Daniel during the following days kept on sending him messages asking when they could act on the plan. He said he pointed out to Daniel that the owners did not allow persons to enter through the main entrance but, according to Daniel, they would gain entry through the roof. Because of Daniel's insistence, accused no. 2 agreed to go along with the plan but silently knew he would not go along in robbing the elderly couple – he just wanted to shake off Daniel. He further suspected that Daniel might get assistance from Sakeus, the gardener. Accused no. 2 further said that he received a greeting message from Daniel on the 1st of August, but that he did not reply on it. He further disputed having been at the house of the victims on the day of the incident.

[30] With regards to his earlier statement to the police about him having placed his shoes in water the previous day, he changed that version to say that it was not him, but his girlfriend who had done so as he found the shoes already submerged in water upon his return to the shack. Sgt Immanuel there after conveyed accused no. 2's narrative to C/insp Litota and the possible involvement of Daniel and Sakeus.

[31] In cross-examination Sgt Immanuel elaborated on the shoeprints and said the ones observed at the shack of accused no. 2 corresponded with what he had seen at the front of the house of the victims. Although his evidence about accused no. 2 starting to shiver after he was informed of the purpose of the police visit was challenged, the witness maintained his position on this point and further denied counsel's contention that the accused was not informed of his rights. As for the cell phone contact between Daniel and accused no. 2, as testified on by the witness, this much was disputed by the accused during cross-examination.

[32] On 04 August 2017 a warning statement was taken from accused no.2 by (then) Sgt Gariseb, the admissibility of which was disputed. The court ordered a trial-within-a-trial and after evidence was heard, the warning statement of accused no. 2 was ruled admissible and admitted into evidence. In summary, the statement amounts to the following:

During June 2017 Daniel called to say that he saw money in the safe at 'Ouma's' place (first deceased) and that he saw her placing the key (of the safe) in her handbag. They discussed over the phone how they could get hold of the key and get hold of the money. It was agreed that they would ask the Damara speaking housekeeper to steal the key as they did not have access to the house. The next day he called the housekeeper in connection with the safe's key and she gave him the said key after four days. He called Daniel and gave him the key after a week had lapsed. Daniel was then dismissed and accused no. 2 was no longer working at the Strzelecki residence. He then informed Daniel that there was no way in which they could steal the money from the safe. The plan they had (to steal the money from the safe) then ended and upon his arrest on 04 August 2017 he was informed by the police that 'Ouma' was killed.

[33] Warrant Officer Gariseb is the investigating officer and attended the crime scene on the day of the incident. He testified about his observations regarding the body of a deceased female covered in blood, lying on the kitchen floor. It corroborates the testimony of Mr Pieterse and need not be repeated. As regards the two safes, he found the key of the one safe stuck in the lock while the handles were broken. He was introduced to the gardener, Sakaria, who was taken in for questioning but released later. In the backyard he observed three sets of shoeprints, similar to prints seen at the front of the house. As the investigating officer, he was responsible for the registering and safekeeping of exhibits seized during the investigation and prepared same for forensic analysis. During 2019 he learned about Daniel and accused no. 2's escape from the Swakopmund police holding cells after cutting through the bars. Though Daniel is still at large, accused no. 2 was rearrested the following day.

[34] In cross-examination he went on to say that the only corresponding shoeprints found at the scene of crime were those of accused no. 2's tackies. According to him, the only evidence that links accused no.1 to the scene is the camera lens that was positively identified by the family. When put to the witness that Daniel had given the camera lens to accused no.1, this was disputed, based on the explanation given to C/Insp Litota that accused no.1 admitted having taken it from the house. I pause to observe that, in light of accused no.1 not having testified in his defence, the instruction given to his counsel carries no evidential weight. During the investigation the witness obtained a call register printout from the service provider (MTC) which confirmed cell phone contact between accused no. 2 and Daphne from July to August 2017. The records further showed that there was no contact between Daniel and Daphne during the mentioned period.

[35] Chief Inspector Skrywer is attached to the Scene of Crime Sub-Division in the Erongo Region and his involvement in this matter mainly concerns the safekeeping of exhibits brought to their office by the investigating officer and the transfer thereof to the National Forensic Science Institute (NFSI) laboratory in Windhoek. It is his testimony that all procedures were followed when the exhibits were brought to their office; once satisfied that the exhibits were still sealed in forensic exhibit bags, they were registered and kept in the store room. After the investigating officer completed

the required application form[6] C/Insp Skrywer personally transferred the exhibits and accompanying documentation to the NFSI for examination.

[36] The evidence of Sgt Murorua turns on the collection of DNA samples from the body of Sieglinde Strzelecki on 03 August 2017 prior to an autopsy performed on the body. The usual procedures as regards packing, registering and completion of application forms for examination by the NFSI were followed and the exhibits were transferred to the NFSI for forensic examination.

[37] By agreement between the state and the defence, a NFSI report[7] and an affidavit[8] were handed into evidence. The report[9] includes the respective application forms and accompanying exhibits as depicted in a corresponding photo plan. The affidavit, attested to by Ann-Angelique Lukas, a Forensic Scientist at the Namibian Police Forensic Science Institute (NPFSI)[10] in the Genetic Section, lists the exhibits subjected to autosomal DNA analysis and findings made in respect thereof. Given the sheer volume and detailed exposition of findings made in respect of each of the exhibits analysed and same not being disputed, I do not intend on dealing with these findings in any detail, except where it concerns the accused persons or where it becomes necessary for the determination of allegations contained in the indictment.

[38] At the outset it should be noted that in the report reference is made to three accused persons, with Daniel being referenced as accused no.1, while the accused before court (accused no's 1 and 2) are cited as accused no. 2 and accused no. 3, respectively. Where reference is made in the report to profiles designated as 'Unknown female-1' and 'Unknown male-1', it relates to the two victims, namely Roswitha Sieglinde and Siegfried Paul Helmuth Strzelecki (first and second deceased).

[39] The gist of the report can be summarised as follows:

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[6] Scientific Examination Application Form.
[7] Exhibit 'P-1'.
[8] Exhibit 'P-2'.
[9] Report 1683/2017/G-R1.
[10] Formerly the NFSI.

(a) The inside of the left shoe of a pair of red slip-ons (Exhibit 'O') found in the hand basin of the bathroom of the victims' residence[11] yielded a partial mixed profile from at least three individuals of which Daniel cannot be excluded as a possible major contributor to the said profile (NPFSI Ref: Q022-4-2021).[12] The right shoe of the same slip-ons on the inside also yielded a mixed profile of at least three individuals of which Daniel cannot be excluded as a major contributor and the first deceased as a possible middle contributor to the said profile (NPFSI Ref: Q023-4-2021).[13]

(b) The sandal of the left foot of a pair of Adidas sandals (Exhibit 'C') identified to have belonged to the first deceased yielded a mixed profile from at least three individuals of which Daniel cannot be excluded as a possible major contributor to the said profile (NPFSI Ref: Q034-4-2021).[14] The sandal of the right foot yielded a mixed profile from at least three individuals of which Daniel cannot be excluded as a possible major contributor, while accused no. 2 cannot be excluded as a possible middle contributor to the said profile (NPFSI Ref: Q035-4-2021).[15]

(c) With regards to shorts (Exhibit 'B#1') and a jacket (Exhibit 'B#2') of Daniel, both yielded a mixed profile from at least three individuals of which Daniel cannot be excluded as the major contributor and the first deceased as a possible major and middle contributor to the said profile (NPFSI Ref: Q041-4-2021; Q042-4-2021 and Q043-4-2021).[16]

[40] When the above forensic findings are viewed in context with other evidence relating to the crimes perpetrated on 02 August 2017 against the deceased couple, the evidence is conclusive when making the following findings: (a) That Daniel and accused no. 2 are directly linked to an Adidas sandal which was removed from the crime scene on the day of the incident; (b) both Daniel and accused no. 2 are linked to the bodily characteristics (DNA) of the first deceased.

[41] That is as far as the evidence for the state goes.

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[11] Exhibit 'E' photo no's 30 - 32.
[12] Report para 5.15.1.1
[13] Para 5.16.1.1 and para 5.16.1.2.
[14] Para 5.26.1.1.
[15] Para 5.27.1.1 and para 5.27.1.2.
[16] Paras 5.33; 5.34 and 5.35.

The Defence Case

[42] Both the accused were placed on their defence with only accused no. 2 electing to give evidence. Counsel for accused no.1, acting on the instruction of his client, elected to remain silent and had no witness to call. I turn next to summarise the evidence of accused no. 2.

[43] Fabian Lazarus (accused no. 2), claims to have only met accused no.1 during their first court appearance. As for Daniel, he worked for accused no.2 during the period when contracted by Mr Hall to build the house of his in-laws during 2015. Upon finishing work in May 2017, he handed over the keys of the house to Mr Hall. He, Daniel and Sakeus (the gardener) assisted with the deceased couple's relocation from Walvis Bay to Swakopmund. Daphne worked for the Hall family at the time and was a friend of accused no. 2's girlfriend by the name of Beauty. Accused no. 2 said he and Daniel continued with paving done at the said house until the end of May of that year, when Mr Hall recommended him to his friend Jacky and accused no. 2 started working for the latter and never returned to the house of the deceased couple. Mr Hall however disputed that he knows a person going by the name of Jacky or that he recommended the accused to such person for work.

[44] With regards to the alleged stealing of the key to a safe belonging to the deceased, accused no. 2 disputes having done so and said he was unaware of the contents of any safe, except for the one from which firearms were removed during the relocation. He confirmed having had Daphne's cell phone number which she gave to him when he asked for it, as he intended proposing her. Although he confirmed Daphne's evidence that he met up with her at a place called Peace Garden for a beer, he disputed having asked her for any remote control or that he told her about him being in possession of a safe key; neither that he called her to enquire when the couple would leave for the farm.

[45] On 02 August 2017, the day of his arrest, he was woken by a knock on the door and when he opened, Mr Hall and two persons, whom he then learned were police officers, were at the door. He was informed of the robbery and murder that

took place at Mr Hall's in-laws and, upon their request, granted them permission to search his place. In a basin they found a pair of white tackies, one trouser and a T-shirt soaked in water. The reason for this, as explained by him, was because they got dirty when he went to the sea. I pause to observe that in cross-examination he changed course and said the tackies did not actually get dirty whilst being at the beach (sea), but when he visited a bar during the evening. The police only seized the shoes whereafter he accompanied them to the police station.

[46] As regards his whereabouts during the night of 01 – 02 August, he said he was at a bar situated down the street where he lives and arrived home at around 22h00 where he remained until the arrival of the police. During Sgt Immanuel's questioning, he confirmed raising the possible involvement of Daniel who had earlier joked to him about money in a safe. He said Daniel elaborated saying that, one day whilst in Swakopmund, he was next to the 'old lady' (first deceased) when she opened the safe and he saw money inside. Besides a text message which was a mere greeting he received from Daniel on 01 August, he had no further contact with him.

[47] Pertaining to the Adidas sandals, accused no. 2 at first said he only saw them in a box when the belongings of the deceased were moved from Walvis Bay and then added that he had packed them in the box. He has no knowledge as to how they came into Daniel's possession when found with him upon his arrest. Neither did he meet with Daniel during the period of 01 – 02 August 2017. He therefore disputes all the allegations contained in the charges preferred against him.

[48] In reaction to Daphne's incriminating evidence, accused no. 2 said that the reason for this was because of an incident that took place one evening when driving back from the bar where they had been drinking. Daphne was with her boyfriend in the rear seat while he and his girlfriend Beauty were seated in front. Daphne got sick and her boyfriend suddenly pulled up the handbrake. He ordered them out of the car and left them standing in the road. The following day he received a call from Daphne saying that she would do something to him that he would never forget and although they were angry at each other, he left it at that. Despite the importance and relevance of his suspicions, this was not raised with Daphne during cross-examination. No

explanation was advanced as to why not. When the court enquired as to whether the accused informed his counsel about this crucial aspect of his defence, he answered in the negative and said he only recalled it during his testimony.

[49] Under cross-examination accused no. 2 referred to an existing arrangement he had with Mr Hall to do further work for him and therefore texted him on the 1st of August to enquire whether he had bought material to do the job. Despite Mr Hall's evidence to the contrary, this was never put to him during his testimony. Mr Hall's evidence that the services of accused no. 2 was already terminated at the end of February/beginning of March and that he was not permitted onto the premises during the month of May differs markedly from the accused's version that he only handed over the keys in May. Notwithstanding, Mr Hall's evidence on this score was also left unchallenged. Equally about accused no. 2 having stayed on to lay pavers in June, which he then corrected and reverted to May. The accused's warning statement however reads that he was on site until June. These contradictions remained unexplained.

[50] Although initially indicating that the accused would be the only witness for the defence, counsel indicated to the court that, in light of the accused's testimony, they intend on calling further witnesses. With the resumption of proceedings counsel for accused no. 2 informed the court that they had no further witnesses to call and closed their case.

Evaluation of evidence

[51] Counsel on both sides in their written submissions identified and discussed principles of law which find application to this case and cited relevant case law in support of the respective arguments advanced. There is no need to rehash settled legal principles except for stating that this court is bound to give effect thereto in its assessment of the evidence.

[52] It is common cause that, besides the forensic evidence adduced and admissions made by the accused persons themselves, the state's case is entirely based on circumstantial evidence. What needs to be determined is whether, in light

of all the evidence adduced, the culpability of the accused persons were established beyond reasonable doubt.

Circumstantial evidence

[53] Although the breaking down of a body of evidence into different components is quite useful, one must guard against a tendency to focus too intently on the separate and individual parts thereof, instead of evaluating it together with the rest of the evidence. When dealing with circumstantial evidence, the Court should not approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of, whether it excludes the possibility that the explanation given by an accused, is reasonably true (*Reddy and Others*[17]). The cumulative effect of all the circumstances must be weighed together and only after this has been done, the accused is entitled to the benefit of any reasonable doubt which the court may have as to whether the inference of guilt is the only inference which reasonably can be drawn. It is trite law that the accused does not have the onus to prove his innocence; the onus is on the State to prove beyond a reasonable doubt that the accused's version is not only improbable, but that it is false beyond all reasonable doubt. Further, that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt.[18]

[54] In *Reddy* (*supra*) the remarks made in the following cases were endorsed where the following is stated at 10a-c:

'[T]he learned Judge also referred, with approval, to the remarks of De Waal JP in *R v Herbert* 1929 TPD 630 at 636 and Rumpff JA in *S v Glegg* 1973 (1) SA 34 (A) at 38H to the effect that in considering the effect of evidence, one need not be concerned with "remote and fantastic possibilities" and that it is not incumbent upon the State to eliminate every conceivable possibility that may depend upon "pure speculation". The fact that a number of inferences can be drawn from a certain fact, taken in isolation, does not mean that in every case the State, in order to discharge the onus which rests upon it, is - "obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the

[17] *S v Reddy and Others* 1996 (2) SACR 1 (A) at 8c.
[18] *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB) at 373.

face of it is incriminating." (Per Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 182G-H.) (See also *S v Rama* 1966 (2) SA 395 (A) at 401A-C, approving the remarks of Malan JA in a minority judgment in *R v Mlambo* 1957 (4) SA 727 (A) at 738A-B.)'

Mutually destructive versions

[55] In *S v Britz*[19] the following was said where the court is faced with two mutually destructive versions:

'Where a court is presented with two mutually destructive versions, it is a rule of practice that the court must have good reason for accepting one version over the other, and should not only consider the merits and demerits of the State and defence cases respectively, but also the probabilities (*S v Engelbrecht*).[20] Evidence presented by the State and the defence must neither be considered in isolation as an independent entity when assessing the credibility of the witnesses and the veracity of their versions. The approach the court must follow is to take into account the State's case and determine whether the defence's case does not establish a reasonable hypothesis. In *S v Radebe*[21] the court at 168D-E said:

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

Common purpose

[56] Where evidence has been adduced to the effect that there allegedly was a prior agreement between the accused persons individually and jointly with a former co-accused (Daniel) to commit robbery and during the actual commission thereof

[19] *S v Britz* 2018 (1) NR 97 (HC).
[20] *S v Engelbrecht* 2001 NR 224 (HC); *S v Petrus* 1995 NR 105 (HC).
[21] *S v Radebe* 1991 (2) SACR 166 (T).

they acted with common purpose, this court stands guided by the approach enunciated in *S v Gurirab*[22] where the following appears in the headnote:

'Where two or more perpetrators participate in a crime, thus necessitating the application of the doctrine of common purpose, it is not necessary to establish a causal connection between the acts of each of the participants and the ultimate outcome of the crime. (*S v Safatsa and Others* 1988 (1) SA 868 (A) at 897.)
In the present case, the court held that this statement of the law was in keeping with the state of the law in Namibia.

Furthermore, the court approved the dictum in *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705 - 706 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* 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.'

Alibi defence

[57] The court in *S v Kandowa*[23] at 732F–I applied the following dicta in *S v Malefo en Andere*[24] as to the assessment of an alibi defence: (Headnote)

'(1) [T]here is no burden of proof on the accused person to prove his alibi;
(2) if there is a reasonable possibility that the alibi of an accused person could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt;

[22] *S v Gurirab* 2008 (1) NR 316 (SC).
[23] *S v Kandowa* 2013 (3) NR 729.
[24] *S v Malefo en Andere* 1998 (1) SACR 127 (W) at 158a-e.

(3) an alibi must be assessed, having regard to the totality of the evidence and the impression of the witnesses on the court;

(4) if there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable; and

(5) the ultimate test is whether the prosecution has proved beyond reasonable doubt that the accused has committed the relevant offence and for this purpose a court may take into account the failure of an accused to testify or that the accused had raised a false alibi.' (Emphasis provided)

Application of the law to the facts

Count 1 – Murder

[58] Mr *Kaurivi* submitted on behalf of accused no.1 that the state has not proved beyond reasonable doubt that the accused had the requisite intention to kill or that it had been established that accused no.1 acted in such a way as to cause the first deceased's death intentionally.

[59] As argued by Mr *Iitula,* the state on this count relies on the warning statement of accused no.1 which was admitted into evidence and in which he described the attack on the deceased couple and subsequent robbery in some detail (para 26 above). Whereas accused no.1 did not testify in his defence and therefore did not dispute the veracity of the statement made by him, there is no basis in law for the court not to rely thereon as self-incriminating evidence against accused no.1.

[60] Accused no.1, when he pleaded not guilty to the charge of murder, elected not to make a statement indicating the basis of his defence, but did so as regards count 3 where he stands charged with housebreaking with intent to rob and robbery (with aggravating circumstances). He admits that on the same day (and incident) when the first deceased was killed, he entered the house with intent to steal money from the safe but denies any altercation with the deceased couple. He further admits that upon leaving the house he took a camera lens.

[61] Although accused no.1 disputes his involvement in the assault on the first deceased, his plea explanation at least places him at the scene of the crime. The content of the warning statement has not been refuted and may be taken into consideration during the court's assessment of the evidence.

[62] The warning statement as it stands explains his direct involvement when overpowering the first deceased with the help of Daniel. This included the tying up of her arms and when she started screaming, the attempt to cover her mouth and, when this was unsuccessful, Daniel strangled her by tying a rope around her neck, causing her death. From the accused's statement it is evident that he was not an innocent bystander; he was actively involved by grabbing and holding the first deceased when forcing her into the house where he and Daniel wrestled her to the ground and tied up her arms. He saw how Daniel strangled the deceased for about 2 – 3 minutes and did not intervene to stop Daniel, especially upon seeing the victim becoming weak up to the point where she was no longer moving. In the absence of any explanation to the contrary, the only inference to draw from these facts is that accused no.1 made common cause with Daniel when strangling the deceased and foresaw the possibility of her being killed. He clearly associated himself with Daniel's actions resulting in the victim's ensuing death.

[63] When considering the admissions by accused no.1 placing him at the scene of the crime together with his narrative to the police when recording his warning statement, the effect thereof is such that it proves beyond reasonable doubt that accused no.1 acted with common purpose when murdering the first deceased. He and Daniel planned how to force their way into the house in order to steal money from a safe and came prepared with rope/strapping material to neutralise any resistance that may be encountered in the process. It would however appear that the strangling of the first deceased was consequential upon her screaming but which Daniel silenced when strangling her with a rope around the neck, resulting in death. From Daniel's actions it can reasonably be inferred that he acted with direct intent when murdering the first deceased. Having acted in concert with Daniel, the same inference of intent is to be drawn against accused no.1. In this jurisdiction the dissenting judgment by Malan JA in *R v Mlambo* 1957 (4) SA 727 (A) has been cited with approval in this court (as well as the Supreme Court) where it reads at 738B-D:

'…if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.'

[64] I equally endorse the *dictum* stated in the preceding paragraph and find that accused no.1 acted with common purpose when committing murder of the first deceased.

[65] Next I turn to consider the legal position of accused no. 2.

[66] As already mentioned, accused no. 2 pleaded not guilty to the charge and elected not to make a statement setting out the basis of his defence on all charges preferred against him. During oral submissions the state conceded that it failed in proving beyond reasonable doubt that accused no. 2 was guilty of murder as charged in count 1. Counsel for the defence obviously agreed.

[67] As stated, where the court is faced with circumstantial evidence, the approach to the evaluation of such evidence must be holistic and not in piece-meal.

[68] The evidence of Daphne stands directly opposed to that of accused no. 2 regarding the key of the safe and the planning as to how access to the home of the deceased couple could be gained.

[69] The evidence by state witnesses firmly establishes that the key to one of the deceased couple's safes went missing since their relocation and was only retrieved on the day of the incident when found at the safes, apparently in an attempt to unlock one of the three safes. Any plans to do so was thwarted when the couple had the locks of the safes replaced after Daphne's report.

[70] Daphne's evidence directly links accused no. 2 to the safe key and implicates him in plans made to gain access to the deceased couple's house by way of the alarm remote control she was to provide him with. Daphne was certain that the accused said he had the key to the safe and her report prompted the decision to have the locks changed and Mr Hall no longer making use of accused no. 2's services. If Daphne's evidence were to be found truthful, then the actual finding of the stolen key on the scene of the crime, shows the direct involvement of accused no. 2 in planning unlawful access to the deceased couple's home.

[71] Corroboration for Daphne's version is partly to be found in accused no.2's own evidence when confirming that he had cell phone contact with her. This much was established through the call registers obtained from the service provider. Accused no. 2 further admits having met up with Daphne at the place she mentioned, but disputes having told her at the time that he has the key of the safe or that he was in need of the alarm remote control. Given their amicable relationship, accused no. 2, when asked during cross-examination what reason Daphne would have had to make a false report to her employer concerning the accused's request, came up with the explanation about the incident in his car and Daphne's phone call the next day which could be interpreted as a threat. As stated, this was new evidence which the accused had not disclosed to his legal representative or at any stage to anyone else. This was not only new evidence which had not been put to Daphne during her testimony, but also evidence that was crucial to the defence of accused no. 2. In the circumstances the accused's contradicting version should have been raised with Daphne during her testimony. Such duty is evident from *President of the Republic of South Africa v South African Rugby Football Union (SARFU)*,[25] a case often cited with approval in this Jurisdiction, where it is stated thus:

'(T)hat the institution of cross-examination not only constituted a right, it also imposed certain obligations. As a general rule it was essential, when it was intended to suggest that a witness was not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation was intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending her or his character. If a point in dispute

[25] *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 2000(1) SA 1 (CC).

was left unchallenged in cross-examination, the party calling the witness was entitled to assume that the unchallenged witness's testimony was accepted as correct. …' (Headnote)

[72] One instance where accused no. 2 could reasonably have been expected to disclose his suspicion to the police was when he gave his warning statement. However, no mention was made thereof at the time or during his evidence in chief. The only person privy thereto was himself, up until he mentioned it during cross-examination. In the absence of providing a reasonable and acceptable explanation for keeping such crucial information to himself up to the end of the trial, the belated explanation has the making of an afterthought, probably to give credence to his version over that of Daphne.

[73] Daphne was not discredited during her cross-examination by the defence and it was not suggested that her evidence was unreliable. As demonstrated, her evidence was corroborated in material respects as regards the nature and extent of the report made by accused no. 2 and is consistent with the actual robbery which took place shortly thereafter. There is thus no reason in law why her evidence should not be accepted as truthful and relied upon in the court's assessment of the evidence.

[74] On the totality of the evidence adduced and due regard being had to the merits and demerits of the state and the defence witnesses respectively, as well as the probabilities present, I have come to the conclusion that Daphne told the truth which undoubtedly proves that accused no. 2 expressed a desire to gain access to the deceased couple's home and to take money from a safe.

[75] The version of accused no. 2 is further inconsistent with that of Mr Hall, but was not fully canvassed during cross-examination. Contrary to the testimony of Mr Hall that he stopped making use of the services of accused no. 2 after Daphne's report, the accused during cross-examination stated that he had an existing arrangement to do further work for Mr Hall and called him to enquire whether he bought the material. Another contradiction in their evidence concerns the date on which the keys of the house were handed over to Mr Hall. Though it is not in dispute that accused no. 2, Daniel and Sakaria assisted with the loading of the deceased

couple's belongings to Swakopmund, it was Mr Hall's testimony that they were only called in to assist with the loading of the heavy items such as the safes. The evidence of accused no. 2 as regards him having packed the sandals of the first deceased in a box and therefore came in contact with it, was not put to Mr Hall, whose evidence is clearly to the contrary. Failing to put the accused's contradicting evidence to Mr Hall deprived him of the opportunity to specifically testify to the accused's explanation for his DNA being found on the sandal of the first deceased. In light of what is stated in the *SARFU* case (*supra*), one is entitled to accept that the unchallenged testimony of Mr Hall on this score may be accepted as correct.

[76] The cumulative effect of contradicting evidence of state witnesses who were not discredited or shown to be giving unreliable evidence, when compared to the version of accused no. 2, albeit on peripheral issues, speaks to the fact that it points out holes in the accused's version which were not satisfactory dealt with or explained when there was an opportunity or duty to do so. Inevitably, it impacts on his credibility as a witness.

[77] Despite the blunt denial by accused no. 2 of his involvement in the commission of any of the offences charged, it is not in dispute that three sets of shoeprints were observed at the scene of the crime and that the diamond shaped pattern on the soles of a pair of tackies found soaked in water at the house of accused no. 2 was similar to that observed at the crime scene. It must be emphasised that the evidence goes no further than establishing a <u>similar</u> pattern, not that it was identical. Forensic evidence to the effect that the DNA of Daniel and accused no. 2 were found on one Adidas sandal of the first deceased was neither disputed. As already observed in the summary of the evidence (para 40), Daniel and accused no. 2 are directly linked to the sandal of the first deceased which was removed from the crime scene on the day of the incident.

[78] As regards his DNA found on the sandal, accused no. 2 countered this by explaining that he handled the sandal when he assisted with the deceased couple's relocation from Walvis Bay to Swakopmund. It is common cause that accused no. 2 was indeed part of the workers who assisted with the relocation and, on the strength of his evidence, when considered in isolation, it cannot be excluded that his DNA was

transferred onto the sandal during that occasion. However, based on the rules and principles of law as stated, it would be wrong to consider (and accept as truthful) the explanation advanced by accused no. 2 in isolation and without having regard to the rest of the evidence.

[79] As regards his warning statement, accused no. 2 during his testimony did not challenge the content thereof at all, except for saying that Sergeant Gariseb preferred the explanation he got from Daphne and Daniel over his explanation and incorporated that into the statement. In the court's judgment in the trial-within-a-trial the court discussed and considered the irreconcilable grounds of objection raised and the impact it likely had on the credibility of the accused.[26] Despite the conflicting versions regarding the source of the information contained in the warning statement, it is evident that only accused no. 2 was privy to the nature and extent of the telephonic discussion between him and Daniel and that neither Daphne, nor Sergeant Gariseb, could have had such information or knew when the key was handed to Daniel. Where the statement reads that Daphne provided him with the safe key after four days, this is simply untrue when considered against Daphne's evidence. However, what the statement does show is confirmation of a plan hatched by Daniel to unlawfully gain access to the deceased couple's home and accused no. 2's willingness to assist in effecting the plan.

[80] The evidence adduced by the state undoubtedly shows a direct link between Daniel, accused no.1 and accused no. 2 as regards the planning of the crime. There further appears to be some common features as regards their going down to the beach afterwards with accused no.1 stating that he and Daniel went to wash the blood from their hands and clothes, while accused no. 2 in his evidence in chief initially said his shoes got dirty when going down to the sea but then changed course to say that it got dirty when he visited a bar the previous night and that he was not at the seaside on that day. This was in an attempt to explain why his shoes and clothes were found soaked in a basin with water on the day of the incident. No explanation was proffered on what prompted or necessitated the soaking of the tackies and clothes after returning from the bar late at night, except for saying that the tackies were dirty. As stated, it contradicts his earlier explanation that the tackies got dirty

[26] Paras 21 – 24.

when going down to the sea while the soaking of the trouser and T-shirt remained unexplained.

[81] Also for consideration is the alibi defence raised and argued by counsel for accused no. 2.

[82] Although true that accused no. 2 informed the police that he was at home with his girlfriend, Lucia Nikomeno, throughout the night until the police turned up at his place in the morning, and that this information was not followed up on during the investigation, it is not insignificant to note that at no stage during the investigation, the pre-trial proceedings or the trial itself, did the accused raise an alibi defence. Relying on the authority of *S v Mlati*[27] it was submitted on the accused's behalf that the investigating officer was duty bound to investigate the accused's alibi and should have obtained a statement from the girlfriend who would have been able to confirm or deny the accused's whereabouts at the relevant time. Also, because accused no. 2 from the onset raised an alibi, therefore, the court should accept his evidence on that point. Counsel's concluding submission is respectfully not consistent with established rules and principles of law, for reason that an alibi defence must be considered with the evidence as a whole and not in isolation.

[83] Though criticism may rightly be levelled against the police for not following up on the accused's alibi with his girlfriend, it does not consequentially translate into acceptance of the accused's alibi. However, it is a factor the court has to take into consideration in its assessment of the totality of evidence presented and not in isolation.[28] Contrary to the facts in the *Mlati* case where the appellant intensely relied on persons whom he claimed were able to corroborate his alibi defence but who could not be traced, accused no. 2 in this instance at no stage during the investigation claimed that his girlfriend would be able to corroborate his version; only that she and their child slept at his place the previous night. Mindful that there is no burden of proof on him to prove his alibi, it would appear that accused no. 2 gave little weight thereto as the accused's alibi defence was not raised or advanced in any particularity during the state case; neither that Lucia Nikomeno was a crucial witness

[27] *S v Mlati* 1984 (4) 629 (AA).
[28] *R v Hlongwane* 1959 (3) SA 337 (A) at 340H.

for the determination of the charges against him. The significance of her evidence was only highlighted by counsel for accused no. 2 during his closing submissions.

[84] It is my understanding of the law that the onus is on the state to show that an alibi defence raised by the accused is false beyond reasonable doubt and not to prove the converse ie that it is truthful. Once the totality of evidence led by the state establishes *prima facie* proof that the alibi is false, then the onus of rebuttal shifts to the accused. In the present instance it is only the accused's bold assertion that he had not left his home since his return from the bar the previous night at 22h00 until the police arrived in the morning. His version therefore stands alone and uncorroborated.

[85] In answering the question whether the state has succeeded in proving that the alibi raised by accused no. 2 is false, regard is had to the totality of the evidence adduced and also the court's impression of the witnesses (including the accused) and the veracity of their respective versions. As pointed out above, the unsupported exculpatory explanation proffered by accused no. 2 is not only contradicted in material respects by witnesses found to be credible, but is also flawed by inconsistencies which remained unexplained and, inevitably, impacts on the credibility of the accused.

[86] The cumulative effect of accused no. 2's expression of intent to assist Daniel in gaining access to the home where a robbery and murder were subsequently committed; DNA evidence linking Daniel and accused no. 2 jointly to the crime scene during the commission of the crimes charged; the accused's tackies found shortly after the incident soaked in a basin of water bearing a similar pattern on the soles to one of three sets of imprints found at the scene of crime; and the accused's contradicting and unsatisfactory explanations on these issues, in my view, renders accused no. 2's asserted alibi a fallacy.

[87] Consequently, I am satisfied that the evidence, considered in its totality, is of such nature that it proves the alibi defence not only improbable, but false beyond

reasonable doubt. Having come to this conclusion, the *dictum* enunciated in *S v Shabalala*[29] find application where stated at 751B-:

'As was pointed out, however, in *S v Mtsweni* 1985 (1) SA 590 (A), caution must be exercised in attaching too much weight to the fact of an accused's evidence being untruthful. An innocent person may falsely deny certain facts because he fears that to admit them would be to imperil himself (*S v Dladla* 1980 (1) SA 526 (A) at 530D). Nevertheless, it is a factor of significance because appellant's evidence, in support of his alibi, having been rejected, he is in the same position as if he had given no evidence on the merits (*R v Dhlomo* 1961 (1) PH H54 (A); *R v Dladla and Others* 1962 (1) SA 307 (A) at 311D - E).' (Emphasis provided)

[88] When applying these principles to the facts and circumstances on the murder charged in count 1, the following have been established beyond reasonable doubt: (i) The fact that accused no. 2, prior to the commission of the murder admitted to being in possession of a safe key which inspired the robbery; (ii) the planning and joining of forces between Daniel and accused no. 2 as to how access to the deceased couple's home could be gained;(iii) forensic evidence (DNA) which, time wise, links accused no. 2 with Daniel to the actual robbery and the killing of the first deceased; and (iv) three sets of shoeprints found at the crime scene being indicative of the number of persons involved.

[89] Despite the incriminating evidence suggestive of accused no. 2's involvement and the court having rejected his alibi, the elements of murder must still be proved beyond reasonable doubt. In the absence of direct evidence to that effect, regard must be had to relevant circumstantial evidence and whether, on the totality thereof, it could reasonably be inferred that accused no. 2 committed the said crimes; either acting in person or with a common purpose where the unlawful actions of others could be attributed to him in circumstances where such actions must have been foreseen and therefore, by inference, were foreseen as part of the general plan.[30]

[90] On the strength of the proven facts by the state and in the absence of evidence to the contrary, regard also being had to the admissions by accused no.1 as per his warning statement, it could with reasonable safety be inferred that Daniel,

[29] *S v Shabalala* 1986 (4) SA 734 (A).
[30] *S v Toubie* 2004 (1) SACR 530 (W) at 549D.

together with accused no's 1 and 2, were at the victims' home when the couple was robbed and the first deceased murdered. Also evident from accused no1's statement and the photo plan of the crime scene, is that severe force was used to overpower the couple and which culminated in the death of the first deceased.

[91] Despite submissions to the contrary by counsel for the defence, it would be naïve to think that the common purpose of Daniel and the accused persons was merely to rob, and that alone. Each one of them must have foreseen and therefore, by inference, did foresee that they were likely to meet resistance which they knew they had to overcome in order to effect the robbery. This indeed happened according to accused no.1's statement and although it appears that their initial intent was only to tie up the first deceased, all changed when she started screaming. Based on the evidence that she was strangled to death with a piece of rope or strapping by Daniel and there being no evidence to the contrary, the only reasonable inference to reach is that her attacker had the intent to silence the victim by strangling her.[31] Whereas the use of physical force against their victims was foreseen, it may further be inferred that, in light of the vulnerability of the elderly victims and the degree of force used to neutralise any resistance and alarm raised during the attack, the accused persons must equally have foreseen and, by inference, did foresee that their actions would result in death and associated themselves with that possibility.

[92] The facts further established that Daniel and the two accused acted with common purpose during the commission of these crimes. When applying the law as stated above to the present facts, I am convinced that the state proved beyond reasonable doubt that both accused no's 1 and 2 are guilty of murdering the victim in count 1, Roswitha Strzelecki.

[93] I turn next to consider the evidence adduced on count 2 where the accused stand charged with murdering the second deceased, Siegfried Strzelecki.

Count 2 – Murder

[31] *R v Blom* 1939 AD 188 at 202-3.

[94] The question that must be answered is whether there is a causal link between the assault perpetrated on the second deceased during the robbery and his subsequent death. In this regard the court in *The State v Jamen Gaoseb and Another*[32] stated the following at para 21:

'[21] I now turn to consider whether there is a causal link (*nexus*) between the assault and subsequent death of the deceased. This is generally referred to as 'causation'. In materially defined crimes like murder and culpable homicide, the State must prove beyond reasonable doubt that there is a causal link between the accused's act and the prohibited situation i.e. his victim's death. The courts have laid down certain broad principles regarding the determination of a causal link, and confirmed that two requirements must be met: (i) whether there was a factual causation; and (ii) whether there was a legal causation (*S v Daniels en 'n Ander*).[33]

[22] In order to establish whether an accused person's act is a factual cause of the deceased's death in a specific case, all the relevant facts and circumstances of that case must be investigated, and the court must decide, with the aid of it's own knowledge and experience, whether the deceased's death flowed from the accused's conduct. Once concluded that there is indeed a factual cause of the situation (death), it is useful to apply a formula known as *conditio sine qua non*, to check whether the conclusion reached, is correct. This formula requires answering the question: what would have happened if the accused person's conduct had not taken place; would the result (death) nevertheless ensue? It must be remembered that this is a checking formula or theory, and not a test. In *Snyman: Criminal Law*[34] the learned author says:

"One first decides on the strength of all the facts whether the conduct is the cause of Y's death, and only after concluding that it is, does one declare that the conduct was a conditio sine qua non of death. One cannot determine whether the conduct is a conditio sine qua non of the result before deciding that there is a causal connection."

[23] It would obviously require thorough investigation to reveal all the facts relevant, and through one's (own) knowledge and experience, this would lead one to conclude that one situation flows from another.'

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[32] *S v Jamen Gaoseb and Another* Case No. CC 19/2010 (delivered on 22 February 2011).
[33] *S v Daniels en 'n Ander* 1983 (3) SA 275 (A).
[34] CR Snyman: *Criminal Law* Fourth Edition at 77.

[95] In the present matter the following facts are common cause: The second deceased was physically overpowered during the robbery which constituted an assault. From the medical report[35] and what can be observed from the photos depicting the injuries inflicted,[36] external injuries were present in the form of ligature abrasion on the neck and haemorrhagic blisters on both arms. Whereas there is no direct evidence showing the intent of the attacker(s) at the time of the assault and the court thus having to infer the accused persons' intent from circumstantial evidence before court, one needs to look at factors such as (i) where a weapon or instrument was used the nature thereof; (ii) the way it was used; (iii) the degree of violence or force applied; (iv) the part of the body aimed at; (v) the persistence of the attack; and (vi) the nature of the injuries inflicted.[37]

[96] The visible injuries inflicted on the person of the second deceased is consistent with the statement of accused no.1 that he was grabbed and held down while a cloth was tied over his mouth. Guided by the relevant factors listed in the preceding paragraph, the only reasonable inference to be drawn from these facts is that the attacker(s) did not act with intent to kill or cause grievous bodily harm. In my considered view their actions amounted to nothing more than common assault. Thus, on the evidence the first requisite of a factual causation has been established.

[97] When deciding whether there was a causal link (*nexus*) between the assault and subsequent death of the second deceased, regard is had to the cause of death noted in the post-mortem report as CVA (Cerebrovascular aneurism). The second deceased was hospitalised for observation that same day and discharged the next day. On 07 August 2017 he was again hospitalised and died three days later. In the absence of evidence to the contrary, when looking at the medical history and the cause of death, it would appear that the second deceased's ensuing death cannot be linked to the assault. Hence, there was no legal causation proved.

[98] Although the offence of murder was not proved, the facts proved an assault and, relying on the competent verdict provided for in s 258(*e*) of the Criminal

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[35] Report on Medico-Legal Post Mortem Examination – Exhibit 'D'.
[36] Photo Plan – Exhibit 'F'.
[37] C R Snyman *Criminal Law* (Six edition) at 453.

Procedure Act 51 of 1977, both accused no's 1 and 2 stand to be convicted of common assault on count 2.

Count 3 - Housebreaking with intent to rob and robbery with aggravating circumstances (as defined in section 1 of Act 51 of 1977)

[99] Despite the allegations made in the charge which reads that 'the accused did unlawfully and intentionally attempt to break open a door and/or attempt to open a door and enter into the house …', the evidence before court did not prove same. The only evidence on how access was gained into the house is to be found in the statement of accused no.1 and his explanation is that first deceased was grabbed when leaving through the back door and was then forcefully pushed back inside. These actions do not satisfy the definition of 'housebreaking' in that there was no breaking into the structure (the house). In the context of the offence, 'breaking' consists of the removal or displacement of any obstacle which bars entry to the structure and which forms part of the structure itself.[38] Consequently, the first leg of the crime of housebreaking with intent to rob has not been proved.

[100] Turning to the second leg, the offence of robbery *inter alia* consists in theft of property by unlawfully and intentionally using violence to take the property from someone else.

[101] Based on the evidence adduced, there is overwhelming evidence showing that the deceased couple were robbed by their attackers who included the accused before court. On this count both the accused persons stand to be convicted of robbery of the property listed in the annexure to the charge.

Count 4 – Theft

[102] On this count both the accused stand charged with theft of a safe key, the property of the deceased couple, committed during the period January – June 2017.

[38] Snyman (*supra*) at 547.

[103] The evidence of the state witnesses is that the one safe key went missing during the time the deceased couple relocated to Swakopmund. There is no direct evidence as to who had stolen the key. Notwithstanding, the evidence proves that accused no. 2 assisted with the handling of the property which could have presented him with an opportunity to steal the key – however this was not established through evidence. He is further linked to the crime scene where the key was found. The most incriminating evidence against accused no. 2, however, came from Daphne who testified about the accused's admission about him having the key in his possession. Whereas the accused's version to the contrary has been rejected as false, the only reasonable inference to draw from these facts is that accused no. 2 knew that the key in his possession was stolen. Our law recognises the principle that theft is an ongoing crime and on that basis, accused no. 2 would be guilty of the predicate offence of theft.

[104] As for accused no.1, there is no evidence that suggests that he was involved in stealing the key. Neither has the evidence proved that theft of the key at the time was already part of their common purpose to achieve a shared unlawful purpose. Accused no.1 is therefore to be acquitted on count 4.

Count 5 – Contravening section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956 – Conspiracy to commit Housebreaking with intent to rob and/or robbery (with aggravating circumstances).

[105] In this charge it is alleged that during the period January – August 2017 the accused persons unlawfully and intentionally conspired to aid or procure the commission of the crime of housebreaking with intent to rob and/or robbery by breaking into the deceased couple's house and rob them of money and other valuable items.

[106] Mr *Engelbrecht* contended that counts 3 and 5 are a 'duplication of counts' and cited as authority the matter of *S v Gaseb and Others*[39] where the Supreme Court approved the application of the two most commonly used tests when the court is called upon to determine whether or not there is a duplication of convictions and

[39] *S v Gaseb and Others* 2000 NR 139 (SC).

cited with approval these tests as summarised in the Full Bench decision of *Seibeb and Another; S v Eixab*[40] where the following appears at 256E-I:

'The two most commonly used tests are the single evidence test and the same evidence test. Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. See *R v Sabuyi* 1905 TS 170 at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences. See *Lansdown and Campbell* South African Criminal Law and Procedure vol V at 229, 230 and the cases cited. This is the same evidence test.

Both tests or one or either of them may be applied and in determining which, or whether both, should be used the Court must apply common sense and its sense of fair play. See *Lansdown and Campbell* (supra) at 228.' (Emphasis provided)

[107] When applying the afore-stated tests to the present facts it is clear that the criminal act, to wit, conspiracy in count 5 was already complete when the accused persons agreed to commit the crime set out in count 3. Even if they decided not to execute their plan, they would still be guilty of conspiracy under the Riotous Assemblies Act 17 of 1956. The commission of robbery as set out in count 3 required a different intent, distinguishable from that of conspiracy. I am accordingly satisfied that there is no merit in counsel's contention in this regard.

[108] On the strength of the statement by accused no.1, he admitted having conspired with Daniel to go to the couple's house in order to gain access and rob them of their property. This culminated in the actual commission of the crime as planned. As for accused no. 2, he equally disclosed to Daphne his intention to steal money from the deceased couple's safe. In addition, in his warning statement he mentioned about Daniel's plan to steal the money and made his intentions known to

[40] *Seibeb and Another; S v Eixab* 1997 NR 254 (HC).

assist. In the end, the evidence places him at the scene of the crime together with Daniel and accused no.1.

[109] In these circumstances the only reasonable inference to be drawn is that the accused persons and Daniel were in cahoots and conspired to aid or procure the commission of the robbery. Therefore, accused no's 1 and 2 are to be convicted on count 5.

[110] Count 6 – Defeating or obstructing or attempting to defeat or obstruct the course of justice.

[111] Mr *Kaurivi* for accused no.1 submitted that, based on his warning statement, his client cannot escape conviction on this count. The concession is proper as the accused admitted that after the robbery, he and Daniel went down to the beach to wash the blood from their hands and clothes. Their actions were clearly aimed at destroying evidence which could possibly link them with crimes committed. In this they have succeeded. The evidence therefore proved the offence of defeating or obstruction the course of justice and not merely an attempt to do so.

[112] Evidence that would incriminate accused no. 2 in the commission of the offence on this count, turns on the discovery of his tackies and some clothes soaked in water at home. The explanation given by the accused for the soaking of his shoes and clothes were already found to be false and rejected in light of the totality of the evidence presented. The question remains whether it could reasonably be inferred from the proved facts that by soaking the tackies and clothes in water the accused intended on destroying evidence that could link him with the crimes committed? The DNA examination conducted on the tackies of accused no. 2 did not yield amplifiable STR typing results.

[113] In the absence of any evidence to the contrary, I am satisfied that the only reasonable inference to draw from these facts is that accused no. 2 indeed defeated or obstructed the course of justice by soaking those items. Thus, on this count, both accused no's 1 and 2 are to be convicted for defeating or obstructing the course of justice.

Conclusion

[114] In the result, the court finds as follows:

Count 1 – Murder: Accused no.1 – Guilty.
Accused no.2 – Guilty.

Count 2 – Murder: Accused no.1 – Not guilty, but in terms of s 258 of the Criminal Procedure Act 51 of 1977, guilty of the competent verdict of Common Assault.
Accused no.2 – Not guilty, but in terms of s 258 of the Criminal Procedure Act 51 of 1977, guilty of the competent verdict of Common Assault.

Count 3 – Housebreaking with intent to rob and robbery (aggravating circumstances):
Accused no.1 – Not guilty, guilty of robbery with aggravating circumstances.
Accused no.2 – Not guilty, guilty of robbery with aggravating circumstances.

Count 4 – Theft: Accused no.1 – Not guilty and discharged.
Accused no.2 – Guilty.

Count 5 – Conspiracy to commit housebreaking with intent to rob and robbery (C/s 18(2)(*a*) of the Riotous Assemblies Act 17 of 1956:
Accused no.1 – Guilty.
Accused no.2 – Guilty.

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

Accused no.1 – Guilty of defeating/obstructing the course of justice.

Accused no.2 – Guilty of defeating/obstructing the course of justice.

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JC LIEBENBERG

JUDGE

APPEARANCES:

STATE:	T. Itula Office of the Prosecutor-General, Windhoek
ACCUSED 1:	T Kaurivi TK Kaurivi Legal Practitioners, Windhoek
ACCUSED 2:	M Engelbrecht Of Engelbrecht Legal Practitioners, Windhoek.