

IN THE HIGH COURT OF NAMIBIA

In the matter, between

THE STATE

versus

JOHN HAPPY KAMBONDE

CORAM: ANGULA, A.J.

Heard on: 1996.04.15 - 25

Delivered on: 1996.04.29

JUDGMENT

ANGULA, A.J. : The accused is charged with: firstly, murder in that on or about 24th August 1994 at Windhoek, in the district of Windhoek, the accused unlawfully and intentionally killed Petrus Sakaria, a male person; secondly, attempted murder in that on or about 24th August 1994 at Windhoek, in the district of Windhoek, the accused unlawfully and intentionally attempted to kill Petrus Sakaria, a male person; thirdly, robbery with aggravating circumstances in that on or about 24th August 1994 at Windhoek, in the district of Windhoek, the accused acted with the intention of forcing into submission Petrus Simon and Petrus Sakaria by threatening them with a pistol and shooting at them with the said pistol, and that he acted unlawfully and with the intention to steal from them \$2 477.65, in cash, the property or in lawful possession of the said Petrus Sakaria and/or Petrus Simon; and fourthly, theft

in that on or about 10th June 1994 near Windhoek, in the district of Windhoek, the accused unlawfully and with the intent to steal, took a briefcase containing documents, a drilling machine, a jigsaw and a bag of tools, the property or in the lawful possession or control of John David Schulein.

The State was represented by Ms H Garbers and the accused was represented by Mr J D Potgieter on the instruction of the Director of Legal Aid. The accused pleaded not guilty to all charges. In explanation for his pleas, he told the Court through his counsel that he did not know anything about all these charges. After the State handed in the records in terms of section 119 proceedings in the magistrate's court, Ms Garbers drew the Court's attention to the accused's explanation of his plea in respect of count 3 at page 3 of the records of those proceedings, whereat the accused stated that "it is quite possible" that a number of tools which he had purchased from a person known to him as Stephanus Tiboth could have been stolen from the vehicle as mentioned in the third count. I may mention that as far as count 3 is concerned, the State in essence alleges that the goods in question were stolen by the accused out of the motor vehicle of Mr Schulein.

The State then called Petrus Sakaria who testified that on Wednesday, 24th August 1994, he was employed at the Tony Rust Service Station as a petrol attendant. He had been working there since April 1994. Even though he was not obliged to work night duty that particular night, he stayed

over because he did not have money to pay for the taxi. His colleague, Petrus Simon (hereinafter referred to as "the deceased"), was responsible for the money bag. On the said night they went to sleep at about 22h00. The room referred to as a kiosk - a small enclosure about 2 m x 4 m - had a double bunk bed. He slept on the top bed and the deceased was sleeping on the bottom bed.

At around 22h00 they were woken by a white man with a petrol container, who wanted petrol as his vehicle had run out of petrol nearby. The white person was given petrol and he left. The witness and deceased went back to bed.

Shortly thereafter the service bell rung. The deceased stood up and opened the door. The witness sat on the bed. The person, who was standing in the doorway, then started demanding money from the deceased. He had a firearm pointed at the deceased but, the witness could not remember in which hand he had the firearm. The deceased then handed the money which was in a brown leather bag to that person, whereupon the person asked whether that was the only money they had. The person then fired a number of shots at the deceased and at the witness, which the witness estimated to be between 4 and 5 shots. The deceased fell down. The witness sustained bullet wounds in the left elbow, in the chest around the left nipple and around the right nipple. After the door of the kiosk was closed by this stranger, the witness pulled himself together and pressed the alarm button with his foot, in order to alert the security. At that stage the deceased was lying on the floor, bleeding. After the witness pressed

the button, he saw people around him. He could not say whether they were police or ordinary people, because by that time he had suffered blood loss and was not able to see. He woke up the next day in the Katutura Hospital where he was treated and discharged two weeks thereafter.

Mr Sakaria identified the person who shot at them that night as the accused in this case. He recognised his face, beard and teeth. His beard looked shorter that night than it is now. I may mention that the accused has a beard.

Mr Sakaria further testified that thereafter he saw the accused in the gallery in the magistrate's court when the accused appeared at the preparatory examination. He said that the accused was seated amongst many people and he recognised him. He pointed him out to his friends who accompanied him to Court. He said that he recognised him by his face and teeth. When questioned by Ms Garbers for the State, when he saw the accused again, he testified that in fact he saw the accused first after he was discharged from hospital at the market at Ombili location in Katutura, while the accused was selling goats. He remembered that it was after Christmas. Thereafter he saw the accused in Court on one of the preparatory examination appearances.

Under cross-examination by Mr Potgieter, Sakaria testified that the man with the petrol container (jerry can) came to the service station after 21h00, some minutes before 22h00, while they were already in bed. He said he was aware of the time because he had a watch. He said that the lights in the

room were not on but the inside of the room was illuminated by the light of the petrol pumps and the light of the filling station canopy. The man was standing in the doorway and he could see him. He repeated the man's description, that he was a black man, tall, his upper teeth decayed, and his bottom teeth slightly bent to the inside. He was wearing a cap with a peak which seemed to him to have been made of brown synthetic leather. Sakaria's statement which he made to the police was read to him and he was cross-examined thereon. His statement reads as follows:

"PETRUS SAKARIA, states under oath, ID: None, Namibian citizen, 25 years of age, resides at Ombili No. 3896, Tel. None, employed at Tony Rust Service Station Tel. 227137, Home language Oshivambo but I state in English

1. On Wednesday 24th Aug. 94; I was performing my duties as a petrol jokky at Tony Rust Service Station at about 07:00 together with a colleague P. Simon
2. At about 19:00 the same day, we were warned by "Swanib" Security guards; to be on alert and they asked us whether we were having an alarm at work; because some men were shot at Khomasdal Service Station on the same day at 07:00. The security guards were all "whites"; three in total.
3. At about 22:00, same day; my colleague and I were sleeping in one of the bedrooms at the station; I was sleeping on the top bed and my colleague on the underbed, when we heard an outside alarm went off.
4. My colleague first wake up and wanted to see what was going on. Just as he reached the door; he met a men at gunpoint; demanding money to be handed over to him, uttering "gee alle geld wat julle het", which my colleague did. The amount was ± \$800-00.
5. I was lying on the bed as I was frightened and couldn't do anything; The suspect then came further into the room, and fired two shots on my colleague (on the head) and then another two shots on my chest and upper arm, and went off. I don't know which means he

(the suspect) used to escape; as he disappeared.

6. I can describe the suspect as a black man; tall; slender; with black eyes. The suspect wore a black jacket and was masqueraded with a sort of "pantihose" staff; dark in colour on the face, and a black head, I can't remember the kind of trouser, shoes he wore, but I can identify him if I see him again. The suspect seems to be an Owambo speaking man.
7. I can only describe the gun as a black kind of pistol, but I don't know which type it is.
8. I further add that, I was assisted by a man unknown to me, after the incident, and I found myself in the hospital as I later lost my consciousness.

I know and understand the content of this declaration. I've no objection in taking the prescribed oath. I consider the prescribed oath as binding on my conscience." (sic)

The statement is dated 26th August, 1994 and is signed by Mr Sakaria. The statement was handed into Court as Exhibit C.

Questioned about the panty hose the accused was masquerading, the witness said that he saw a thing covering accused's ears which looked like a panty hose. He was questioned as to why his statement did not mention the teeth and the beard. He replied that he had mentioned it to the police, but that they might not have written it down, because those were some of the features he recognised when he saw the accused later. It was put to the witness that he and his friend wanted to assault the accused when he appeared in the magistrate's court at one of the preparatory examinations. This he denied. He was questioned as to why, after he had seen the accused in Ombili, he did not report it to the police. He replied that by that time he had already given his statement to the police. Asked whether he

was taken to the identification parade, he told the Court that the police came to take him but he replied that something was wrong with his health and that he could not go.

Then the State called Jacques Alberts who testified that on that night at about 22:00 he went on foot to Tony Rust Service Station with a jerry can after his vehicle had run out of petrol nearby. The petrol attendants were sleeping. One of them came out and filled his can with petrol. Alberts left to put petrol in his motor vehicle and returned to the service station after 3 or 4 minutes. On arrival at the service station the alarm was on. He knocked at the door, opened it and entered the room. One of the guys told him that they had been shot. The lights of the service station were shining into the room. One of the guys was lying on the floor; another was sitting on the upper bed. He went across the street to the guards at the Nigerian Embassy and requested them to call the police and the ambulance. He went back to help the injured people. He was there until the police and ambulance arrived. He did not hear any shots while fetching his motor vehicle. Questioned under cross-examination whether he saw anybody driving away or running away, he replied that he did not, but he told the police about a motor vehicle which looked as if it came out of the entrance between Alfa and the service station. He said that he was able to see well while inside the room as the bulbs of the canopy were fluorescent and were bright.

The next witness called by the State was John Schulein who

testified that during 1994 he was employed by TransNamib. On 10th June 1994 he went to watch Schindler's List, a 3-hour movie which was showing at the Kine 300. He parked his motor vehicle at the Eros Shopping Centre and locked it. He left his briefcase, tools and a brown bag in the motor vehicle. When he returned, the motor vehicle had been broken into and all his goods to the value of N\$5 000 were stolen. Some time thereafter he received a telephone call from Sergeant van der Merwe of the Windhoek Police station who told him that he had his identity card. He got his identity card and enquired from the police about his stolen goods which were stolen together with the identification card. The accused was brought from the cell and he and Schulein were taken by the police to the house of the accused. At the accused's house he was taken to an old fridge which was locked. After it was opened by the accused's wife, he retrieved his distinctive leather bag, a screw driver with his mark MTC-ST-70, his jigsaw engraved "Jooste" and a drilling machine. He estimated the value of the items recovered at N\$3 000.

Cross-examined by Mr Potgieter for the Defence, Mr Schulein confirmed that there was a Combi in the yard, that is the yard of the accused's house. He was not able to say whether anybody used to sleep there. He confirmed that he heard the accused telling the police that he bought the tools from another person but was not sure whether the name mentioned was "Tiboth". Later, in cross-examination, he conceded that he heard about the name "Tiboth".

The State then called Stephanus Tiboth. Before he testified, he was warned in terms of section 204 of the Criminal Procedure Act. He testified that he is currently in prison on a charge of attempted burglary. He knows the accused since 1970. They used to steal from motor vehicles. He stayed at the accused's place for about six months during 1994. The accused has a yellow pick-up which is painted black on the sides, with a Mariental registration number, N 1114 M.

He remembered that on 24th August 1994 he was with the accused from the morning until late. They were stealing around. First they visited the rugby stadium and thereafter the Eros Shopping Centre. They were in the accused's said pick-up and accused was driving. They were looking for something to steal because accused told him that he (accused) needed money to go to the farm. They left for Eros Shopping Centre before 22h00. On arrival accused parked the vehicle in front of Eros Post Office. Accused told Tiboth to stay in the motor vehicle and be on the look-out for oncoming vehicles. Accused then went towards Kine 300. Thereafter accused walked in front of the building and went out of Tiboth's sight. Tiboth thereafter heard shots fired. He could not see whether or not it was accused who fired the shots. Accused then came back. He told him (Tiboth) in Damara that "there is shit." Tiboth heard about 3 shots but said it is possible that it could have been more. Accused had 2 firearms. He showed it to Tiboth on the way to the Eros Shopping Centre. He got off the vehicle with the firearms. The firearms were different. One was

with a round of six, the other with a magazine. The one with a magazine was about 18cm long and dark brown in colour.

When accused returned he had a newspaper folded like an ice cream cone which he put on the seat. Except for the newspaper, he did not have anything else. The newspaper was an ordinary newspaper containing many pages. The witness could not say what was in the newspaper. He got the impression that it was heavy from the way accused was holding it - as if he was trying to prevent something from falling out of it. Accused put it down very slowly on his left side, in a lying position.

They then drove to the accused's house. When they arrived at the accused's house, accused started packing his goods in preparation to leave for the farm. He left for the farm later the same night. Asked whether the accused had money, Tiboth replied that he must have had money, that is why he left for the farm. Accused gave him N\$30.00 and instructed him to look after his house. Accused returned on Monday afternoon. When accused returned Tiboth enquired from the accused about the television news concerning the robbery at Eros Shopping Centre. Accused did not respond, but asked Tiboth at what time the news was broadcast. Thereafter they never discussed anything further about this incident. Prior to his arrest Tiboth had a quarrel with accused whereafter he moved out of the accused's house.

He testified that that day accused was wearing grey trousers

and a grey jersey with stripes. He was not wearing a jacket. He had a grey balaclava.

Tiboth denied that he ever sold tools to accused. He denied further that he broke into a Toyota station wagon during June, 1994 at Eros Shopping Centre. He knows about the old fridge at accused's house as he gave it to the accused to fix it. It was always locked and the accused and Tiboth had access to the fridge. The key to the fridge was on the bunch of keys of the accused's motor vehicle key holder. Tiboth used to see a distinctive leather bag in the fridge. He did not know though, where it came from. He saw several passports belonging to the people who were staying at the accused's house. He further testified that the identity documents and passports were kept on the shelf in the bathroom-cum-toilet of the accused.

He was shown the photographs of the accused's vehicle which was Exhibit D1 - D3 and confirmed that it was the accused's bakkie.

He further testified that the usual deal between him and the accused was that after they sold the spare wheels they had stolen, he would receive a small amount. Asked why the deal was so unfair, he said that accused had more financial commitments. He received N\$30 from the accused from the incident at the Eros Shopping Centre. This was given to him by the accused before he left for the farm.

Hereafter Mr Tiboth was cross-examined by Mr Potgieter. He

testified that he met the accused at the taxi rank where he used to wash taxis, whereafter accused took him to his house. He said that he used to stay either in the Combi or in the structures built outside the house. Accused used to take him to the farm on occasions to help him out. He testified that he was arrested by the police after he had broken into a motor vehicle. He confirmed that some times he operated on his own without the accused. He confirmed further that after he was arrested he called on the accused to come and bail him out because they know each other. He confirmed that he had an argument with the accused when he and a child, Robert, smoked dagga but said that accused knew that the child was smoking dagga. He denied that he brought stolen goods to the accused's house because he either sold the goods or took it to his aunt's house. He confirmed that the accused went to the farm with the children. He knew of the funeral of the uncle of the accused's wife which was held during that weekend. He was, however, persistent that accused left the following day after the incident.

He confirmed that he knows Frans Gawanab as a brother of the accused's wife, Sam Jahrs, brother-in-law of the accused's wife and Abraham Gaseb, a friend of the accused. He could not remember a lady by the name Sarah Rooi but remembered that during the long weekend while he was at accused's house, there was a lady, light of complexion. They fetched her from the farm Summerdown outside Helmeringhausen the weekend before the long weekend. He remembered one girl who came to the house that Friday afternoon. She was light of complexion. She was supposed to accompany the accused to

the farm but she was late. He remembered that she arrived on Friday afternoon at about 17h00.

He testified that on Wednesday, 24th August 1994 in the morning, they were cleaning the bakkie. He denied that other people worked on the Combi. After they cleaned the motor vehicle, they left for the stadium at about 16h00. They hung around the rugby stadium. They stole tools and spare wheels. They stayed at the rugby stadium for about 3 hours. They were moving around. He testified that there were no security guards present outside the stadium, but there were security guards inside the stadium. Asked what time they left for the Eros Shopping Centre, he testified that they left at about 20h30. They arrived at Eros Shopping Centre before 21h00 but turned back to town. They drove around the town scouting to steal spare wheels from motor vehicles. They could not find a motor vehicle in town from which they could steal spare wheels. They again left for Eros Shopping Centre before 22h00. They parked in front of the Post Office, more to the left side of the Post Office, that is, closer to Nelson Mandela Avenue. The motor vehicle's nose was facing Kine 300. The Post Office was more to his right hand side. Even though there are trees on the open space between the Post Office and Eros Shopping Centre, it did not obstruct his view. He testified that they went to Eros Shopping Centre to steal. Asked what his role normally was, he said that he would keep surveillance while the accused would remove spare wheels. If he observed something he would hoot or switch the head lights on and off. That specific night he had instructions from the

accused to watch the motor vehicles coming from the Lalapanzi Flats' side. He kept observation through the rear view mirror. • He confirmed that the accused is paralysed in his right hand but testified that accused can use this hand. He testified that accused normally picks up things with his healthy hand and supports it with his paralysed arm.

He testified that he observed the accused after he left the motor vehicle; he went to the shopping centre, peeped into the pharmacy and then moved towards the right hand side of the area, whereafter he moved out of his view. He testified that accused went out of his sight for about 5 minutes. He got worried and almost got out of the motor vehicle. Thereafter he heard about 4 shots fired. He thought that accused had been shot. He was about to open the door of the motor vehicle to get out when he saw the accused coming. He saw accused coming from the small gate which is situated between the service station and the yard of the Eros Post Office. Accused was walking at a fast pace. He looked behind him once. When accused got into the motor vehicle, he asked him what was wrong. Accused said that "there was shit." He did not ask him whether he had been shot. His impression was that accused was shot at but had probably been missed. He did not enquire about the "shit" accused referred to. He was curious but he was stunned to ask.

They drove to the accused's house at a high speed and it took about 10 minutes from Eros Shopping Centre to the accused's house in Katutura. He confirmed that it was usual for the accused to carry two firearms. One of the firearms,

he was told by the accused, he had borrowed from an Oshiwambo- speaking man. He did not know this Oshiwambo- speaking man • but saw him at the accused's house when he called in to have his vehicle repaired.

He was questioned when the accused left for the farm. He said the accused packed that evening and left the following morning. It was pointed out to him that in his evidence-in-chief he testified that "he left quite late that evening." He conceded that he was wrong in that respect and that what was correct was that the accused packed and left the following morning. He was adamant that the accused left Windhoek the morning after the night of the incident.

At this stage the defence counsel applied for the Court to conduct an inspection in loco. The Court granted the application and an inspection in loco was conducted. The observations made at the inspection in loco were placed on record. I may mention that the area between the Post Office and the service station has changed in the meantime. A new motor vehicle sales business is occupying that area, but the photos handed in as Exhibit T1 - T4 show the area as it was then. Tiboth was asked to walk the same route the accused walked the night of the incident. He walked from the vehicle which was parked at the parking area of the Eros Post Office, over the open area between the Post Office and the shopping centre, through a small gate in a dilapidated fence, past the front of the movie house, pharmacy and Eros Bottle Store towards the filling station. Hereafter the Court came back to the Court house.

Mr Potgieter continued with the cross-examination of Tiboth. Tiboth was asked whether there were security guards in the vicinity that night and he replied that there were no security guards in the vicinity. He did not see any fire burning but he was aware of one security guard who normally made a fire in the Elite Car Auctions premises across Nelson Mandela Avenue. He knew about the presence of that security guard before the incident of that night.

It was put to Tiboth that the accused and his family left Windhoek for the farm on Friday. He said he could remember that the school were in vacation. A school report of accused's child, Doney Kambonde, was handed in as Exhibit E. It indicates that the second semester started from 1st June, 1994 to 25th August 1994. Tiboth insisted that he was present when accused and his family left for the farm. He said it was a Thursday. He was supposed to go to the farm but there was no room in the vehicle. Asked to describe the balaclava the accused wore that night, he testified that it was drawn over his head but rolled up. He explained that it was pulled over his head but rolled up so that the eyes and ears were still visible. Asked whether he ever sold tools to the accused, he said that he never sold tools to the accused because they were friends and he would not get enough money out of him. He was asked what was the usual selling price of a spare wheel and he replied that it was normally N\$180 if it was a new wheel and he would normally get N\$50. He knew that the accused's wife was attending evening classes which started at 17h00 and stopped at 21h00. The accused normally fetched her at 21h00.

He testified that the driver of the Combi when the accused left for the farm, was the accused's brother-in-law.

At this stage the statement of Tiboth which he made to the police was handed in as Exhibit G. After he confirmed that it was his signature, the statement was read into the record. It reads as follows:

"STEFANUS TIBOTH
NAMIBIA - MALE - 40 YRS
GRYSBLOK 1879
KATUTURA

STATES:

I am an adult Namibian male residing at above address. This residence is that of John Happy KAMBONDE, the latter is well known to me for many years. I used to accompany John during evenings. He is driving a Toyota Hilux bakkie with registration N 1114 M.

We used to visit parking areas through out Windhoek where John will then steal spare wheels from L.D.V. vehicles parked in these areas. Later John sold the spare wheels & would then give me some of the money. We regularly visited the Eros shopping centre where John also stole spare wheels.

I can remember an evening during August 1994. The following weekend was a long weekend, I can not remember the exact date. I must mention that John always carried a revolver when we went out in the evenings. On this specific evening he also had a pistol with him which he carried tucked into his pants.

I knew that the pistol was the property of an Owambo man. I have seen the pistol with the Owambo & also that John previously borrowed the arm from this Owambo.

We left the house in the bakkie of John, he was driving as usual, it was twilight. John drove to the rugby stadium. There was a rugby match on & a number of vehicles were parked on the parking area in front of the stadium. We waited until it was dark when John went out & stole three spare wheels from three different L.D.V. vehicles. There was security guards & John decided that we must leave. We went back to the house in

Katutura, that is John's house, where we off loaded the spare wheels.

After this John drove to the Eros shopping centre. On the way John mentioned that he was in desperet need of cash money. The reason was that he had to return to his farm in the Gibeon district. He needed money for petrol & food for the people on the farm. He also made mention of a funeral.

John parked infront of the Eros Post office. John left me in the vehecle & said that he must go to the pharmacy in the shopping centre. Both the firearms, as mentioned previously, was in his porsestion. John also had a balaklawwa on his head. This hat was not rolled down but he wore it as a hat. John walked in the direction of the pharmacy. The area in the shopping centre is well enlighten & I could observe John well. He did not enter the pharmacy but turned around & came towards the Eros service station. I then lost John out of my sight.

Short after this I heard gun shots, it was rapid fire & I would say 4 - 5 shots. John arrived shortly after this, he was walking in a quick pace. He got into the vehicle & said in Afrikaans "My vriend ek het groot kak gemaak & ons moet nou vinnig maak." He then drove to Katutura.

I questioned John as to what happened but he ignored me. When returning to the vehicle John had something wrapped in a news paper in his hand.

The same evening John left the house accompanied by his wife, children, his wife's sister & her husband. John gave me N\$30 & requested me to look after the house.

The following evening I saw on T.V. of the robbery at the Eros service station. When John returned home I confronted him but he answered that he will tell me some time or other but at the moment the Police are looking for him. I am certain that it was John who robbed the Eros service station.

The day when John returned he told me that he was going to return the pistol to the Owambo. I do not know the name of the Owambo man but will point him out to the Police.

The balaklawwa is of greyish colour with blueish stripes. This clothing is still in John's possession. John always had the balaklawwa with him when we went out in the evenings.

After his return John was interviewed by the Police. On his return after the interview John informed me that the Police are also looking for me & that I must say nothing about the Eros

shopping centre.

I must mention that just before I lost John out of sight on his way to the service, the balaklawas were rolled down over his face.

I know & understand the contents of this statement.

I have no objections in taking the prescribed oath.

I consider the prescribed oath as binding to my conscience." (sic)

The statement is dated 24th September, 1994 and is signed by Tiboth.

Thereafter the witness was questioned about the discrepancy as to when the accused left for the farm. He corrected himself and said that accused left the next morning. Asked whether he knew which teams were playing, he said he did not know as they did not enter the stadium. It was put to him that accused entered the stadium and watched the match. He disputed that and said that as far as he knows, accused did not enter the stadium. He knew Abraham Gaseb but did not see Abraham with the accused that evening. It was further put to him that in his evidence-in-chief he said that they drove around town looking for opportunities to steal. That it is contradiction to what he said in his statement, namely that they took the spare wheels first to the accused house. He corrected himself by saying that first they went home to unload the wheels. Questioned about in which language his statement was taken, he said that it was taken in Afrikaans. He was speaking in Afrikaans but it was translated into English by a Herero-speaking person. He said that although he spoke Afrikaans they did not quite understand each other.

He was asked to demonstrate if the balaclava was rolled down, what parts he was able to see. He demonstrated and what was visible were the eyes, mouth and nose.

Hereafter the State called Riaan van Wyk who testified that during the night of 24th August 1994 he was on duty at the Windhoek Police station when he received a report about the incident at Tony Rust Service Station. Two guards drove in front and he drove alone in his police motor vehicle. When he arrived at the scene of the incident and there was a white person busy stopping the bleeding of the person lying on the floor. Thereafter the ambulance arrived and the injured persons were carried out and taken to hospital. Sergeant Gaven of the CID arrived and took over the scene from him. They searched the room and found five 9mm spent cartridges. The cartridges were handed over to Sergeant Gaven. He was questioned by Mr Potgieter whether they searched the area nearby, which he confirmed. However, they did not have search lights although the area was lightened.

The following day they searched the room and found two further 9mm spent cartridges. He handed it over to Sergeant Gaven. He remembered that they found a 7.65 calibre pistol in the room. It was pointed out to him that in his statement he said that the cartridges were those of a 7.65 pistol. He said that he made a mistake by having confused the cartridges with the firearm which was found in the room.

Thereafter the State called Sergeant Gaven who in essence

corroborated Van Wyk's testimony. He testified that they found five empty spent cartridges of a 9mm pistol and that they also found the 7.65 firearm in the room which had a full 8 rounds in its magazine.

The State then called Dr Lisse who testified that he is a doctor employed by the Namibian Government and that he is now a Senior Medical Officer stationed at Swakopmund. He conducted the post mortem in respect of the deceased on 30th August 1994. He concluded that the death of the deceased was caused by gun shots. He described the external injury which he found on the body of the deceased as follows:

"Gunshot wound to the right jaw 18 x 10mm most like entry, fracturing the jaw, fragments pointing inside, exiting below the left jaw 9 x 8mm.

Large gunshot wound 55 x 38mm, most likely entry, on left inginal area.

18 x 15mm laceration on the left flank, compatible with gunshot.

12 x 17mm laceration on the left buttock, compatible with gunshot.

11 x 11mm gunshot wound on the left upper arm in the front, fracture of the humerus in that area, two exit wounds on the back of the arm 17 x 12mm and 18 x 12. Bullet recovered from the right upper posterior chest wall and handed to Cst. Freyer.¹¹

He expressed the opinion that the entrance of the gunshots gave the impression that they must have been shot from a short distance of less than one metre. The post mortem report was handed in as Exhibit J. I mention that Dr Lisse was asked by Mr Potgieter to express an opinion about the ability or otherwise of the use of the right arm of the accused. He was not prepared to venture any opinion.

Hereafter the State called Adriaan Rust who testified that he is the owner of the Tony Rust Service Station for the last 15 years. He recalled the night of 24th August 1994. The alarm went off and he drove to the service station. He found Mr Alberts and Petrus Sakaria on the scene. Sakaria was shot. He phoned the police and the ambulance. He noticed that the money bag was gone. Later thereafter he was in a position to calculate how much money had been taken. This he did by way of what is called a "drive-way sheet" which was handed in as Exhibit L. The total money which was short was N\$2 477.65. He testified that the previous evening they conducted tests with the investigating officer in this case to see how far the lights would shine inside the kiosk. They established that it could shine through the door of the kiosk, 2.8m into the kiosk. He testified that if a person is standing in the doorway of the kiosk one can still see the white of his eyes but not the colour of his pupil. He testified that the money bag has not been retrieved to date.

The next witness called by the State was China Mutumba. He testified that he is a constable in the Namibian Police, currently stationed at the State mortuary. During August 1994 he was attached to the Serious Crime Unit. He remembered that during August 1994 they went to the house of the accused to search it. He found three identity documents and one passport in the house of the accused. The documents were on the top shelf in the accused's bathroom- cum-toilet. He remembered that one of the identity documents belonged to a certain Schulein. He testified that during the search

accused and his wife were present. When accused was asked where he got the documents, he replied that he did not know how the documents came there. Mutumba remembered that there were also tools found in the accused's house, but could not remember what kind of tools. He said that the owner of the identity document, Mr Schulein, was present when the search was conducted. It was put to Mr Mutumba during cross-examination that according to Schulein he was told by Van der Merwe that his identity document was found and that he should go to the police station to fetch it. Mutumba insisted that Schulein was present. He was clearly wrong in regard to the evidence of Schulein and Van der Merwe. He said that present at the search were Inspector Becker, Sergeant Stuurman and Sergeant van der Merwe.

Hereafter Mr Potgieter made a formal admission in terms of section 220 of the Criminal Procedure Act; that the deceased did not sustain further injuries other than those injuries made in the course of the operation to try to save his life; that the report entitled "Report On Person Whose Death Is Associated With The Administration Of An Anaesthetic Or A Diagnostic Or Therapeutic Procedure" is correct (the report was handed in as Exhibit M); that the contents of the affidavit in terms of section 212(7) of the Criminal Procedure Act, being an affidavit in connection with the identification of the deceased's body by Constable Freyer to Dr Lisse is admitted. It was handed in as Exhibit N.

The next witness called by the State was Jacobus Hoxobeb.

He testified that during August 1994 he was employed by Elite Car Auctions as a security guard. He was so employed since February 1994 until December 1994. On Wednesday, 24th August 1994 he reported for duty at about 17h30. It was cold and he made a fire and was also cooking his food. He made the fire in the backyard under a big tree which is on the premises. On that night, at about 22h00, he observed a yellow bakkie with a white canopy in the vicinity of Eros Post Office. After he observed the vehicle he did not pay further attention to the vehicle as he was busy cooking. While he was cooking, he heard a sound equivalent to a wall falling. He then stood up and saw a man passing the service station; the man was jogging from the service station in the direction of the Post Office. The man was tall. He could not see whether he had anything but saw him moving towards the Post Office and later he saw the yellow bakkie which was parked in front of the Post Office moving away. He was asked to indicate the height of that man and the height which he indicated was two metre. When the man went around the Post Office, he did not see him and could not see whether he went into the motor vehicle or not. The motor vehicle drove away with Omaramba Road and thereafter he did not see anything further. After the motor vehicle left, he heard an alarm going off at the service station. He then saw the owner of the service station arriving in a bakkie. Thereafter he saw the police and the ambulance arriving too. He was observing this while standing in the yard. He made a statement to the police the following day. He further testified that while the bakkie was parked there he could not see anybody in the bakkie. This was not the first time

that he saw the bakkie at that parking area. It used to come there almost every night. Normally there were two persons, one- short and one tall. One was light of complexion and one was dark. They used to take spare wheels from motor vehicles. Asked how these people operated he testified that while the people were in the movies, one would get under the motor vehicle and remove the wheel. They would leave just before the movie ended. He said he reported the matter to his employer, one Hennie Venter. On 18th October 1994 he attended an identification parade but was unable to identify any person. He was also asked to identify a vehicle. He said he was asked whether he was able to identify the vehicle which used to come to the Eros Shopping Centre and which was there that evening. He was taken to the public parking lot in front of the Windhoek Police Station and asked to look for the vehicle he was referring to. He identified the bakkie of the accused. Photos were taken of the vehicle which he identified. These photos were handed in as Exhibit D1 - D4. The photos depict a yellow bakkie with black stripes on the side, with registration number N 1114 M. He reiterated that he saw the accused on several times at Eros Shopping Centre and he always parked his motor vehicle in front of Eros Post Office. He said that the reason why he could not identify the accused at the identification parade, was because the accused normally arrived at night and he used to see him at night. It was difficult to recognise him at the parade. He said that after the incident he has never seen the accused and his colleague again. The bakkie does not longer come to the shopping centre as it used to do before the incident.

Hereafter Mr Hoxobeb was cross-examined by Mr Potgieter. He said that during that time he used to start his work at 17h00 in the afternoon until 08h00 the following morning. During that night the yard was full of motor vehicles and he was sitting at a fire with his back towards the river bed. He had a full view of the Eros Shopping Centre. He was sitting in the corner inside the fence on a bundle of tyres which were about 1.5 metre high from the ground. He said he only saw the vehicle while it had already parked and he recognised it as the vehicle which normally came there. He said that after he saw it it was parked there for about 20 minutes. He observed the vehicle at all times even though there were times when he also stood up to fetch something. He agreed that from where he was seated he could not see what was going on in the parking area of Kine 300. He said that during the night the people parked their motor vehicles in front of the Post Office, either to fetch their mail or to make phone calls from the public telephone at the Post Office. But that night it was quiet. Asked how he knew that the accused and his friend were stealing tyres, he said he saw them with spare wheels. A sketch was drawn indicating the position of the service station, the Post Office, Elite Car Auctions, Nelson Mandela Avenue and Omaramba Road. The witness was then asked to indicate where the motor was parked that night. He indicated that the motor vehicle was parked in front of the Post Office and then marked the spot "A". The sketch was handed in as Exhibit P.

He was further cross-questioned and he said that he saw the

man getting out of the motor vehicle, walking towards Kine 300 and returning. He could not see anybody getting into the vehicle after that and did not see the vehicle moving from where it was parked. He further testified that the next time he saw the vehicle it was parked between the Post Office and Kine 300. The vehicle pulled out from where it was parked in front of the Post Office and drove with Nelson Mandela Avenue, turned into the area of Eros Shopping Centre where it parked. He did not see how the motor vehicle moved from point "B", being a point between the Post Office and service station. The next thing he saw was the man jogging from the direction of the service station towards the Post Office. He got into the motor vehicle from where the vehicle drove with Omaramba Road. It was put to him that Tiboth testified that the vehicle was standing at one place that night. He insisted that the motor vehicle moved around.

Hereafter he was asked how many yellow bakkies were parked at the parking lot in front of the police station the day he identified the accused's bakkie. He replied that it was the only bakkie that was there. I may mention that on Exhibit D1 - D3 one can see a number of vehicles parked on the same parking lot. On D1 where the witness is pointing at the registration number of the vehicle, one can see two vehicles in the background. On D2, taken from another angle, one can see a sedan and what appears to be a Datsun 1400 with a white canopy, and on D3, a photo also taken from a different angle, where the witness is showing the white canopy of the yellow bakkie, one can see what appears to be a white Jetta,

a red Toyota double cab with railings on its loading box (commonly referred to in Namibia as "tralies") and another white sedan with a black stripe on the side. There is also a white sedan, a yellow sedan and another bakkie of which only a white canopy is visible.

Hereafter the defence read the three statements to the witness which he made to the police. The first statement which the witness made was on 24th August 1994, a day after the incident. It reads as follows:

"Jacobus Hoxobeb states under oath.

ID 600101900265, male, adult Namibian citizen, resides at erf 1973 Wanaheda, employed at Elite Auctions, tel. 230571.

1. I am employed at the above-mentioned company or auctionhouse as a night watch.
2. On 1994-08-24 Wednesday I reported on duty at about 17:30.
3. On the above-mentioned date approximately 22:00 I was sitting next to the fire.
4. While I was sitting I heard a hard noise in the direction of Tony Rust service station. I couldn't say what kind of a noise it was but I heard only one noise in that direction.
5. The moment I heard the noise I immediately look in the direction of Tony Rust service-station where I heard the noise.
6. I was not so much interested in what was going on but after I heard the noise a (I) saw a tall man approximately 1,80 metres running slowly in the direction of Eros post office. This man was looking backwards time and again in the direction of the service station while he was running in the direction of this Eros post office.
7. After I saw this man running in the direction of Eros post office I just sit down next to the fire.
8. I later on heard or see the beige vehicle

which belongs to Tony Rust service station. I immediately went to the main gate of the business where I was guarding.

9. The- alarm of the business Tony Rust service station was going on all the time after I heard the noise.
10. The beige bakkie then stopped at the service station but I couldn't say who was driving the vehicle but it was a white man.
11. The police vehicles and ambulances also arrived on the scene. At that stage (I) didn't know what happened but later on I saw people carried by the ambulance drivers and the police to the ambulance.
12. I couldn't remember or say what this tall man I saw running from the service station was dressing and I even don't (know) who he was.

I know and understand the contents of this declaration. I have no objection by (to) taking the prescribed oath. I consider the prescribed oath as binding on my conscience." (sic)

[Dated 25th August 1994, 18:00 and signed by Hoxobeb.]

Hereafter Hoxobeb was asked why he did not tell the police about the yellow bakkie. He insisted that he told the police. Furthermore, he was asked why he did not tell the police that there was a man who always came to steal the tyres. He reiterated that he told the police and also his employer. He said that before the incident he told the police officer, Johannes Naruseb, that there were spare wheels being stolen. The said policeman did not take him seriously. He knew this police officer, Naruseb. He used to come to the business premises as his vehicle engine was being fixed at Elite Car Auctions. The statements were then handed in as Exhibit Q.

The statement dated 6th October 1994 was then read into the

record. It reads as follows:

"1. JACOBUS HOXOBEB states in English under oath:

I am an Namibian male ID 600101900265 residing at erf 1973 Wanaheda. Employed at Elite Auctions as a security guard Klein Windhoek Road tel. 230571.

2. On 1994-08-25 I made a statement to the police. I would like to add the following. On the 21st of February 1994 I started working at Elite Auctions as a night security watchman. I usually start from 18:00 until the next morning at 08:00. During that time on a lot of occasions I saw a Toyota LDV bakkie, white in colour with a white canopy with a black underside and reg N 1114 M coming at night to the post office parking at Eros as well as the Eros shopping centre parking. There was usually two males in the vehicle, one was tall and the other short. The tall one would usually get out of the bakkie and would then steal spare tyres from motorvehicles which was parked at the Kine 300. On one occasion myself and my employer Mr Visser tried to apprehend the two males but they saw us and fled. The tall male usually wore a balaclava and I remember that he used to look around a lot before stealing a tyre. He was also quite fast when removing a spare tyre from a vehicle. I think that the tall man is a damara speaking male. I think I will be able to identify the tall male if I should see him again due to the fact that I saw him a lot.

3. On the night of the murder, the 24th of August 1994 at ± 21:00 I saw the same LDV with reg N 1114 M at the Kine 300 parking. The vehicle was parked under a type of balcony on the parking premises. I saw the tall man walking around between the m/vehicles until ± 22:00 when the people in the movies came out. I didn't see him stealing anything that night but when the movies came out he was sitting in his m/vehicle. I cannot remember if there was anybody else in the bakkie. After all the people left, the bakkie left passing the left hand side of the service station. I could not see in which direction the bakkie then turned and I then thought he had also left. I was sitting at my fire in the premises of Elite Auctions at the time. After ± 10 minutes after I saw the bakkie leaving I heard a loud noise. I thought at that stage that it was a garage door slamming. From

where I was sitting at the fire I could see the area between the filling station and the post office. I then saw a tall male walking and then jogging on the sidewalk between the garage and the post office. The male looked around and at that stage I suspected it was the same tall male that I always saw stealing the spare tyres. I recognized him by the peculiar way in which he looked over his shoulder. At first I suspected that the sound that I heard was him burgling the filling station but I later saw an ambulance arriving and then realised that something else was wrong. I can also remember that after seeing the tall male I heard the alarm of the service station going off.

4. The next day the police interviewed me and I then told them about my suspicions. Since the murder I never saw the bakkie in the area again. On 1994-10-06 I pointed the place out to the police where I saw the tall male and it was then photographed. The police also showed me a prisoner whom they had with them and asked me if I recognized the man. I have never seen the man before in my life. I will be able to identify the vehicle that the tall male was driving and will recognize and identify the tall male should I see him again.

I know and understand the contents of this declaration.

I have no objection to taking the prescribed oath.

I consider the oath as binding on my conscience." (sic)

The statement is dated 6th October 1994 and signed by Hoxobeb. It was handed in as Exhibit R.

Hoxobeb was asked why he said that the colour of the bakkie he saw that night was white with a white canopy. He replied that the lights on Nelson Mandela Avenue and in the vicinity were yellow and it made the bakkie appear to be white. He was further asked that, if he knew and he told Naruseb that the bakkie was yellow, why did he tell Inspector Becker in

his second statement that the vehicle was white. He persisted that he told Inspector Becker that the vehicle was yellow.

Then the third statement made by Mr Hoxobeb was read into the record and handed in as Exhibit S. It reads as follows:

"Jakobus Hoxobeb states under oath, Namibian male, 34 years of age, ID 6001010900265, residing at Wanaheda, Erf 1973. Employed at Elite Auction Car Sales, tel. 001-230571. My home language is Nama but I state in English.

I am a security guard at above-mentioned employment and working night shifts. I start at above-mentioned employment on February 1994 and are still employed at this employment. On Tuesday 1994-10-18 about 20:50 a Toyota Hi-Lux was parked at Eros-post-office. I immediately recognize the vehicle as the one I saw many times in the pass in that vicinity. I recognize the vehicle because the driver of that vehicle are the one who normally visit the place at Keny 300 and stolen tyres from the vehicles. The night when the murder occurred at Eros-service-station I also recognize the same vehicle at the premises. It was about 21:00 the same night. I saw the vehicle petrol the are an there-after lost it. After a while I heard a noice but I never paid attention to it. After the noice I saw a long black man running into the direction of the post-office nearby the service station. He there-after disappear and I never saw him again. I have no doubt to identify that vehicle because it happen several times that the vehicles driver visit the area of Keny 300 and I saw it that night of the insident again on the same premises.

I know and understand the contents of this statement.

I have no objection into taking the prescribed oath.

I consider the prescribed oath to be binding on my conscience."

It is dated 18th October 1994.

It was put to Koxobeb that he testified that the vehicle was moving around, but in this statement he said that it was parked. He replied that the vehicle was first parked and then drove around.

In re-examination Mr Hoxobeb was presented with photos which were taken on the day he pointed out the points to the police in the area of the Post Office and Eros Shopping Centre. It was explained to the Court by Ms Garbers for the State that these photos were only made available to her by the investigating officer during the cross-examination of Hoxobeb, hence she was not able to hand them in when she led the evidence-in-chief of Hoxobeb. The defence did not have any objection to the photos being handed in at this stage and reserved its right to cross-examine Hoxobeb based on the photos. The photos were handed in as Exhibit T1 - T4.

Photo T1: Mr Hoxobeb explained that it was taken from the premises of Elite Car Auctions itself where he was seated in the corner of the yard of Elite Car Auctions.

Photo T2: He explained that it shows the points as shown the police, being the direction the person moved from the service station to the Post Office. He stated that he had a full view of the area between the service station and the Post Office. It shows Mr Hoxobeb standing on the pavement of Omaramba Road with Tony Rust Service Station in the background.

Photo T3 : Shows part of the Post Office taken from the side of Nelson Mandela Avenue. It also shows big trees which are on the open space between the Post Office and the Tony Rust Service Station.

Photo T4: Shows the front part of Eros Post Office and there is a red motor vehicle parked, facing Eros Shopping Centre. Again there are big trees on the open space. One has a clear view of the front of the Eros Shopping Centre. There are motor vehicles parked in front of the shopping centre and the sign of Alfa shop is also clear.

Hoxobeb was asked how he was able to remember the registration number of the yellow bakkie. He said that at one time he wrote it down on a cardboard hanging at the door in the office of Elite Car Auctions. He gave the number to his employer. However, when he gave the statement to the police he knew the number by heart.

The State called Sergeant van der Merwe who testified that during August 1994 he was a member of the Namibian Police stationed at Windhoek. He was a constable at the time. On 18th October 1994 he and Sergeant Stuurman, Constable Mutumba and other policemen went to the house of the accused. The purpose was to look for items which were stolen from the SWAPO camp in Brakwater. That was a different case which he was investigating. The accused accompanied them. During the search Constable Mutumba found an identity card which did not belong to accused or his

family members. The identity card belonged to Schulein. He could not find anything in the accused's house which connected the accused with the housebreaking at the SWAPO camp in Brakwater. After the search he contacted Mr Schulein after he looked up his telephone number in the directory. He said that after Schulein arrived, Constable Mutumba and Stuurman and other policemen took Schulein to the accused's house because Schulein told them that he also lost other goods together with the identity card. He testified that accused was confronted when the identity card was found, but denied any knowledge as to where it came from. He testified that accused had an attache case full of receipts in respect of items which he had bought and which were in his house. Those goods were not taken by the police.

Hereafter the State called Inspector Nelius Becker. He testified that he is a member of the Namibian Police and the commander of the Serious Crime Unit. He is the investigating officer in this case. He has experience of 13 years in the police. The previous investigating officers in the matter were Gaven and Naruseb. He took over the investigation of this matter on 15th February, 1995. He testified that accused was arrested on 17th October 1994. There had been previous interviews with the accused and from the beginning of the investigation, a motor vehicle was mentioned which was seen in the vicinity of Eros Shopping Centre. The ownership of the vehicle was followed up. He said that witnesses were interviewed who gave a description of the motor vehicle which fitted the description of the

accused's motor vehicle. He interviewed the accused in his office in the presence of Sergeants Stuurman and Dausab. He spoke Afrikaans to the accused. At that time he was trying to find out from the accused what he was doing on the night of the incident. The statement of Tiboth had not been taken at that stage. The interview took place on 21st August 1994. He said that the accused told him that he went to see the rugby at the rugby stadium and that he was alone; that he drove to Kine 300 in order to visit the pharmacy. He asked the accused whether he was there after or before 22h00. The accused said that he was there before 22h00 in the evening. When asked what he wanted to do at the pharmacy, Becker said the accused could not tell him at first but later said that he wanted to buy something for his child's stomach. He told Becker that he was driving his yellow bakkie. Accused's explanation was not reduced to writing, but later Inspector Becker himself made a statement about this interview. He testified that a statement was taken from the security guard at the Nigerian Embassy, one Fred Murema. However, Murema could not be traced as he no longer worked for that specific security company. He further testified that the spent cartridges were sent for ballistics tests and the results confirmed that the cartridges were fired from the same firearm. Unfortunately it could not be compared to the firearm as the firearm was never found. The results of the ballistics tests were handed in as Exhibit U. Inspector Becker was questioned as to who followed up the information about the identity of the accused's motor vehicle and he replied that it was Inspector Jumbo Smit, and furthermore that that information came from

the security guard of Elite Car Auctions who gave it to him, Naruseb and Smit. This information is reflected in the investigation* diary. Furthermore they are reflected in the statements which were taken at a later stage. He was questioned why Sakaria was not taken for the identification parade. He replied that Sakaria told him that he could not recognise the person. Furthermore, at the time the identification parade was held, Sakaria was in Owamboland. His experience is that when witnesses are shocked, they are not always able to identify the person. It was then put to Inspector Becker that accused denied that he told him that he was alone; furthermore that accused denied that he told Becker that he went to Eros Shopping Centre to buy medicine for his child. Inspector Becker persisted that accused told him so. He testified that when he took over the investigation, the registration number of the accused's motor vehicle was known. He was asked why it took long to hold an identification parade. He said that he wanted to gain more information.

After Inspector Becker's testimony the State closed its case. The defence then called the accused to testify. He confirmed that he knew Tiboth for some time, that he found him at the taxi rank and took him to his house to assist him with his household duties. He did not know where Tiboth was staying at the time, but sometimes he was sleeping around in the pipes. At his house Tiboth slept in the Combi which was converted into a caravan. He had some minor problems with Tiboth relating to his drinking and smoking habits. He said that at some stage he reprimanded Tiboth for smoking dagga

at his house. He would not say that there was any major problem between the two of them. He was asked whether he saw Tiboth since he left his house until 24th August 1994. Accused replied that he sometimes saw Tiboth in town while he was driving, but never stopped so that they could talk. He was asked to tell the Court what happened on 24th August 1994. He testified that nothing in particular happened. He kept himself busy with routine duties and in the afternoon he took his wife to the classes. Thereafter he dropped his brother-in-law and went to the rugby. After the rugby match he went home. He was asked what time he arrived at home. He said that he arrived at 22h45. He said the reason why he said it was 22h45 was that he watched television for a while and thereafter the transmission for the day ended. He said that he went straight home after the rugby match. He said that during the day he fixed some mechanical defects of the motor vehicle because he had to go to the farm for a vacation. The school vacation, according to his recollection, started on Thursday and he left the next day. He said that he left with two vehicles, the Combi and the Hilux. The Combi was occupied by a choir. He was supposed to attend a funeral of somebody who passed away. He confirmed that he is the owner of a the yellow Toyota Hilux with registration number N 1114 M and that it has black stripes on the side. He said that he was helped by Jahrs and Frans Gawanab in fixing the motor vehicle. He testified that during the weekend, while he was on the farm, he was contacted by the police from Gibeon who told him that the police in Windhoek would like to make contact with him. He said that he told them that there was no problem as he was

on his way back to Windhoek. However, while in Mariental, he met policemen from Windhoek, Sergeant Stuurman and Warrant Naruseb. He said the police told him that they were looking for an Oshiwambo person who is working with a white person and that person is driving a beige motor vehicle. He was questioned by the police on two or three occasions about this matter. He was also asked about the whereabouts of Tiboth. He confirmed that after he was arrested his house was searched and the police alleged that they found identity cards in his house. He testified that everybody in his house has access to the bathroom-cum-toilet. They are about 10 people who are staying in his house.

Accused further testified that at one occasion of his appearance at the magistrate's court, one person and his friend confronted him and wanted to know why he had killed his brother. He ran to the police station and reported the incident. He said that nothing happened because he did not have the identity of the persons. It was put to him that Tiboth testified that it was their habit to go out at night and steal. He denied and further said that sometimes Tiboth went out to steal and sometimes he (the accused) bought tools from Tiboth. He denied that he was at Eros Shopping Centre on the night of 24th August 1994. He also denied that he told Becker that he was at Eros Shopping Centre that night. He said that he was questioned by Becker as to whether he knew about the pharmacy at Eros Shopping Centre, and he told Becker that at one stage he bought medicine there. He said the leather bag and tools were brought to his house by Tiboth and his friend. He said that this was

so because Tiboth knew that he was a mechanic and he bought the tools from Tiboth. He denied that he owns a balaclava and he does not have a jacket but only owns jerseys. He testified that there is something wrong with his right hand from a serious injury he sustained in a motor vehicle accident during 1975. He further testified that when he arrived from the farm he did not see Tiboth, neither did he have any discussion with Tiboth. After he returned from the farm they did not meet. He did not know Hoxobeb and denied that he visited Eros Shopping Centre frequently. He said he only visited it on one occasion when he bought medicine at the pharmacy. He said that he went to the NBC to look at the news broadcast regarding the incident at Eros Shopping Centre. He went there on two occasions; on the first occasion he was assisted and the people replayed the cassette for him where it was reported that a white person was responsible for the incident and he was given a serial number of the cassette.

Hereafter he was cross-examined by the State. It was established that he is 1.89 metre in height. He confirmed that he has a beard for a long time which he sometimes trims. He had been wearing a beard since he was 25 years old and he is now 40 years old. He said that prior to 1994 he resided on the farm, but during 1994 his wife came to attend a course in Windhoek and he decided also to come to stay in Windhoek together with his wife and children.. On the farm he farmed with pigs, poultry, sheep and goats, etc. During 1994 he was a motor mechanic as he had been fixing motor vehicles while he was on the farm. While in Windhoek

he used to receive orders and sold his livestock in Katutura. He said that he met Tiboth in the 1980's. He said that he bought his Hilux bakkie with registration number N 1114 M in the last half of 1992. He was asked as to what household duties Tiboth had to assist him with. He replied that, Tiboth assisted him with the fixing of motor vehicles and cleaning of the yard. Tiboth started to stay at his house from the middle of June 1994. He denied that Tiboth was residing at his house on 24th August 1994. He testified that Tiboth left his house a few days after the birthday party of his daughter. Thereafter he never spoke to Tiboth again, even though they greeted each other by waving at each other. Tiboth never visited his house again. He denied that Tiboth accompanied him to the farm the weekend following the week of 24th August 1994. It was pointed out to him that this was put to one of the witnesses by his counsel. He confirmed that on the night of 24th August 1994 he did not pick up his wife, but she took a taxi. When he dropped her at the classes he was alone and then left for the rugby stadium alone. It was pointed out to him that it was put to Tiboth that he went to the rugby with Abraham. He explained that maybe his counsel did not understand his instructions, as he told him that he met Abraham at the rugby stadium. He said that after he was released he obtained newspapers from newspaper places to refresh his memory about that period. Asked what his motive was for looking at the cassette at the NBC, he said that he did it because he had read about the incident in the Tempo and he did not know about it in detail when the police started questioning him. The main reason is because it was

reported that it was a white person; that is why he went to see it. Questioned as to why he went to the NBC for the second time, he said that because he saw the news broadcast the following day and it was a different version from what he had seen before. He confirmed that he travelled with his yellow bakkie to the rugby stadium that afternoon. He met Abraham Gaseb during the interval when Gaseb was buying cold drinks. During the duration of the game he sat alone. Asked how he was dressed that afternoon, he said he could not remember but he thought that he was wearing a pull-over (a jersey without sleeves) and a blue blazer. He said that he left for the farm on Friday at about 11h00 in the morning. He said that he left two girls from the neighbours to look after the house. He only remembered one girl's name as Doreen. He paid both of them N\$50. He remembered Anna Rooi who was supposed to go with them but she was late for the trip. She is related to his wife. When he came back from the farm the girls told him that Tiboth had been around. He testified that there is no ill-feeling between him and Tiboth but could not think of any reason why Tiboth should say that they used to steal spare wheels.

Hereafter Mr Potgieter handed in newspaper clippings from the "Republikein" of 29th August 1994, pages 1 and 5 and of the "Tempo" of 28th August 1994, page 3. They were marked Exhibit W1 - W3. Mr Potgieter explained that it was merely proof that it triggered off the accused's steps to make enquiries at the NBC.

The defence then called Agnes Kambonde, the wife of the

accused. She testified that on the afternoon of 24th August 1994 she attended classes from 17h00 to 21h00. She confirmed that- on that day her husband had been fixing motor vehicles. At about 16:45 they left the house with her brother. Accused first dropped her brother at her mother's house. Thereafter he dropped her at the classes. She said that he told her that if he does not show up at 21h15 that evening she should take a taxi. He did not show up and she took a taxi home. When he returned she was at home. She was watching television. They left for the farm on Friday and returned on Monday. Asked from when Tiboth had resided with them, she said from the beginning of the year up to June. Pressed to be exact, she said up to 27th June, 1994. She remembered that because it was the day of her child's birthday. She confirmed that Tiboth had a quarrel with the accused. Thereafter she did not see him again. During the weekend they left for the farm, Doreen and another girl, who is known to her as Hantjie, looked after the house and they were paid N\$50 by her husband.

Hereafter the defence called Frans Gawanab. He testified that on that day he assisted the accused with the servicing of the motor vehicle. Thereafter he was dropped at his mother's house in the yellow bakkie of the accused. Under cross-examination he testified that they worked on the Combi and they were assisted also by Sam Jahrs. He confirmed that Tiboth used to assist them when they were fixing the vehicles, but that morning when he arrived he did not see Tiboth. He denied that he ever discussed the event of 24th August 1994 with the accused. He remembered that the Combi

was filled up on Friday between 10h00 and 11h00 when they left for the farm.

The next witness called by the defence was Sam Jahrs. He testified that during August 1994 he stayed at the accused's house. He remembered the weekend when they went to the funeral. He recalled the night of 24th August 1994 when the accused returned home. He said he remembered because the next morning they worked on the motor vehicle. He said accused arrived at home 15-20 minutes before the evening television transmission for the day was finished. He was in his room watching television. He peeped through the window and saw the accused. He said that Tiboth used to stay there since early 1994. He also confirmed that he (Tiboth) used to help the accused fixing motor vehicles or cleaning the yard and Tiboth used to sleep in the black Combi. He did not see Tiboth again after the child's party and that was in June. He testified that they overhauled the engine of the Combi and they finished on Thursday. The Combi was filled up with petrol and Thursday and the accused was given money by the people hiring the Combi on Friday.

Joseph Smith was then called by the defence. He testified that he attended a rugby match on 24th August 1994 and that he saw the accused at the tuck shop during the interval (half-time). He saw the accused with Abraham and a third person. They did not sit together while watching the match. He said that the match finished after 22h00. He confirmed that he and the accused are friends. He could not remember the last time he watched a rugby match again. Asked whether

he often saw the accused at rugby matches, he said "No, but only at soccer matches." He remembered that the accused was wearing a blazer that night.

Hereafter the defence called Sarah Rooi who testified that she was supposed to travel with the accused to the farm that weekend but she was late. She came to the house on Friday and confirmed that Tiboth arrived at the accused's house on Saturday and asked for the accused. The accused is her aunt's husband. She said that Tiboth did overnight there but when she woke up the following morning he had gone.

The next witness called by the defence was Doreen Vlermuis. She testified that she is the neighbour of the accused. During the weekend of 26th August 1994 she was asked by the accused to look after his house. She testified that a lady arrived on Friday evening and she stayed there over the weekend. She was paid N\$50 by the accused. She remembered that a man arrived during the weekend in the evening. She testified that she watched television together with her sister and the other woman. She denied that Tiboth watched television. She did not know whether Tiboth did overnight at the house. This was the first time that she was asked to look after the house of the accused.

The defence then informed the Court that they wanted to call Henry Nanub. A subpoena was then issued and the matter was adjourned to 25th April 1996. The next morning Mr Potgieter called Sergeant Stuurman who testified that he had been unable to serve the subpoena on Nanub. The defence then

closed its case.

Ms Garbers for the State submitted that the State proved its case beyond reasonable doubt and the alibi by the accused as a defence should not stand. She said that Petrus Sakaria's evidence should be accepted. She maintained that he had a good view of the accused. There was light in the room and the only dark spot was at the back of the room. She further submitted that accused was identified by Sakaria as a tall, black man and wearing a jacket; his teeth are as described by the witness Sakaria, decayed and bent inside and he has a short beard. She submitted that Tiboth was an excellent witness and the only contradiction is to when the accused left for the farm. She submitted that the evidence of Tiboth that the accused was at the Eros Shopping Centre that night, was corroborated by Hoxobeb. His description of the area before the inspection in loco was conducted fitted the scene when it was visited by the Court and it was also corroborated by the photos handed in. She submitted that Tiboth knew when the lady arrived the afternoon after the accused left for the farm. She submitted further that the evidence of Hoxobeb should be accepted, that he saw the accused's vehicle at Eros that night and furthermore that he knew the accused's vehicle before the incident. Otherwise, so she submitted, where could he have found the registration number of the accused's vehicle? She submitted that he gave an acceptable explanation for the reason why he was initially not sure about the colour of the vehicle. She maintained that he furnished the registration number of the vehicle to the police and that is why the accused was traced

to the farm.

With regard to the accused's case, she submitted that all the accused's witnesses were either family members or friends. She submitted that they must have discussed their testimony with the accused as their evidence fitted to the dot with that of the accused.

Mr Potgieter, on the other hand, submitted that no direct evidence was placed before the Court and that the Court has to rely on the inference. He referred to the golden rule of inference, namely that it must be the only inference to be drawn and on the proven facts. He said that Sakarias's evidence that it was a panty hose, can be criticised. If it was the accused who took the money with one hand while he had a gun in the other hand, Sakaria would have noticed that the accused's hand was paralysed. The money bag was not found and on the evidence of Tiboth the accused came to the vehicle with a newspaper. The identification of Sakaria about the accused cannot be relied upon because he had seen the accused first at the Lower Court when accused appeared at the preliminary examination. He submitted that the evidence of Tiboth could not be relied on. He said that Tiboth changed his evidence when he said that when accused returned from the garage, he first said that accused spoke to him in Damara and thereafter he changed to say he spoke to him in Afrikaans. He maintained that Tiboth had an argument with the accused, that is the reason why he is implicating the accused. He is a self-confessed criminal and had been warned in terms of section 204.

With regard to the evidence of Hoxobeb, Mr Potgieter submitted that in his first statement Hoxobeb told the police that he did not even know who that man was. He was unable to identify the accused at the identification parade. With regard to his knowledge about the registration number of the accused's vehicle, Mr Potgieter submitted that Hoxobeb might have seen the car but it might not necessarily be that it was at the Eros Shopping Centre. He submitted that the evidence should be treated with caution and should be rejected. He submitted that the accused must be given the benefit of the doubt.

In reply Ms Garbers for the State submitted that accused was out of Tiboth's sight for 5 minutes and he had a chance to change his appearance after he left Tiboth. About the leather bag, she said that the police testified that they never searched the area of the Post Office and the parking area.

The question to be answered in this case is whether the State has proved its case beyond reasonable doubt that the accused was at the Eros Shopping Centre and the Tony Rust Service Station the night of 24th August 1994. It is common cause that the accused is the owner of a Toyota Hilux with registration number N 1114 M. It is also common cause that the accused went to the farm during the long weekend of 26th August 1994. I must point out that when the accused explained his plea in respect of counts 1-3, he said that he did not know anything about these charges. His defence of alibi only came out during the cross-examination of the

State witnesses. The accused did not, for instance, say that "I was not at the Eros Shopping Centre that night as I went to the rugby stadium and thereafter I watched television with my family."

The description given by witness Petrus Sakaria fitted that of the accused. He testified that the person who shot them was tall and has a beard and in particular that the teeth of that person looked like the teeth of a child who had eaten too much sweets. Furthermore, the person's teeth were bent to the inside. This description fits the accused. Regarding the panty hose which was drawn over the accused's head, this is also corroborated by Tiboth in his evidence. It is fair to say that the accused is, on average, a tall person. A person with a height of 1.89 metre like the accused, will under any circumstance be described as tall. It would be unrealistic to expect anybody under those circumstances, like Petrus Sakaria, to observe everything such as a paralysed hand. What is significant about the identification of the accused by Sakaria is when he said that he saw accused in Ombili selling goats. He said that he immediately recognised him as the person who shot at them the night of 24th August 1994. Even if it were to be accepted that Sakaria saw the accused first in the magistrate's court and thereafter at Ombili, I would have attached less value to his evidence if he had said that he identified the accused when he was standing in the dock. But, according to Sakaria, he identified accused while accused was sitting among people in the gallery. I am, however, satisfied that the sequence of the occasions when

Sakaria saw the accused was that he first saw the accused in Ombili and thereafter in the magistrate's court. His evidence is corroborated to a certain extent by the evidence of the accused when he testified that during 1994 he used to sell livestock to customers in Katutura who placed orders with him, and he fetched livestock from the farm. On the accused's own evidence and that of Gawanab he was wearing a blue blazer (jacket) that night.

It is so that the evidence of Tiboth is subject to the cautionary rule. The reasons for approaching the testimony of an accomplice with care were set out by Holmes J.A. in S v Hlapezula & Others, 1965(4) SA 439 (A) at 440D - E, which reads as follows:

"First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit."

According to the accused himself there are no "ill feelings" between him and Tiboth and according to Tiboth they are still friends. I ask myself why, if it is not true, would Tiboth implicate the accused if the accused was not involved in this matter. If Tiboth was not with the accused that evening, how does he know that the accused was at the rugby that night, if one has regard to the accused's and his witnesses' version that by that time Tiboth had already moved from the accused's house and had not been to the

accused's house until the weekend of 26th August 1994? How does Tiboth know, for instance, that the vehicles were fixed prior to the -departure for the farm? It is a detail which he could not possibly have gained from the girls at the house when he visited over the weekend. Tiboth is probably confused as to when the accused left for the farm; to my mind this is of little significance.

Tiboth is in custody for the minor offence of attempted burglary for which he would, if convicted, receive a fine and/or a short terms of imprisonment. I do not think that he would fabricate such a serious story against the accused just for the sake of expectation of conditional clemency. The evidence of Tiboth is further corroborated by that of Hoxobeb. Hoxobeb is an independent witness who also placed the accused's vehicle on the scene that night. He had seen this vehicle before, stealing spare wheels, and to me what is important, he had written the number of the vehicle on the cardboard in their office and further told his employer about this vehicle prior to this incident. It was on his information that the ownership of the accused's vehicle was established and shortly thereafter the police traced the accused at his farm in Gibeon. I am in agreement with Ms Garbers for the State that his confusion about the colour of the vehicle being white or beige, is acceptable due to the fact that it was testified by Hoxobeb and Inspector Becker that the lights in that vicinity are yellow which caused the vehicle to look, in the dark, as if it is white or beige. Hoxobeb further gave the description of the person he saw jogging to the vehicle which fitted that of the accused, in

particular his height. More particularly, it was not the first time for Hoxobeb to see the accused. He had only seen the accused before during the night, and at a distance. I may add that I would have been surprised if Hoxobeb had identified the accused at the identification parade, because he had never had an opportunity to see the accused so closely as to be able to identify him. If one has regard to the poor quality of the first statement taken from Hoxobeb, one is bound to believe Hoxobeb that he would have furnished the police with more information if the first interview was properly conducted. It is only after the investigation was taken over by Inspector Becker that a proper interview was held with Hoxobeb.

According to Inspector Becker, who is a senior police officer with many years of experience in criminal investigation and who is known to this Court, accused initially told Inspector Becker that he had been at the Eros Shopping Centre that night to buy medicine for his child's stomach. I cannot see any reason why Inspector Becker would be untruthful as to what accused told him. It was not even suggested to Inspector Becker, and rightly so, that he was being untruthful.

The accused's alibi is a thin one. It is confined to the time between the rugby interval, the half-time and his arrival at his house some minutes before 23h00 that night. I accept that accused was at the rugby stadium and that he might have spoken to Joseph Smith at the rugby stadium. But that was during the half-time interval. Except for the

accused's own evidence, there is no further evidence to corroborate that the accused thereafter stayed at the rugby until the end' of the match. According to Tiboth, they left while the match was still going on. According to the accused, he arrived at his house at 22h45 and his wife also testified that he arrived while she was watching television and shortly thereafter the television transmission ended. This is also corroborated by Sam Jahrs who said that he peeped through the window and saw the accused arriving and who also said that it was 15 - 20 minutes before the night's transmission ended. The accused might have arrived at his house as he testified and as corroborated by his wife and Jahrs. It still leaves an uncorroborated time by any of the accused's witnesses between the rugby half-time when he was seen by Joseph Smith and his arrival at his house and this is sufficient enough for him to have gone to Eros Shopping Centre and committed the crime if one has regard to the fact that the robbery was committed in under 10 minutes. According to Alberts, he returned to the service station 3 to 4 minutes after he refuelled his car. According to Hoxobeb the vehicle was parked there for about 20 minutes and according to Tiboth the accused went out of his sight for about 5 minutes. Furthermore, Tiboth testified that they drove fast and it took them about 10 minutes from the Eros Shopping Centre to the accused's house.

In the result, I am prepared to accept the evidence of Sakaria, Tiboth, Hoxobeb and Becker. The first three witnesses place the accused on the scene of the murder and I am satisfied that the accused told Becker that he had been

at Eros Shopping Centre the night of the incident. I am therefore satisfied that the State has proven its case beyond reasonable doubt and the accused's alibi should thus fail.

As far as count 4 is concerned, it is common cause that the accused was found in possession of the bag and tools which belonged to Schulein. He explained that he bought these goods from Tiboth even though Tiboth denied that he ever sold the goods to him. There is no evidence placed before me which connect the accused to the breaking into the motor vehicle of Schulein on 10th June 1994. The accused bought the tools from Tiboth, whilst he knew that Tiboth used to steal the goods and sell it to him. At best the evidence show that the accused received stolen property knowing it to have been stolen.

Accordingly the accused is convicted of murder, attempted murder, robbery with aggravating circumstances and of a competent verdict of theft, that of receiving stolen property knowing it to have been stolen.

A handwritten signature in dark ink, consisting of a series of loops and a final upward stroke, positioned above a horizontal line.

ANGULA, ACTING JUDGE