REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 19/2013

In the matter between:

THE STATE

and

MARCUS THOMAS **FIRST ACCUSED**

KEVAN DONEL TOWNSEND **SECOND ACCUSED**

Neutral citation: *S v Thomas* (CC 19/2013) [2023] NAHCMD 550 (6 September 2023)

Coram: LIEBENBERG J

Heard: **7, 11 & 12 November; 8 December 2014; 5 & 29 January; 25 February; 25 March; 24 April; 27 May; 25 June; 7, 20, 23, 28 & 29 July; 3 & 27 August; 23 September; 16 October; 13 November; 9 December 2015; 8 & 27 January 2016; 24 February; 23 March; 27 April; 18 May; 28 & 29 July; 29 August; 3, 4 & 19 October 2016; 24 April; 5 June; 3 & 17 July; 28 & 29 August; 10, 16 & 17 October 2017; 22 March; 23, 24, 25, 26,**

27, 30 & 31 July; 28 November 2018; 11 & 12 February; 20 March; 15 & 17 April; 6 May; 16,18 & 20 September; 1, 28, 29, 30 & 31 October; 1, 13, 14, & 15 November 2019; 10, 11, 12, 13 & 14 February 2020; 23 March 2020; 22 April 2020; 19, 26 & 27 May 2020; 7, 8, 9, 10 &11 September; 12, 13, 14, 19, 20, 21 & 22 October 2020; 8 & 23 March 2021; 13 April; 5 July; 16, 17, 18, 19, 30 & 31 August; 1, 3, 13, 14, 15, 16 & 17 September 2021; 31 January; 1, 2 & 3 February ; 8, 22 & 24 March; 14 April; 26 - 30 September; 3, 4, 5, 6 & 7 October; 7 - 11 November 2022; 17 - 21 April 2023; 8 - 10 May 2023 and 19 June 2023.

Delivered: 6 September 2023

Flynote: Evidence – Circumstantial evidence – Approach – Whether guilt of accused persons established beyond reasonable doubt – Court must consider cumulative effect of all the evidence – Right to remain silent – *Prima facie* case sufficient to translate to proof beyond reasonable doubt – Credibility and reliability of State's witnesses still to be assessed when there are discrepancies – Right to remain silent – Direct evidence – Risk thereof greater in cases where guilt is sought to be proved by inference – Doctrine of common purpose and hearsay evidence – Principles restated.

Summary: The accused persons stand charged with count 1, murder; count 2 is a charge of robbery with aggravating circumstances; counts 3, 4 and 5 relate to contraventions under the Arms and Ammunition Act 7 of 1996 for c/s 22(1) Importation of firearms (gun barrels) without a permit (count 3) alternatively, c/s 2 Possession of firearms (gun barrels) without a licence; c/s 2 Possession of a firearm without a licence (count 4); and c/s 33 Possession of ammunition (count 5). On count 6, the accused persons stand charged with the common law offence of defeating or obstructing or attempting to defeat or obstruct the course of justice. It is the State's contention that the accused persons, at all material times, acted in common purpose.

Both accused pleaded not guilty to all counts and at the close of the State's case, following the dismissal of their respective applications for discharge, elected to remain silent without disclosing the basis for their respective defence(s). Before court therefore, is only the evidence of the State's witnesses – which is circumstantial as far as counts 1 and 2 are concerned –

and the denials by either accused regarding their alleged involvement in the commission of the offences preferred against them.

Held that: Where the court is faced with circumstantial evidence, what needs to be determined is whether, in the light of the evidence as a whole, the guilt of the accused persons was established beyond reasonable doubt.

Held further that: Circumstantial evidence should not be approached upon a piece-meal basis but that the cumulative effect of all the facts must be weighed together and only thereafter, the accused is entitled to the benefit of any reasonable doubt the court may have as to whether the inference of guilt is the only reasonable inference that could be drawn from the proved facts.

Held that: Although differences and contradictions highlighted by the defence cannot be ignored during the court's assessment of the witnesses' evidence, these discrepancies, when holistically viewed, are not material and therefore fall short from discrediting any particular witness. On the contrary, what appears to be most significant is that the evidence of these witnesses is corroborative in material respects.

Held further: The hearsay rule only operates to exclude evidence which is tendered to prove the truth of what is asserted.

Held that: The question of common purpose must be considered in light of all the evidence and not in isolation. The evidence demonstrates that the accused persons jointly planned their actions and acted with common purpose when setting the scene to murder the deceased. It is therefore not necessary to establish a causal link between the acts of each of them and the outcome of the crimes committed i.e. murder and robbery.

ORDER

Count 1: Murder (direct intent) – Accused 1 & 2: Guilty.

Count 2: Robbery (with aggravating circumstances) – Accused 1 & 2: Guilty.

Count 3: Importing of firearms (barrels) without a permit (c/s 22(1) of Act 7 of 1996) – Accused 1: Guilty. Accused 2: Not guilty and discharged.

Alternative count: Possession of firearms (barrels) without a licence (c/s 2 of Act 7 of 1996) – Accused 1: Not guilty and discharged. Accused 2: Guilty.

Count 4: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996) – Accused 1 & 2: Guilty.

Count 5: Possession of ammunition (c/s 33 of Act 7 of 1996) – Accused 1 & 2: Guilty.

Count 6: Attempting to defeat or obstruct the course of justice – Accused 1: Guilty. Accused 2: Not guilty and discharged.

JUDGMENT

LIEBENBERG J:

Introduction

[1] Trial proceedings commenced in November 2014 but little progress was made due to two interlocutory rulings on the criminal capacity of accused 1, followed by numerous applications by the defence for the recusal of the presiding judge. At the same, time the court was faced with multiple withdrawals by counsel representing accused 1, which obviously procrastinated trial proceedings even further to the point where the Directorate of Legal Aid (Legal Aid) withdrew their instruction and the accused was left without counsel and had to conduct his own defence. He however refused to take part in the proceedings without a lawyer. Despite the earlier decision, Legal Aid then changed their stance where after two more counsel were instructed to represent accused 1, Mr Kanyemba being the latest.

[2] During the more than eight years it took to reach the stage where the state has rested its case, the court heard the evidence of no less than 49

witnesses during the interlocutory applications and the main trial. With the close of the state's case on 10 May 2023, both the accused applied in terms of s 174 of the Criminal Procedure Act 51 of 1977 (CPA) for their discharge on all the counts. On 19 June 2023, the court ruled against the accused and found that the state made out a *prima facie* case and placed the accused persons on their defence. Subsequent thereto, the defence informed the court, as per the instructions from their clients, that they close their case without calling any witnesses.

[3] It is against this background that the court is now required to pass judgment after a trial that took almost nine years to reach this stage.

[4] Mr Kanyemba appears for accused 1, Mr Siyomunji for accused 2, while Ms Verhoef represents the state.

The charges

[5] On count 1, the accused persons are charged with murder for the unlawful and intentional killing of André Peter Heckmaier (the deceased) on 7 January 2011, in the district of Windhoek. Count 2 is a charge of robbery with aggravating circumstances, alleged to have been committed at the time of the murder when the deceased was robbed of his cellphone and wallet containing a 100 Swiss Franc note. Counts 3, 4 and 5 relate to contraventions under the Arms and Ammunition Act 7 of 1996 for c/s 22(1) Importation of firearms (gun barrels) without a permit (count 3) alternatively, c/s 2 Possession of firearms (gun barrels) without a licence; c/s 2 Possession of a firearm without a licence (count 4); and c/s 33 Possession of ammunition (count 5). On count 6, the accused persons stand charged with the common law offence of defeating or obstructing or attempting to defeat or obstruct the course of justice.

[6] The firearms referred to in count 3, as well as the alternative thereto, relate to two 9mm pistol barrels allegedly found in possession of the accused persons whilst the firearm and ammunition described in counts 4 and 5 concern the alleged buying of a 7.65mm pistol and an unknown number of live rounds of ammunition for the said arm, with neither of the accused persons being a licence holder of such arm or ammunition. In count 6 it is alleged that

a notebook which was seized as evidence and as such an exhibit in this case, was unlawfully removed from police custody, where after, some pages were torn out and destroyed with intent to frustrate or interfere with the police investigation.

[7] The summary of substantial facts puts the allegations set out in the indictment in context, based on the following allegations: On 10 December, 2010 accused 1 entered into a bail agreement with the mother of accused 2 in New York, United States of America (USA), in terms of which accused 1 would pay US$10 000 towards the bail amount fixed in respect of accused 2, who was in police custody at the time. Subsequent to his release, the accused persons on 27 December 2010 entered Namibia via Hosea Kutako International Airport (HKIA), Windhoek. The next day they collected a package that was earlier forwarded from Finland, from the cargo agency at the airport. The package contained a firearm silencer which was in preparation of their plan to travel to Namibia in order to kill the deceased. It is further alleged that two 9mm pistol barrels were equally illegally imported into Namibia. The summary then sets out the manner in which the accused persons searched for a 9mm pistol and when unable to find one, settled for a 7.65mm pistol which was illegally acquired with ammunition. After obtaining the deceased's contact number, they wanted to meet up with him and this culminated in a lunch appointment with the accused persons. It is further alleged that the deceased was lured by the accused to a different location where he was executed by a single gunshot to the head with the firearm they had obtained. The deceased was then robbed of his property. As borne out by the summary of substantial facts, it is alleged that the accused persons planned to murder the deceased and thus acted with common purpose.

[8] The sole purpose of the summary of substantial facts is merely to inform an accused of the nature of the case he or she is facing, by setting out material facts on which the prosecution relies.[1] To this end, the accused before court were duly informed about the case they had to meet.

[1] *S v Van Vuuren* 1983 (1) SA 12 (A) at 21E.

[9] When required to plead to the charges, both accused pleaded not guilty on all counts and elected to remain silent without disclosing the basis of their defence. As the defence closed their case without leading any evidence, what is before court is only the evidence of state witnesses and the blunt denials by both the accused regarding their alleged involvement in the commission of the offences preferred against them.

The undisputed facts

[10] It is not in dispute that on 7 January 2011 between 13h00 and 14h00, the lifeless body of the 25 year old deceased was found in the driver's seat of a stationary vehicle on Gusinde Street, a *cul de sac*, in the residential area of Klein Windhoek. He was found with a single gunshot wound in the head, most likely fired from close range. During an autopsy performed on the body on 11 January 2011 by a pathologist, Dr Jaravaza, a spent projectile was found lodged in the posterior muscles on the left side of the neck and retrieved as evidence (Exh. 'JJ'). It was subsequently, by means of ballistic examination, determined that it was fired from a 7.65mm calibre arm.

[11] Both the accused in their respective replies to the state's pre-trial memorandum admit that accused 1, on 12 October 2010, entered into a bail agreement with Ms Tonya Townsend, the mother of accused 2, in the sum of US$10 000 towards the release of accused 2 on bail. At that stage accused 2 was in police custody in New York. The said bail agreement and bail bond issued in respect thereof were seized by the police during a search conducted on 9 January 2011 of the room occupied by the accused persons at the African Sky guesthouse in Windhoek.

[12] It is common cause that the accused persons, being USA nationals, were in each other's company when they arrived in Namibia on 27 December 2010 via HKIA. Up to the time of their arrest on 7 January 2011, they had stayed together and shared accommodation, initially at the Cardboard Box backpackers where after they moved over to the African Sky guesthouse. It is further not in dispute that they were in each other's company when socialising with persons they had met during their stay and when buying SIM cards from MTC, a local service provider. These SIM cards were utilised to make/receive

calls and send/receive text messages which were captured by MTC in call registers and produced into evidence. Information reflected in the call registers confirmed telephonic contact between the deceased's number and one of the SIM cards acquired by the accused persons.

[13] It is further not disputed that with their arrest on 7 January 2011, they were found in possession of cannabis which led to their arrest on the day and for which they were charged. They however deny having committed the offences charged.

Summary of evidence

[14] As borne out by e-mail communication between accused 1 and Mr Chad Wratten and Monalisa from the Cardboard Box backpackers (Exh. 'DDD'), reservations were made for two persons for 26 December 2010 until 9 January 2011. Despite knowing that they would be accommodated at the Cardboard Box backpackers, the immigration arrival forms filled out by the accused persons on their arrival on 27 December 2010, as to their physical address during their stay, reflect a different name, to wit, 'Windhoek Inn'.

[15] When checking in at the Cardboard Box backpackers, accused 1 completed the check-in register. The passport number provided by accused 1, however, differs from the passport he had at the time of his arrest. As with the wrong physical address provided, no explanation for this further discrepancy was given.

[16] It is common cause that the accused persons on that same day (27 December 2010), spoke to Donny Kock (Kock) regarding the hiring of a vehicle for the period of their stay in Namibia. The next day, accused 1 entered into a rental agreement with Kock for the use of a VW Golf sedan and presented a copy of his driver's licence and a contact number ending with -4153. Both accused were present during the deliberations with Kock where after they took possession of the said vehicle. Kock then assisted the accused persons to relocate to the African Sky guesthouse.

[17] On the day of their arrival, the accused persons met with Kobus Henri Olivier (Henri) at Primi Priati in the evening, where they enjoyed some drinks

together and socialised. The accused introduced themselves as ‘M’ (accused 1) and ‘K/Cash’ (accused 2). During the evening, enquiries were made as to whether Henri knew the deceased and how difficult it would be to acquire a firearm in Namibia. As borne out by the testimony of Henri, he managed to establish contact by means of text messages with the deceased’s mother, Birgit Heckmaier, informing her that the deceased’s two friends from the USA were in Windhoek and would like to meet up with him. Once provided with the deceased’s number, Henri passed it on to the accused. Although the impression was created by the accused persons that they were friends of the deceased, it is evident from the testimony of the deceased’s sister, Bianca Heckmaier, not to have been true as the deceased had no idea who the so-called American friends might be. It turned out in the end, that the deceased believed they were friends of a mutual friend, a certain Natali Muscat from the USA, whom he had earlier met whilst doing practical training in New York.

[18] Direct contact was established with the deceased which culminated in a lunch appointment made by the deceased with the two Americans on 7 January 2011. Mr Kanyemba’s submission during oral argument that a reasonable court, acting carefully upon the proven facts, may reasonably infer that the persons whom the deceased were to meet are the accused persons before court, is proper and consistent with the established facts.

[19] I pause to remark that counsel’s further submission that accused 1 did commit to the appointment at the Stellenbosch Restaurant but that the deceased never turned up, was ruled in the court’s earlier judgment to be a mere allegation or imputation by the accused as, at that stage, there was no evidence to substantiate his claim. In light of the accused persons having elected to close their case without leading any evidence, the position as to the veracity of the allegation remains unchanged.

[20] State witness Paulus Uukongo testified about the events of 28 December 2010 when the accused persons arrived at Leizure Cargo, based at HKIA, to collect a parcel that arrived in Namibia on 22 December 2010. The air waybill issued in respect of the parcel (Exh. ‘PPPP’) reads that one piece of ‘furniture spares’ was despatched from Helsinki, Finland, to Windhoek on

17 December 2010. The consignee's name and address is that of 'Guest Marcus Thomas' at the 'Cardboard Box Hotel', Windhoek. After the required fees and duties were paid, the content of the parcel was examined in the presence of a customs official. The witness described how accused 1 was required to open the parcel in their presence and removed a white table leg from a black bag. From inside the table leg, he pulled out a smaller black pipe, explaining that these were furniture spares. The explanation satisfied the customs official. No one besides accused 1 handled these items and there was no independent verification whether the black pipe (only partly pulled out from inside the table leg), was the only item it contained. The parcel was released into the custody of the accused persons and they left in a VW Golf.

[21] On 29 December 2010, the accused persons bought from MTC at Maerua Mall two starter packs (SIM cards) with the numbers 081 681 4153 and 081 681 4154. These were placed into two Samsung cellphones provided by the accused and Mr Glen English (English), who assisted the accused persons, activated these numbers. The phones handed to him were still in their boxes and appeared brand new. These boxes were later found and seized by the police on 9 January 2011 from their room at African Sky guesthouse and, according to the testimonies of Chief Inspector Ndikoma (Ndikoma) and Deputy Commissioner De Klerk (De Klerk), the IMEI (serial) numbers depicted on the two boxes, correspond with the IMEI numbers on the MTC printouts as regards the -4153 and -4154 numbers. The effect of this evidence is that it materially corroborates the evidence of witness English regarding the issuing of these numbers to the accused persons and which were linked up with the two Samsung cellphones provided by the accused.

[22] To further place the evidence relating to the two cellphones in context, it should be noted that during a police search of the room occupied by the accused at the guesthouse, only the phone with the -4154 number was found. According to the evidence, this was the phone accused 2 had been using. As already found in the court's earlier judgment, the call registers confirm telephonic contact between the deceased's number and the -4153 number, with the last communication between them shortly before he was murdered. Though not disputed that accused 1 used the cell phone with the -4153

number to contact the deceased with, the cellphone and SIM card could not be found during the investigation. The unexplained disappearance of this cellphone remains unanswered.

[23] As mentioned, the accused persons, already on the date of their arrival, enquired from Henri into the possibility of obtaining a firearm. What follows is the evidence of several witnesses who testified about the manner in which they assisted the accused persons to obtain a firearm.

[24] During 2010, Jerome Onesmus (Jerome), then aged 16, was employed as a casual worker at the Cheers Lounge situated near Maerua Mall. By end of December of that year, he came into contact with the two accused persons who visited the lounge one evening. During the evening accused 2 asked where he could buy cannabis and Jerome took him to a nearby seller where he bought cannabis; they smoked some of it together. They introduced themselves – the accused as 'Cash' and 'M' – and agreed to meet again the following day at the mall. After having breakfast together, they drove about while Jerome showed them around. Accused 2 then asked Jerome whether he knew of someone from whom he could buy a 9mm Glock 18 (pistol). It was decided that they should approach his cousin Simon Muliokela (Simon) who might know. When asked why he needed a gun, accused 2 replied that where he comes from, he always carries one and that it is better to be arrested having a gun than being without one. It was said that they needed the gun immediately and would pay any amount for it; also that Jerome would get something out of the deal.

[25] The three of them then proceeded to Simon who owned a car wash and whilst their car was being washed, the accused persons and Simon met up and had a talk. They exchanged cellphone numbers and Simon would call them directly. Jerome, afterwards, learned that Simon agreed to help them find a firearm. When Simon took too long, the accused persons asked Jerome to try and find someone else who could deliver the gun they were looking for. Contact was then made with Natangwe Nafuka (Mase) who, during his evidence, confirmed Jerome's version about the two Americans looking for a firearm and that he personally communicated with them by phone but, despite

all efforts, nothing came of it. The MTC printout for the -4153 number confirms contact between accused 1 and Mase on 1 January 2011.

[26] During cross-examination by defence counsel, Jerome's testimony was primarily attacked as regards the efforts made to find a gun for the accused persons. The witness was adamant that, although accused 2 mostly interacted with him, accused 1 is the one who specified the type of firearm they needed i.e. an '18 Glock'. Counsel for accused 2 pointed out discrepancies between the testimony of the witness and his witness statement and asserted that his evidence was fabricated. When considering the extent of the discrepancies referred to by counsel, it does not appear to be material to the *facta probanda* and therefore unlikely to render the witness's evidence unreliable. Moreover, where there is no rebutting evidence.

[27] During the state's case, Ms Verhoef requested the court to warn some state witnesses in terms of s 204 of the CPA, as they were likely to incriminate themselves during their testimonies. Witnesses Simon Muliokela, Stephanus Tieties, Ashley Hendriks, Gaylo Kavari and Leon van Neel were accordingly warned before giving evidence.

[28] After Simon Muliokela, on 11 November 2014, took the stand, proceedings were adjourned to allow the erstwhile legal representative of accused 1 to obtain further instructions from his client. Trial proceedings thereafter virtually came to a standstill for reasons already stated and Simon only returned to the stand some four years later.

[29] Simon confirmed that on Saturday, 1 January 2011, he came into contact with the two accused through Jerome who brought them to his house and informed him that they needed a 9mm pistol. During this meeting, accused 2, after putting on black gloves with red stripes, produced two objects from a black plastic bag which he described as 'pipes'.[2] Accused 2 further mentioned the function of these pipes. Simon then exchanged cellphone numbers with accused 2 whose number ended with the numbers -4154. It was agreed that Simon would let them know if he found the requested type of firearm. The next day (Sunday), the accused persons arrived at his house

[2] Exhibits 1 & 2 being 9mm gun barrels.

enquiring about the progress made, but left after being informed that he was unable to find such firearm. Simon then called an old school friend, Ashley Hendriks (Ashley), and enquired about someone who could sell them a 9mm pistol. Ashley later called back to say that he found someone and Simon informed the accused persons accordingly. After meeting up with Ashley later in the day, they drove to a friend's house where Gaylo Kavari (Gaylo) joined them. Gaylo took them to a house in Dorado Park where he entered a house and returned with a white plastic bag which was handed over to accused 2. After putting on a pair of gloves, he took the gun from the bag and after inspecting it, said it was a 7.65mm and not the required 9mm Glock. The accused persons insisted that they (Ashley and Gaylo) hold on to this firearm whilst they were searching for a 9mm pistol. Later that same day Ashley texted to say that they were unable to find a 9mm Glock and, when Simon informed accused 2 accordingly, he replied that they would settle for the 7.65mm pistol.

[30] In the evening, the accused persons picked up Simon from home and proceeded to a service station where they met with Ashley and Gaylo. Again accused 2 wore gloves when handling the firearm and upon discovering that there was only one live round in the magazine, he remarked that 'even the best shooter can miss with one bullet'. The deal fell through and Ashley and Gaylo were asked whether they could find more bullets.

[31] On Monday 3 January 2011, Ashley texted Simon that they got more bullets and after informing the accused persons, they picked him up and again met up with Ashley and Gaylo. The deal was finalised at the selling price of N$1000 and the pistol and ammunition were handed over. They were informed by the accused that they could only pay N$500 then, as the bank card of accused 1 had expired and had to be renewed. The balance would be paid on Wednesday 5 January 2011. When contacted on the Wednesday about the outstanding amount, Simon learned that the accused persons were in Swakopmund and would only be back in town on Friday, 7 January 2011.

[32] On the afternoon of 7 January 2011, Simon received a text message saying that they were outside his house. They were driving a white City Golf.

Simon was handed N$800 in cash of which N$500 had to go to Ashley and Gaylo. When Simon asked accused 2 what they did with the gun, he replied saying ‘you would not want to be found with a gun that had been used’ and ‘I tossed it away’. They parted ways and Simon had no further contact with the accused persons. He handed over the amount due to Ashley. He was subsequently arrested when Ashley brought the police to his house. During his testimony, he identified the silver pipes referred to during his testimony as exhibits 1 and 2 before court.

[33] In cross-examination, Simon was taken to task to explain what counsel for accused 2 described as contradictions between his testimony and the statement made to the police. He was required to give a detailed account on peripheral issues which he was unable to do. As for differences between his statement and his testimony, this, he explained by saying that his testimony was more detailed and that he could only testify as to how he remembered the events.

[34] When put to the witness by counsel that accused 2 did in fact meet up with him (Simon) for purposes of ‘hanging out with him and having a good time’, his response was that it is false. When put to him that the two accused came to Namibia on holiday to visit people he knew, the witness replied that when they had met, the accused persons said they were on tour and not to visit mutual friends of Simon.

[35] Ashley confirmed having been called by Simon enquiring about the availability of a 9mm pistol for sale. Ashley approached his neighbour Steven who knew of a person and Ashley informed Simon accordingly. Ashley arranged with Gaylo to pick up the firearm and, as agreed with Simon, they met with Simon and two persons driving a white Golf sedan. He identified the then unknown persons as the accused persons before court. Ashley, in material respects, confirmed Simon’s version as to what transpired during this meeting with the accused persons. This involves accused 2 taking a pair of black gloves from a black plastic bag with a ‘Musica’ emblem printed on the side, which he wore while inspecting the gun they brought along. Accused 2 also produced a ‘silver pipe’ which he attempted to fit to the firearm but

without success. Accused 2 said that it had to be a 9mm Glock. During his testimony, Ashley identified the silver pipe as depicted in photo 39 of the photo plan received into evidence (Exh. 'ZZZZ'). Ashley and Gaylo then returned the firearm to Steven as they were trying to find a Glock the accused persons asked for. They were unable to find one and conveyed this to Simon.

[36] After Simon called at 22h00 that evening to say that they would take the 7.65mm pistol, Ashley and Gaylo fetched it from Steven, where after they met with Simon and the accused persons at the Total service station. His testimony corroborates that of Simon as to what transpired on this occasion and that the deal did not go through as the accused persons required more rounds than the one that came with the gun. They parted ways where after Steven and Gaylo went in search of more rounds. They returned with four more rounds and Ashley contacted Simon. It was agreed that they again meet the following day, Monday, 3 January 2011, which they did. Ashley and Gaylo again met with Simon in the company of the two accused and the transaction was finalised. N$500 was handed to Ashley and it was agreed that the remaining N$500 would be paid later as accused 1's bank card had expired. He received the outstanding amount from Simon on Friday, 7 January 2011. There is no material discrepancy between the evidence of Ashley and that of Simon. When questioned about giving three statements to the police, he explained what further information was requested by the police and that he obliged.

[37] Stephanus Tieties (Steven) confirmed that he was approached by Ashley, asking about someone selling a 9mm pistol. Steven then met up with a certain Kumalo later that day who took him to another person who handed them a 7.65mm pistol. He contacted Ashley saying that he could not find a 9mm Glock but that he must look at the one he managed to get. Gaylo arrived later to collect the firearm which was in a plastic bag. He confirmed that the firearm was returned to him that same evening by Gaylo and Ashley, saying that they needed more ammunition. Gaylo then contacted his brother-in-law, Leon van Neel, from whom they got four more rounds and conveyed this to Ashley. The next day he received N$500.

[38] Leon van Neel (Van Neel) knew Gaylo as a former boyfriend of his sister. He confirmed that Gaylo contacted him on Sunday, 2 January 2011, asking about 7.65mm rounds. Though initially reluctant to assist him, he gave in after Gaylo explained why he wanted the bullets, i.e. to test fire a firearm he intended buying from foreigners. Gaylo, accompanied by someone unknown, arrived 30 minutes later and the witness handed him four 7.65mm live rounds.

[39] During cross-examination, defence counsel pointed out the contradicting explanation Gaylo had given to Van Neel for the ammunition he wanted from him. Counsel relied on the contradictions during argument to say that it would appear to have been a completely different transaction than the one implicating the accused persons. However, what appears to be the more likely reason for the contradiction, is that Gaylo was reluctant to reveal the real reason why he required the bullets and came up with the story about him being interested in buying a firearm. On this point, Van Neel's version appears more reliable.

[40] As for the events of 7 January 2011: When family members of the deceased arrived at the murder scene, they discovered that the deceased's wallet and cellphone were no longer on his person. Neither could the firearm used in the murder or any spent cartridge be found on the scene. Once the deceased's cellphone number was provided, the police were able to obtain the MTC call register from which it was obvious that the last registered contact was with the number -4153. Contact could not be made when this number was called. Following up on contacts between the -4153 number and other numbers as per the MTC call register, the police were able to make contact with Kock. From information provided by him that he had rented his Golf out to two Americans who were checked in at the African Sky guesthouse, the accused were considered suspects in light of the deceased's lunch appointment with two American males. Arrangements were made with reception at the guesthouse to let the police know when the accused persons were in. When confirmed, the police arrived and were directed to room 5 where the accused persons were. They found the door locked and, despite announcing their presence to the occupants, there was no response. After a brief standoff and only after the police threatened to use force to enter, was

the door unlocked which allowed some members of the police to enter. Accused 1 was aggressive and in fighting spirit, which required some force to bring him under control. A search of the room was conducted during which the police were looking for the deceased's wallet and cellphone, as well as a firearm and spent cartridge.

[41] It is common ground that the items the police were searching for could not be found with the accused during the search of 7 January 2011. However, cannabis was found in their possession which led to the arrest of both the accused. Further searches were conducted in the absence of the accused persons on 8 and 9 January 2011.

[42] During the trial, the court was called upon to consider the admissibility of search and seizures conducted by the police on 7, 8 and 9 January 2011, respectively. The state sought the admissibility of several items seized as evidence which was opposed. After evidence was heard in a trial-within-a-trial, the court, as per the judgment delivered on 14 April 2022, ruled all items seized on 7 and 9 January 2011 to be admissible evidence.[3]

[43] Besides their clothing and personal belongings, several items relevant to the charges before court were handed in as exhibits which, *inter alia,* included several cellphones of which one, a Samsung, operated with the -4154 number. A briefcase, found on a shelf in the wardrobe, revealed two pairs of black/red striped hand gloves, two clear plastic casings, each containing one 9mm pistol barrel, and a firearm spring. Inside a folder taken from a black suitcase, the bail agreement and bail bond referred to were found. A black sports/carry bag revealed a white metal pipe. In the drawer of a nightstand was a street map of the area where the murder took place. A ring binder notebook with notes and a black plastic carry bag, with a Musica logo, were found amongst the properties seized. Also in their possession was a 100 Swiss Franc note.

[44] A laptop seized at the time and believed to belong to accused 1 could not be accessed as the accused, according to the evidence of Ndikoma,

[3] *S v Townsend (*CC 19/2013) [2021] NAHCMD 193 (14 April 2022).

refused to provide the password. When Ndikoma later showed the laptop's screen saver to Birgit Heckmaier (Birgit), the mother of the deceased, she was able to identify the deceased's then girlfriend, Christene Bruhwiler, posing next to a male person whom she later identified as accused 1.

[45] With regards to the Swiss Franc note, Birgit testified that her husband handed the deceased a 100 Swiss Franc note on 6 January 2011, which he still had in his wallet on the morning he was murdered. She and her daughter, Bianca, both confirmed that the deceased took his cellphone and wallet with him when he left for the lunch appointment. I pause to observe that the evidence of these witnesses does not prove that the 100 Swiss Franc note found with the accused persons, is the exact same note the deceased had with him. It is, at least, similar as far as it concerns the amount and (foreign) currency, a fact which is relevant to the totality of evidence for consideration.

[46] On 11 January 2011, Inspector Vilonel, a gunsmith from the Namibian Police, was called to Ndikoma's office at the Serious Crime Unit for purposes of identifying certain items seized by the police. He was handed a white aluminium table leg with a cap on the one end. He unscrewed the cap and inside, found a silencer wrapped in a piece of carpet and a piece of black pipe. Upon closer inspection, he discovered that the silencer had not been used as there was preservation oil present and displayed no carbon marks. He was also handed two barrels in clear casings which he identified as the Glock 17 and 19 which were not standard, as they were threaded. With the right adaptor, the silencer could be screwed onto the barrels which, in turn, could be fitted to either a Glock 17 or 19. Similarly, these barrels were new and unused.

[47] On 1 March 2011, Mr Nambahu from the National Forensic Science Institute (NFSI), handed Insp. Vilonel a spent projectile which he identified as a 7.65mm projectile. The report prepared by Mr Nambahu in this regard (Report 40/2011/R1), confirmed the spent projectile to be of 7.65mm calibre; the two 9mm pistol barrels not having been used recently, and a bolt suppressor (spring) plus a 7.65mm silencer without any signs of gun residue present.

[48] The spent projectile (Exh. 3) was retrieved from the deceased's body during an autopsy and handed over to Sgt Shatipampa who packed, marked and sealed it together with other samples. These were subsequently handed in at the NFSI for forensic and ballistic testing.

[49] With regards to the note book (Exh. 'X'), Ndikoma's testimony is that all the items removed from the room on 9 January 2011 by him and De Klerk, were brought to his office (being the main investigating officer) where he placed the exhibits in marked forensic evidence bags and kept them under his control. He made photo copies of all the pages of the notebook (Exh's. 'JJJJ1-2'). The second bundle marked 'JJJJ2' reflects handwritten notes which were of interest for purposes of the investigation. The following entries are considered of relevance to this case: The name 'Kevan' and 'Kevan Townsend' appear on some pages which corresponds with the name of accused 2. At page 6, seemingly part of a checklist, the word 'gloves' appears and at the top thereof, 'SF Burn Buy Checklist'. At page 7 the following entries appear: 'Suppressor for a Glock 17 9mm', 'sell the threaded and extended barrel for that', 'Glock needs spring modification', and 'What is the quietest suppressor I can get for a Glock 9mm here'. On pages 8 – 10 further information regarding 9mm silencers and types of pistol suppressors are recorded, which corresponds with the markings on the exhibit handed into evidence. At page 16 further information regarding firearm barrels is noted with questions pertaining to a 'Brugger & Thomet impulse II', whether they work on a Glock and where a threaded barrel could be obtained. Still relating to firearms, the words 'Lone Wolf, Glock 17 9mm' and 'Glock 19 9mm' appear at page 19. At page 25 appears a flying schedule setting out the itinerary for two persons where the words 'us', 'him' and 'me' are in brackets behind the indicated destinations.

[50] At page 13 of the notebook the names 'Peter & Birgit' appear with area codes and telephone numbers following. During her testimony Birgit identified these numbers as being that of the Cattle Baron restaurant (of which they were the owners at the time) situated at Maerua Mall and the head office of the Cattle Baron franchise in Cape Town.

[51] Ndikoma testified that the accused persons were brought to his office on 13 January 2011 by officials from the Namibia Correctional Service in order to collect clothing and personal belongings which were not required for the investigation. According to him, the notebook was on his desk at the time of their visit. When the accused persons got what they came for, they left.

[52] Joshua Hecht (Hecht) testified that during January 2011 he was a sentenced prisoner serving his sentence at the Windhoek Correctional Facility and shared a cell with accused 1 in B-Section. On 13 January 2011, both accused were told by officers to prepare for court where after they left. With their return to the section during the afternoon, they had with them bags of clothes. Accused 2 was taken to a different cell while accused 1 returned to the cell he was sharing with Hecht. Accused 1 then mentioned to him that a murder case was opened against him, but that his clothes were returned to him. After a while he saw accused 1 take out a black notebook from a forensic bag which he identified as an evidence bag and started tearing out pages. He placed the torn out pages in a tin and moved to the ablution area in the cell where he set it alight and closed the door. Hecht saw the notebook and a loose page on the accused's bed and took it to see what was written on it. After reading it and mindful of the accused persons now also being charged with murder, he hid the paper under his mattress. He positively identified the notebook and loose page when shown to him in court.

[53] The next day, at Hecht's request, De Klerk and Ndikoma came to see him and then reported what he had seen the previous day and handed them the page he had taken from accused 1. De Klerk informed Hecht to place the page under his mattress as it was to be found during a staged search of the cell. The search was conducted during the afternoon and, besides the page found hidden under Hecht's mattress, the notebook was also found in the cell; he was unable to tell exactly where it was found. According to Hecht, he was thereafter threatened by both the accused and feared for his life. The accused persons were then moved to another section.

[54] Accused 1, at that stage acting in person, did not challenge Hecht's testimony. It should be noted that the accused, at this point, refused to

‘acknowledge proceedings’ without him having legal representation; despite having been informed by the court of the consequences of his decision earlier. Though accused 2 was not implicated by the witness as regards the notebook, his counsel, notwithstanding, cross-examined the witness regarding the observations testified to, but was clearly unable to challenge what the witness said as accused 2 had no knowledge of what happened. During cross-examination, counsel denied that threats were made to the witness by the accused persons, which he disputed.

[55] De Klerk confirmed that he, on 14 January 2011, received a message from the prison authorities and, accompanied by Ndikoma and Kantema, they attended to a report made by Hecht. After learning about the notebook and accused 1 having torn out some pages from it which he burned, Ndikoma only then realised that the notebook must have been taken from his office. De Klerk confirmed that a search of the cell was done and that the notebook was found among clothes of accused 1. De Klerk did not deny that the search conducted of the cell was staged as this was required to protect Hecht, the whistle-blower. The testimonies of witnesses De Klerk and Ndikoma corroborate that of Hecht in all material respects.

[56] Ndikoma further said that when the notebook was retrieved, he discovered that a number of pages were torn out. He was fortunate to have photocopied all the pages with notes on before it was removed from his office. He suspected this to have happened on 13 January 2011 during the time the accused persons were brought to his office to collect their clothes, though he did not actually see this happening. Notwithstanding, his suspicion is fortified by Hecht’s evidence and the actual recovery of the notebook from accused 1 on the next day. Ndikoma discovered that all the pages on which entries were made as quoted and described above, were missing from the notebook (exhibit ‘JJJJ’).

[57] During the cross-examination of state witnesses, the defence primarily focussed on witness statements deposed to by the respective witnesses and pointed out discrepancies between the statement and the witness’s testimony. Though this could be an effective tool when testing the

credibility and reliability of a particular witness, much will depend on the nature and extent of the alleged discrepancy and whether it constitutes a material deviation from the earlier statement. For obvious reasons, the court needs to consider the alleged contradictions, firstly, in context with the full testimony of the witness and secondly, in light of the circumstances of the case and not limit the inquiry to what is recorded or omitted from the statement, and what the witness testified.

[58] Whenever there are contradictions between the police statement of a witness and the evidence of such witness, the approach adopted in regard thereto is set out in *S v Mafaladiso en Andere*[4] at 584 (headnote):

'The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task

[4] *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA).

of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings. (At 593e - 594h.)'

[59] In this Jurisdiction, the above quoted *dictum* has been adopted with approval in numerous judgments of this court (*S v Unengu;*[5] *S v Krylov*[6]*; S v BM*[7]).

[60] In the same vein Maritz J (as he was then) in the unreported matter of *Simon Nakale Mukete v The State*[8] at 21 stated:

'It is the experience of the Court that witness statements drafted by police officers are often not all-inclusive. Police officers tend to focus the statement on what they consider – rightly or wrongly – to be more (or most) relevant facts relating to the offence under investigation. The failure to include all the details of a series of events does not in itself mean that those events did not take place or that they have been a recent invention by the witness – especially not if the witness gives an explanation for their omission and that explanation is not gainsaid by anyone.' (Emphasis provided)

Also in *Hanekom v The State*[9] where Hannah J said:

'What is set out in a police statement is more often than not simply the bare bones of a complaint and the fact that flesh is added to the account at the stage of oral testimony is not necessarily of adverse consequence.'

[61] In its evaluation of evidence in the present instance, this court stands guided by the approach as set out above and adheres to the stated guidelines.

Case for the Defence

[62] Following the court's ruling on the application for discharge in terms of s 174 of the CPA, the accused persons elected not to testify and had no witnesses to call in their defence.

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[5] *S v Unengu* 2015 (3) NR 777 (HC).
[6] *S v Krylov* (CC 32/2018) [2023] NAHCMD 48 (13 February 2023).
[7] *S v BM* 2013 (4) NR 967 (NLD).
[8] *Simon Nakale Mukete v The State* Case No. CA 146/2003 delivered on 19 December 2005.
[9] *Hanekom v The State* Case No. CA 68/1999.

[63] In criminal matters, the ultimate requirement or test is proof of guilt beyond reasonable doubt which, primarily, will depend on an appraisal of the totality of the facts presented at the end of the trial, including the fact that the accused persons did not give evidence. Hence, it does not follow that a *prima facie* case will inevitably yield a conviction when the accused elects not to give evidence or to call witnesses. That would only be the case where the *prima facie* evidence is capable of translating itself into proof beyond reasonable doubt in the absence of any explanation by the accused or his witness, with a reasonable possibility of being true (*R v Difford*).[10] In *Pezutto v Dreyer and Others*[11] at 391E-F Smallberger JA stated that 'It is trite that it does not follow merely from the fact that if a witness' evidence is uncontradicted that it must be accepted. It may be so lacking in probability as to justify its rejection. But where a witness' evidence is uncontradicted, plausible and unchallenged in any major respect, there is no justification for submitting it to an unduly critical analysis, ...'

[64] It thus follows that the court, at this juncture, is required to assess the *credibility* and *reliability* of state witnesses, contrary to what was required of the court with the s 174 application where the credibility of state witnesses was of lesser importance.

[65] The question of an accused's constitutional right to silence was dealt with by the Supreme Court in *S v Nangombe*[12] at 280E-I where it is stated:

'The Court a quo was alive to this evidence and correctly, in my view, accepted it. It was not contradicted because appellant chose to remain silent which he was entitled to do. But his failure to testify strengthens the State case against him.

"On the other hand it is right to bear in mind that there is no obligation upon the accused to give evidence in any sense except that if he does not do so he takes a risk. The extent of that risk cannot be analysed in terms of logic: it depends on the correlation and assessment of the factors by the trier of fact, that is, on his judgment."

Per Schreiner JA in *R v Ismail* 1952 (1) SA 204 (A) at 210.'

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[10] *R v Difford* 1937 AD 370 at 372.
[11] *Pezutto v Dreyer and Others* 1992 (3) SA 379 (A).
[12] *S v Nangombe* 1994 NR 276 (SC).

[66] In this case direct and circumstantial evidence was adduced in order to prove that the accused persons, at least, committed some of the crimes they stand charged with. The risk is therefore greater than in cases where guilt is sought to be proved by inference alone. While the accused persons have a constitutional right to silence, the direct evidence against them could not be ignored.[13]

Applicable principles of law

[67] What needs to be said at the outset, is that there is no direct evidence linking the accused persons to the murder and robbery charges. Thus, as far as it concerns counts 1 and 2, the state's case is entirely based on circumstantial evidence. With regards to the remaining counts, evidence directly implicating the accused persons was adduced.

[68] Where the court is faced with circumstantial evidence, what needs to be determined is whether, in the light of the evidence as a whole, the guilt of the accused persons was established beyond reasonable doubt. Although the breaking down of a body of evidence into different components is quite useful, the trier of fact must guard against a tendency to focus too intently on the separate and individual parts thereof, but rather to evaluate it with the rest of the evidence. Circumstantial evidence should thus not be approached upon a piece-meal basis.[14] The cumulative effect of all the facts must be weighed together and, only thereafter, the accused is entitled to the benefit of any reasonable doubt the court may have as to whether the inference of guilt is the only reasonable inference that could be drawn from the proved facts.[15] It is trite law that the accused does not bear the onus to prove his or her innocence.

[69] In the oft quoted *dictum* of Denning J (as he then was) in *Miller v Minister of Pensions*[16], when dealing with the onus resting on the State and the adequacy of proof, the following was said:

'It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law

[13] *S v Boesak* 2001 (1) SACR 1 (CC).
[14] *S v Reddy* 1996 (2) SACR 1 (A).
[15] *R v Blom* 1939 AD 188 at 202-3.
[16] *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373H.

would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt.'

[70] Where the state, as in this instance, relies on the doctrine of common purpose in respect of all counts, this court stands guided by the approach enunciated in *S v Gurirab*[17] 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.'

[71] What is now required is to consider whether the *prima facie* evidence presented by the state 'is capable of translating itself into proof beyond reasonable doubt in the absence of any explanation by the accused' (*R v Difford*) supra.

Evaluation of evidence

[17] *S v Gurirab* 2008 (1) NR 316 (SC).

[72] In view of the argument advanced on behalf of accused 1 that the state cannot rely on unconstitutionally obtained pieces of evidence, referring to the discovery of evidence during a search conducted by the police of the room occupied by the accused persons at the guesthouse on 9 January 2011, it seems apposite to decide this point at the outset.

[73] The argument is primarily based on a quote from the *Shikunga* judgment (supra) that 'There can be no state reliance upon any unconstitutional irregularity(ies) in pursuit of an accused conviction'. (*sic*) Besides levelling some criticism against the manner in which the state executed the power vested in the Prosecutor-General to prosecute the accused in this case which, as argued, was with complete disregard to inalienable constitutional procedures and the individual rights of the accused, nothing further turns on this point. Counsel's bold assertion that the state, in an attempt to prove its case, relies on unconstitutionally obtained evidence, fails to appreciate the findings by this court on the very issue. As mentioned, in the judgment delivered on 14 April 2022, the court extensively discussed the question of unconstitutionally obtained evidence. In paras 62 – 70 of the judgment, the admissibility of evidence seized by the police on 9 January 2011 was decided and ruled admissible.

[74] For purposes of this judgment, there is no need to rehash the court's reasoning and applicable case law, all of which already incorporated in the judgment. Since the court's earlier ruling to date hereof, no evidence or argument has been advanced that necessitates a reconsideration of the question as to the admissibility of evidence that was ruled admissible. The court accordingly adheres to its earlier findings in this regard.

[75] I then proceed to evaluate the evidence from the basis that evidence found on 7 and 9 January 2011 in the room at the guesthouse and testified on by state witnesses, constitute lawful and admissible evidence.

[76] Despite assertions that evidence, namely, two gun barrels and a silencer have been planted in the room by the police, there is no evidence supporting such conclusion; neither could it be inferred from the proven facts. The fact that the gun barrels were not already discovered by the police during the (first) search on 8 January 2011, was explained by De Klerk who pointed out

that the first officers who searched the room, were looking for specific items that could be linked to the murder scene i.e. the deceased's wallet and cellphone, a firearm and, possibly, a spent cartridge. As testified by De Klerk, the barrels are individually packed in plastic casings and, as such, do not bear any resemblance to a firearm. It was only upon closer scrutiny that he himself realised what it actually was. Support for De Klerk's reasoning is to be found in the testimonies of other state witnesses who described these items as 'silver pipes'.

[77] Having had the opportunity to personally view the gun barrels inside their casings when tendered as exhibits and regard being had to the purpose of the initial search, there appears to this court nothing ominous about the officers ignoring the gun barrels (in a briefcase) on the first occasion. In my view, the oversight on the part of the police does not translate into support for the assertion that it was planted there by the police. Such finding, on the contrary, is irreconcilable with the testimonies of several witnesses who said they had seen the same pipes *prior* to the search on 7 January 2011. The inference sought to be drawn by the defence is clearly inconsistent with the evidence before court.

[78] The evidence of Henri Olivier that he met with the accused persons whilst socialising at a club is not disputed; neither that they claimed to be friends of the deceased who wanted to meet up with him. To this end, he managed to obtain the contact number of the deceased through Birgit (the mother) which, in turn, was passed on to the accused persons. This part of his evidence is corroborated in material respects by Birgit. Henri's evidence also relates to enquiries made by the accused persons as to the availability of firearms in Namibia. This is the first instance where the issue of firearms arose and, although nothing came from it at the time, the same inquiry and request was made to other independent witnesses shortly thereafter. Also, that the accused persons introduced themselves not by their actual names, but by referring to themselves as 'K/Cash and M'. This continued during subsequent meetings with other witnesses.

[79] Questions put to Henri during cross-examination attempted to show that accused 2 had no interest in enquiries made concerning the whereabouts of the deceased; further, that it was actually accused 1 who enquired about a

firearm. Though Henri was unable to give a clear and detailed account of what exactly he had said to which accused and who asked about the firearms, his uncontroverted evidence is that he provided the contact details of the deceased to them and that they showed interest in obtaining a firearm.

[80] The fact that accused 2 distances himself from the deceased, is obviously to refute allegations by the state that the two accused, from the onset, acted with common purpose when planning to murder the deceased. Though it appears from the evidence of Henri that accused 2 did not show any personal interest in the deceased's whereabouts, the question of common purpose must be considered in light of all the evidence and not in isolation.

[81] Shortly after meeting Henri, the accused persons met Jerome, during which accused 2 (again) enquired about the possibility of buying a Glock pistol. This set in motion a series of events involving a number of persons who joined forces, first to find a 9mm Glock pistol and when that did not materialise, a 7.65mm with ammunition. The evidence of these witnesses is intertwined and, central thereto, is the role each played to find a firearm that would be suitable to the buyers. Despite realising that their actions were criminal, they stood to gain financially from it.

[82] It is for this very reason that counsel argued that the court should be slow in finding these witnesses credible. Moreover, where there are contradicting versions pertaining to the handling of the firearm and whether there was proof of the sale of a 7.65mm pistol. With regards to the gun barrels/silver pipes the witnesses said they were shown by accused 2, it was argued that these witnesses were unable to positively identify these objects as exhibits 1 and 2 in court. In support of the argument, it was pointed out that the explanation of Gaylo when he approached Van Neel for more bullets, was a lie and refers to a completely different transaction than what was testified to by Gaylo, Van Neel and Ashley. Hence, it was submitted, these witnesses fabricated their evidence in order to implicate the accused persons.

[83] Despite these witnesses having been subjected to extensive cross-examination, it cannot be said that the credibility of any one of them had been destroyed. Though differences and contradictions highlighted by the defence

cannot be ignored during the court's assessment of their evidence, it is my considered view that these discrepancies, when holistically viewed, are not material and therefore fall short from discrediting any particular witness. On the contrary, what appears to be most significant is that the evidence of these witnesses is corroborative in material respects i.e. the identification of both accused who, at all times, were together and accused 2 taking the lead when discussing firearms, whilst accused 1 in the end financed the deal. Though true that the witnesses could not independently identify or describe the markings on the silver pipe(s) when shown to them, the common factor that stands out from their testimonies is that this object was shown to them when explained why the firearm had to be a Glock pistol. Given the uniqueness of the object and the witnesses' unfamiliarity with its appearance at the time, the possibility that it was something other than the barrels found in possession of the accused persons, is so unlikely, that it can safely be ruled out. I accordingly find that what was shown to the respective witnesses and described as a 'silver pipe', in fact, was one of the gun barrels subsequently found in possession of the accused persons.

[84] Consistent with this finding is evidence that, during their meeting with the accused persons, accused 2 wore black/red striped gloves prior to handling the gun barrel. Also, that it was taken from a black plastic bag with a Musica emblem printed on the side. Counsel for the defence took issue with the identification of these items and reasoned that it had not been established that the gloves and plastic bag found with the accused are the exact same ones the witnesses had earlier described. Though correct that no forensic examination was done on these items, it seems to be of little significance (if any) in circumstances where these items were found among the accused persons' personal belongings and there being no evidence about any of the witnesses coming into contact with the gloves, the bag or even the gun barrel. Without such evidence, forensic examination of these items seems pointless.

[85] By the same token, De Klerk explained during his testimony that the reason why the gun barrels were not subjected to forensic examination was because, by the time he realised what it actually was, he had already handled them whilst trying to figure out what they were.

[86] During cross-examination of the witnesses testifying on their interaction with the accused persons at different stages, it was put to them that their evidence was fabricated and not trustworthy. In light of the witnesses' respective versions dealing with different and independent aspects of evidence for which there is material corroboration, where overlapping, there is simply no room for such finding. It would imply that the witnesses, at some point, joined forces to create evidence implicating the accused persons in the commission of an offence which was yet to be committed. It was neither alleged that this was yet another plot against the accused, orchestrated by the police.

[87] Any form of fabrication of evidence – especially by Simon who was key to the delivery of the firearm – would also go against the spirit of him and accused 2 'socialising together' as alleged by accused 2 during cross-examination. Unbeknown as to how things would turn out and none of these witnesses having further contact with the accused persons (except for Simon who was paid in the afternoon of 7 January 2011), there would have been no reason to falsely implicate them. The assertion is accordingly found to be baseless.

[88] On the contrary, when the testimonies of the respective witnesses are pieced together, a picture emerges showing how the accused persons were able to buy a 7.65mm pistol and ammunition. This court is therefore satisfied that the evidence of witnesses Jerome, Simon, Gaylo, Ashley and Van Neel proves such sale beyond reasonable doubt.

[89] In the same vein, the testimonies of the state witnesses on this point also refute allegations made by the accused persons that the police planted these objects in the room after their arrest on 9 January 2011. At the time of the search, the police could not have known that it had been shown to the witnesses when looking for a specific firearm. That information only became known during the investigation when the witnesses gave statements to that effect. Against this background, any suggestion that the police planted the barrels in the room is equally unmeritorious.

[90] Furthermore, the evidence establishes a direct link between the gun barrels and the silencer found hidden in the table leg, in that they are both

threaded and able to fit onto a Glock pistol. There is ample evidence to prove that accused 1 dispatched a parcel from Finland, collected it from the airport after his arrival in Windhoek and which turned out to contain a silencer hidden inside a table leg. Allegations that the silencer must equally have been planted in the room of the accused persons at the guesthouse, based on the fact that nothing was found inside the table leg when opened in the presence of the customs official, clearly loses sight of the evidence of witness Uukongo. He testified about the manner in which accused 1 opened only one end of the pipe from which he pulled out a piece of black pipe, without a proper inspection of the pipe being conducted. The silencer was ultimately found lodged deeper inside the table leg, wrapped in a piece of carpet.

[91] On its own, the silencer was of no use, unless fitted to the barrels. In turn, these accessories would only serve a purpose when fitted to a Glock pistol. Despite evidence that the barrels and silencer had not been used prior to their discovery and had thus not been used in the commission of the murder, its mere possession by the accused persons is, in the absence of evidence to the contrary, receptive for the drawing of inferences when considered with the rest of the evidence.

[92] Any suggestion that the silencer and two gun barrels were planted in the room by the police to prove their initial suspicions against the accused persons, as alleged, is not only inconsistent with the proven facts, but so improbable that it can safely be ruled out as a possibility.

[93] The fact that the state was unable to show how the accused persons came into possession of the gun barrels must neither be considered in isolation. Entries were made in a notebook[18] found in possession of the accused persons which bear reference to (a) the same type of gun barrels and (b) suppressors/silencers found in their possession. In these circumstances and in the absence of evidence proving otherwise, it would be reasonable to infer that the gun barrels were brought into Namibia by the accused persons, albeit in a manner unknown.

[18] Exhibit ‘JJJJ-2’ at pages 7 and 8.

[94] A further inference that may reasonably be drawn from the accused persons' conduct, when considered with evidence about them being desirous to find a matching firearm, is that they intended *using* it. This conclusion is fortified by evidence showing that, when they were unable to find a specific make and calibre pistol, they settled for a different one, a 7.65mm pistol, but not without ammunition.

[95] With regards to the issue raised by the defence whether the firearm was actually handed over as testified, it was argued that there is conflicting evidence on this point and that such evidence is lacking. This argument will only find favour with the trier of fact if considered in isolation and with complete disregard to the rest of the evidence proving that there were two occasions during which the accused persons handed over cash money to Simon. Given the circumstances where the sole purpose of the interaction between the state witnesses and the accused persons concerned the sale of a firearm, logic dictates that money was paid over for the firearm the accused persons got out of the deal, nothing else. There can be no doubt that the accused persons took possession of the firearm which brought the deal to an end, except for the last payment.

[96] It is not known what happened to the firearm thereafter, except for Simon's testimony that when he asked accused 2 what they did with it, accused 2 responded by saying that it had been used and tossed it away.

[97] The alternative argument advanced by the defence is that, even if it were to be found that the accused persons were in possession of the two gun barrels and silencer, then this *per se* does not link them to the murder, as there is evidence showing that these accessories had not been used before. I agree.

[98] However, there is evidence that proves the deceased was killed with a 7.65mm pistol which is of the same calibre as the firearm sold to the accused persons shortly before the murder. These facts are crucial in determining whether, in the circumstances, the accused persons would have been able to commit the crime and whether they could be linked to the murder.

[99] Next I turn to consider the events of 7 January 2011, preceding the murder.

[100] As mentioned, it is not in dispute that the deceased had a lunch appointment with the accused persons before court. This much was conceded by counsel for accused 1. It is further common cause that there was telephonic communication between the deceased and accused 1 prior to this day and the last contact the deceased had, was with accused 1. This was also the only number the deceased had contact with after he made the lunch appointment. As borne out by the evidence, the cellphone ending with the -4153 number and used by accused 1 up until then, could not be traced or retrieved during the police investigation. The only person who could possibly explain this pressing issue is accused 1, who elected to invoke his right to remain silent.

[101] Counsel for accused 1 pursued the argument that the accused could not have been at the scene where the murder took place as he was at the restaurant for his appointment with the deceased, but that the deceased never turned up for the appointment. Although the evidence of the deceased's mother and sister confirms that the deceased never showed up at the restaurant, there is no evidence that remotely shows that accused 1 was also there – that was no more, as stated, an instruction by accused 1 to his counsel which does not translate into evidence. It therefore remains an unsubstantiated allegation with no probative value.

[102] Counsel for accused 2, in turn, argued that despite the lunch appointment having been at a different location, it had not been investigated why the deceased ended up at Gusinde Street where the murder took place. Neither had it been established that there was indeed a lunch appointment, nor that it involved accused 2 and that he was with accused 1 at around 13h00 that day. In support of the contention that accused 2 was not in the area of Gusinde Street at the time of the murder, counsel relies on what Maria Maseko from the African Sky guesthouse conveyed to the investigators during an interview conducted with her. As already found in the court's earlier ruling at para 17 of that judgment, Maria Maseko was never called to testify as a witness for the state – neither for the defence – which renders her narrative, hearsay evidence.

[103] With regards to the admissibility of hearsay evidence and in particular, with reference to Maria Maseko, counsel cited the unreported judgment in *Shidangi v State.*[19] From a reading of the quoted paragraphs in counsel's written submissions, I am unable to see how it supports the contention that evidence about what Maria Maseko would have said concerning the whereabouts of accused 2 at the time of the murder, is admissible evidence. In fact, the view of the court in *Shidangi* was quite the contrary, in that the court considered such evidence to be inadmissible. It is settled law in this Jurisdiction that 'all hearsay evidence which does not come within some established exception to the hearsay rule is inadmissible and the reliability or relevance thereof makes no difference to this rule. It must be borne in mind that the hearsay rule only operates to exclude evidence which is tendered to prove the truth of what is asserted'.[20] (Emphasis provided)

[104] When applying the stated authorities to the present facts where counsel for accused 2 wishes to rely on a report made by a non-witness to the present proceedings as truthful, then such evidence amounts to inadmissible hearsay evidence. In coming to this conclusion, it is evident that there is accordingly no evidence showing that accused 2 was in his room at African Sky guesthouse at the time of the murder.

[105] The state, in its supplementary heads of argument, provided a comprehensive summary of the testimony of the witness Mark Plaatje and his interpretation of the MTC call registers, received into evidence. The purpose was to confirm the evidence of state witnesses who testified on the gun deal with the accused persons. There is no need to deal with this aspect of the evidence in any detail, suffice for saying that the witness's interpretation of the call registers is based on the general operation of receiving towers and, therefore, not conclusive. Be that as it may, although the information gathered from the call registers does not *per se* corroborate evidence about a gun deal between the accused persons and state witnesses, it does place them in the area where the meetings took place, as testified. To this end it refutes allegations by the defence

[19] *Shidangi v State* (HC-NLD-CRI-APP-CALL-2020/00049) [2022] NAHCNLD 10 (15 February 2022).
[20] *Rentokil Initial 1927 PLC v Michael Demtschuk t/a Rentokil and Four Others* Case No.SA 88/2016 delivered on 10.10.2018.

that the witnesses fabricated evidence about a gun deal to implicate the accused persons in the murder.

[106] With regards to count 3 where the accused persons stand charged in the main count of the offence of importation of firearms without a permit i.e. two 9mm pistol barrels, there is no direct evidence which proves these allegations. What has been established, though, is that a silencer was imported. However, a silencer/suppressor is not defined as an arm as per s 1 of the Arms and Ammunition Act 7 of 1996. It then raises the question whether, in these circumstances, it could reasonably be inferred that the gun barrels were also imported by the accused persons?

[107] In answering this question, regard must be had to entries made in the notebook referencing gun barrels and matching silencers which, when read with other entries and the sequence in which the notes are recorded, this strongly suggests that it was done in preparation of their visit to Namibia. Of significance is that the accused persons, from the onset, were specifically in search of a 9mm Glock pistol which could be fitted with barrels they already had. At no stage did the accused persons express the desire to buy gun barrels, only a matching pistol. There is further direct evidence proving that they were in possession of at least one barrel when showing it to potential sellers of a firearm, shortly after their arrival.

[108] It is not required that each individual proven fact must exclude all other inferences save the inference of guilt, but that the facts as a whole must do so. To this end, regard could (and should) also be had to all the evidence and not only evidence relevant to the particular charge.

[109] In these circumstances and, despite the lack of direct evidence as proof of such fact, it would be reasonable to infer that the barrels were brought into Namibia by the accused persons. The court accordingly so finds.

[110] In light of the accused persons' decision not to give evidence, counsel for accused 1 argued that state counsel's submission that the accused persons could easily have refuted the *prima facie* evidence against them by giving evidence, confirms (and acknowledges) the weakness in the state's case –

therefore the accused persons stand to be acquitted. With deference to counsel, this argument clearly loses sight of the fact that the accused persons were already placed on their defence in the court's earlier ruling. The court at the close of the state's case found that the accused persons had a case to meet and it was up to them to decide whether or not they would lead evidence to gainsay the state's case or not. It is settled law that, for the accused persons to remain silent under these circumstances, is a factor that may be taken into consideration in the court's evaluation of evidence. Though the accused persons were entitled to remain silent, there is uncontroverted evidence implicating them in the commission of crimes they are charged with. Essentially, their silence strengthens the state case (*S v Nangombe – supra*).

[111] In the final analysis, the evidence adduced established the following facts:

111.1. The accused persons travelled from the USA to Namibia and were in each other's company at all material times. By then accused 1 had already dispatched from Finland to Namibia, a pistol silencer which he collected shortly after their arrival. Besides the silencer, two gun barrels of similar calibre were found in their possession. These firearm accessories correspond with entries made in a notebook also found with the accused during a police search conducted of the room they were in at a guesthouse on the day of the murder. Though neither of the accused claimed to have made the entries in the notebook, there is evidence that strongly points at accused 1 as the author and owner thereof, moreover when he claimed that he had business dealings with the deceased in the past. Other entries made in the notebook, *inter alia,* reflect the names and telephone number of the restaurant of the deceased's parents in Windhoek. That in itself, indirectly establishes a link with the deceased.

111.2. There is further evidence that on the same day of their arrival, accused 1 started enquiring about the deceased, portraying him and accused 2 as friends of the deceased and successfully obtained the cellphone number of the deceased. This culminated in a lunch

appointment arranged by the deceased with two Americans. That these persons in actual fact were the accused before court, was not disputed. Call registers of MTC established telephonic contact between accused 1 and the deceased before and after the lunch booking was made. The last activity between accused 1 and the deceased was at 11h56 when the deceased received a text message, where after all activity on the cellphone of accused 1 ended. That was also the last activity on the deceased's phone except for two forwarded calls which registered after the murder.

111.3. Although both the accused in their defence distanced themselves from the crime scene, a street map found in their possession depicts the area and street where the murder took place. Having their own transport it would have been possible for them to travel there. There is no evidence that shows the accused persons were indeed where they claim to have been.

111.4. The impression gained from the evidence adduced, shows an urgency on the part of the accused to find a specific calibre pistol and when this did not materialise, they settled for one of smaller calibre; the same calibre used to kill the deceased with.

111.5. On the same day as the murder, the accused persons in the afternoon met with Simon to pay the outstanding amount from the gun sale. By then Simon had no knowledge of the murder and when asking what had happened to the firearm, accused 2 said it had been used and that he tossed it away. This information ties in with the fact that the firearm could not be found during the police investigation.

111.6. Among the items that were found inside the briefcase in the room of the accused at the guesthouse was a 100 Swiss Franc note which ties in with evidence about a similar bank note the deceased had in his wallet before leaving for the lunch appointment. Though the evidence does not prove that it was the same note found in possession of the accused persons, it is a relevant fact for consideration.

Conclusion

[112] What is now required of this court is to consider whether the *prima facie* evidence presented by the state 'is capable of translating itself into proof beyond reasonable doubt in the absence of any explanation by the accused' (*R v Difford*) *supra*.

[113] Where the court, in the present instance, is called upon to draw inferences from proved facts which satisfy the requirements laid down in *R v Blom* (supra), it seems apposite to repeat what Davis AJA said in *R v De Villiers*[21] at 508-9:

'It is not each proved fact which must exclude all other inferences; the facts as a whole must do so … As stated by Best Evidence 5th ed at 298:

"Not to speak of greater numbers; even two articles of circumstantial evidence - though each taken by itself weigh but as a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone . . . . It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same conclusion the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them." '

[114] When applying the tested and accepted principles stated above to the present facts, it can justifiably be inferred from the proved facts that the accused persons travelled to Namibia for reasons other than being mere tourists. This much is evident from providing a false physical address and accused 1 entering a false passport number when signing in at the accommodation establishment they checked in. The evidence further proves their actions to have been goal directed: firstly, to find a way to make contact with the deceased and succeeded in doing so by means of false pretences; secondly, to arm themselves with a firearm and thirdly, to come into physical contact with the deceased; fourthly, the seizing of further contact with the deceased from the time of the murder and lastly, there being no sign of the cellphone used during their earlier communications.

[21] *R v De Villiers* 1944 (AD) 493.

[115] When considering the cumulative effect of the evidence presented, the court is satisfied that the only reasonable inference to draw and conclusion to reach from the proved facts is that the accused persons planned and committed the murder. What may further be inferred from these facts is that they acted with direct intent when shooting the deceased in the head with a firearm.

[116] Given the close relation in time and place between the commission of the murder and robbery of the deceased's wallet and cellphone, it is further inferred that the accused persons robbed the deceased of his property during the murder.

[117] The state's submission that the accused persons already from the release of accused 2 from custody in the USA started planning the murder together and thus acted with common purpose until the execution thereof, is not borne out by the facts. While there is direct evidence linking accused 1 to the importation of the silencer and in all probability did the same with the two gun barrels, there is no evidence showing the involvement of accused 2 when these arrangements were made. As evinced by entries made in the notebook, accused 1 took charge of arrangements regarding the acquisition of gun barrels and silencer brought into the country. He was also solely responsible for their travel and accommodation arrangements, transport and financing of the expenses – including payment for the firearm.

[118] From the evidence, accused 2 only became directly involved when the search for a Glock pistol started and, from that moment onward, he took the lead in searching for a suitable firearm. Having handled the gun barrels during meetings with potential sellers, his actions meet the legal requirement of possession. Evidence in this regard clearly demonstrates that the accused persons jointly planned their actions and acted with common purpose when setting the scene to murder the deceased shortly thereafter. It is therefore not necessary to establish a causal link between the acts of each of them and the outcome of the crimes committed i.e. murder and robbery. From the proven facts it can further be inferred that the accused persons when committing the offences of murder and robbery, acted with common purpose. It is accordingly so found.

[119] Turning to those charges relating to the firearm and ammunition obtained by the accused persons during an unlawful gun deal, the evidence proves that they took possession of the pistol and ammunition handed to them. Arguments advanced to the contrary is fallacious. In order for a conviction of the offence of possession of a firearm or ammunition without a licence, it is not required of the state to prove that the accused at the time of their arrest were (physically) *found* in possession thereof. The elements of possession are physical control (*corpus* or *detention*) over the article, and the intention with which control is exercised over the article (*animus*). With regards to the gun deal, the evidence proves that the accused persons took possession of the firearm and ammunition when handed to them with the intent to exercise control over it. That clearly satisfies the legal requirement of possession. As for the two gun barrels, these were found in their possession among their personal belongings and therefore under their control. The evidence further established that they had the required intent to possess same.

[120] Lastly, as for the charge of defeating or obstructing or attempting to defeat or obstruct the course of justice, the evidence of Hecht was particularly criticised for reason that he was a sentenced prisoner at the time. Moreover, in circumstances where there was no direct evidence implicating the accused of removing the notebook from Ndikoma's office when they came to collect their clothes and other items. Criticism was also levelled against the police for staging the search that led to the notebook being found with accused 1.

[121] The fact that Hecht was a sentenced criminal does not *per se* mar his credibility. That would only be the case if his credibility was destroyed during cross-examination or where contradicting *aliunde* evidence rendered his testimony unreliable. That was not the case. Accused 1, being the only person who could possibly have challenged Hecht's testimony on his observations, declined to cross-examine the witness. Despite the lack of direct evidence proving that the accused persons took the notebook during their visit to Ndikoma's office, there is corroborating evidence that the notebook was afterwards found in possession of accused 1, and that pages were missing from it. That in itself corroborates Hecht's evidence who, on his own volition, reported the incident to the authorities. The only reasonable inference to draw from these

facts is that the notebook, considered as evidence in the matter under consideration, was unlawfully removed from police custody with intent to destroy evidence. In the absence of evidence showing any involvement on the part of accused 2 in these actions, either directly or indirectly, he must be given the benefit of the doubt regarding this charge.

[122] As for accused 1, there is persuasive evidence showing that he tore out pages from the notebook and set them alight in order to destroy evidence. As copies of those pages had been made by the investigating officer which salvaged information that otherwise would have been destroyed, the accused's actions constituted a mere attempt to defeat or obstruct the course of justice.

[123] Consequently, the court finds as follows:

Count 1: Murder (direct intent) – Accused 1 & 2: Guilty.

Count 2: Robbery (with aggravating circumstances) – Accused 1 & 2: Guilty.

Count 3: Importing of firearms (barrels) without a permit (c/s 22(1) of Act 7 of 1996) – Accused 1: Guilty. Accused 2: Not guilty and discharged.

Alternative count: Possession of firearms (barrels) without a licence (c/s 2 of Act 7 of 1996) – Accused 1: Not guilty and discharged. Accused 2: Guilty.

Count 4: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996) – Accused 1 & 2: Guilty.

Count 5: Possession of ammunition (c/s 33 of Act 7 of 1996) – Accused 1 & 2: Guilty.

Count 6: Attempting to defeat or obstruct the course of justice – Accused 1: Guilty. Accused 2: Not guilty and discharged.

[124] With regards to the witnesses Simon Muliokela, Stephanus Tieties, Ashley Hendricks, Gaylo Kavari and Leon van Neel, the court is satisfied that during their testimonies, they answered frankly and honestly all questions put to them and in terms of s 204(2) of the Criminal Procedure Act 51 of 1977, these person are discharged from prosecution.

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JC LIEBENBERG

Judge

APPEARANCES

STATE:	A Verhoef Of the Office of the Prosecutor-General, Windhoek.
ACCUSED 1:	S Kanyemba Of Salomon Kanyemba Incorporated, Instructed by Directorate: Legal Aid, Windhoek.

ACCUSED 2:	M Siyomunji Siyomunji Law Chambers, Windhoek.