

Circulate to Judges: YES / NO
Circulate to Magistrates: YES / NO
Circulate to Regional Magistrates: YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case No: K/S 03/2007

Heard: 12-22/02/2007

Delivered: 01/02/2007

In the matter:

THE STATE

versus

JOSEPH LE GRANGE	Accused 1
HENDRIK LAURENS VAN DER WESTHUIZEN	Accused 2
PIETER JACOBUS LE GRANGE	Accused 3

JUDGMENT AND SENTENCE AT P37

KGOMO JP:

1. The three accused, Mr Joseph Le Grange a male aged 57 years, Mr Hendrik Lourens Van der Westhuizen, a male aged 29 years and Mr Pieter Jacobus Le Grange (the son of accused 1) aged 21 years, are arraigned on one charge of murder. The State accuses them of having murdered a boy named Biron Tiron Phetlo, aged 13, at Prieska, Northern Cape on the 20th March 2005.
2. All the accused are represented by an experienced advocate, Adv Ferdie Van Heerden, of the Criminal Bar, Kimberley, on the instructions of attorney Mundus Van Niekerk of Prieska. The State is represented by Advocate Hannes Cloete, a senior state advocate, of the office of the Director of Public Prosecutions.

3. At the inception of the trial the State apprised the defence that it intends to invoke the provisions of sections 51(1) and 51(2) of the Criminal Law Amendment Act, Act 105 of 1997, in the event of the trial terminating in the accused being convicted. Attention was also drawn to the fact that should the Court find that accused 2 and 3 are not complicit in the murder of the deceased the State will contend, as stipulated in the Summary of Substantial Facts, that the two are guilty as accessories after the fact to the murder of the deceased.
4. This judgment deals with two matters: The application for my recusal from the case, which I will dispose of first, and the judgment on the merits of the case. I dismissed the application for my recusal and reserved my reasons, which now follow.

THE RECUSAL

5. During the course of the trial the defence brought a substantive application for my recusal citing the following incidents (summarised):
 - 5.1 Accused 1 says in his statement that the Court interrupted or curtailed his legal representative's cross-examination on aspects which were important to him (the accused).

Response: Throughout these proceedings it became evident that counsel for the defence was pandering to the whims of the accused, stating on numerous occasions that it was his instructions to do this or the other thing. He did not seem to appreciate the fact that he was conducting the trial, and not the accused. Counsel decides which questions to ask or not to ask, how and when to ask the questions, which witnesses (including the accused) to call or not to call, etc. See **R v Matonsi** 1958(2) SA 450 (A) at 456C-D

Schreiner JA stated:

*“Once the client has placed his case in the hands of counsel the latter has complete control and it is he who must decide whether a particular witness, including the client, is to be called or not. So in **Swinfen v Lord Chelmsford**, 157 E.R 1436 at p. 1449, **Pollock, C.B.**, states the court’s view that,*

‘a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it – such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial’.”

No specific instances of interruption or curtailment have been cited by the defence, but I allude to only one. After lengthy cross-examination of the second State witness, Mr Jaco Botha, as regards a piece of wire I enquired (record p 129(24) – 131(6)

HOF: Mnr Van Heerden, ek hoor nou wat u sê, maar dit blyk ten minste gemeensaak te wees tussen wat u opdrag is en wat Curtis gesê het dat daar `n draad was. Nou watter punt wil u maak met hierdie langdradige kruisverhoor oor `n draad wat daar was? **MNR VAN HEERDEN:** Edele, ek is besig om die geloofwaardigheid van die getuie te toets. Curtis ... (tussenkoms).

HOF: Kom op die punt af. Ek gaan u stop as dit die enigste rede is, u moet u punt maak ek gaan u stop.

MNR VAN HEERDEN: So ek mag nie getuies nou konfronteer oor hulle getuienis ... (tussenkoms).

HOF: Mnr van Heerden, ek sê maak u punt. Ek gaan u stop. En as ek u gestop het, dan mag u dit nie voortvoer nie. Want ek kan nie sien watter punt u maak, want u erken dat die draad daar was. Dit is u instruksies.

MNR VAN HEERDEN: Edele, met respek. As ek nie begryp ... (tussenkoms).

HOF: As u nie u punt maak nie, dan gaan ek u nou stop.

MNR VAN HEERDEN : Edele, ek versoek die geleentheid om dit met u - te kan toespreek oor dit wat u vir my sê.

HOF: Ek wil nie hê u moet my toespreek nie. Stel die vraag. En maak u punt.

MNR VAN HEERDEN: Meneer, wat ek aan u stel is, dit was vir u snaaks dat hulle loop terwyl u afspraak nie was dat hulle moes loop nie. Is dit korrek? --- Dis korrek.

So u het seker gekyk wat doen hulle, waarheen loop hulle? --- Ja, soos ek loop kyk ek om waarnatoe is hulle rêgtig oppad.

As hulle iets vreemd by hulle gedra het, sou u dit toe gesien het? Want u kyk mos nou mooi na hulle? --- Nee, ek kyk somer net vinnig, want ek moet kyk vir die karre wat van voor af aankom.

Kan u op 20 meter, dis die helfte van die hofgebou – sal u in staat wees om `n draad te sien? --- Ek sou hom kon gesien het.

Goed. Toe gaan koop u kos. Is dit korrek? --- Dis korrek.”

As will be seen later respecting to the judgment on the merits the question of the presence of a piece of wire was no longer in issue when Jaco Botha testified, because it became common cause when Curtis Maritz,

the first State witness, testified. In fact, accused 2 and 3 acknowledged the existence of the piece of wire in their statements made the day after the incident and admitted as part of Exhibit "A".

5.2 The second ground was that the Court did not afford the defence a sufficient opportunity to consult with Mr Bolla Emmanuel Bosman after the State case had been closed. Counsel applied for a postponement to the following day.

Response: I refused to accede to the request because it was early in the day and the defence was already in possession of Bolla's statement. Fifty minutes after the adjournment I directed that the trial should proceed, notwithstanding counsel's intimation that they were still consulting with Bolla. It was evident from the State's case that Curtis Maritz was the only witness who saw the fatal stabbing and that Bolla arrived on the scene after the event and that he did not find the accused on the scene. Counsel had already intimated that he was going to call accused 1 after the consultation. In the premises Bolla would not have been the first defence witness. Section 151 of the Criminal Procedure Act, 51 of 1977 (the CPA) states, inter alia, that if the accused intends giving evidence on behalf of the defence he/she shall, except where the Court on good cause shown allows otherwise, be called as a witness to testify before any other witness for the defence. The purpose of this provision, it is trite, is to lessen the possibility of an accused tailoring his evidence to accord with other defence witnesses. I point out that after accused 1 had testified (including being cross-examined) on Wednesday the 14th February 2007, the case was postponed to Monday the 19th February 2007, when accused 2 and 3 testified. Only then did Bolla testify - on the 20th February 2007.

5.3 The third ground is that accused 1 says he testified without knowing what Bolla was going to testify.

Response: This cannot be correct for the reasons partly addressed above. In addition this allegation implies that an experienced counsel went into the trial without having consulted

with the accused on Bolla's statement and had not done so at the close of the State case. This would speak of gross incompetence which the Court cannot be blamed for.

5.4 Grounds 4 and 5 can be treated together:

"4.5 Ek het toe getuig en nadat ek klaar gekruisverhoor was het die Edele Regter my begin vrae vra. Die Edele Regter se hele houding was egter dat as ek sekere vrae nie beter kan antwoord nie, gaan hy my skuldig bevind. Hierdie intimiderende wyse van vrae stel het my erg ontsenu. Die Edele Regter se houding het van ongeloof gespreek.

4.6 Die Edele Regter het ook vrae aan my gestel wat dit vir my duidelik gemaak het dat hy my weer kruisverhoor. Die Edele Regter het byvoorbeeld oor aspekte gevra wat die Staatsaanklaer reeds oor gevra het en ek reeds geantwoord het. Hy het ook aan my die stelling gemaak met die strekking dat aangesien dit kinders was het ons die aangeleentheid nie verder geneem nie. Hierdie stelling is verkeerd aangesien dit maar een van my redes was. Die feit dat die Edele Regter my klaarblyklik nie glo nie het duidelik na vore gekom."

Response: This intimation is frivolous and borders on the vexatious. The record will speak for itself, particularly at p 201(1) to 202(13) and at 250(7) to 258(25). The allegation is also so vague that nothing more need be said.

5.5 *"4.7 Die Edele Regter het ook tydens die verhoor opgemerk dat hy nie Afrikaanssprekend is nie. Daar word van geen tolk gebruik gemaak nie en die verrigtinge is in Afrikaans. Aangesien die Regter my getuienis nie op die vorige aspek gevolg het nie, laat ook die vraag ontstaan of daar nie getuienis verkeerd geïnterpreteer word aangesien die Edele Regter nie Afrikaanssprekend is nie."*

Response: What is particularly puzzling in this regard is that the context in which I said that I am not Afrikaans-speaking has being woefully distorted. I misheard accused 1's counsel addressing Dr Isaacs in the disrespectful form "jy" and not "u". At p 15(3) to (15) the following dialogue took place between me and counsel:

"(MNR VAN HEERDEN) ...Kan u vir my sê dat of die rib wat deurdring is, is dit die kraakbeen gedeelte ... (tussenbei)

*HOF: Mnr van Heerden, **ek is nie Afrikaanssprekend nie**, maar ek weet nooit wie "u" en wie "jy" is nie.*

MNR VAN HEERDEN: Wie is u en ...?

HOF: Ja, u sê nou "kan jy vir my sê."

MNR VAN HEERDEN: Soos die hof behaag, u Edele. Ons sal dit dan formeel hou.

HOF: Of het die aanspreekvorm "u" weggeval? Julle moet net vir my sê as dit gebeur.

MNR VAN HEERDEN: Nee, nee, dit is korrek so, u Edele. Kan u vir my sê ---." (My emphasis)

Response: What more can one say? This is one of the examples that demonstrates adequately that counsel had abdicated his duties and allowed himself to be dictated to by his clients. He clearly has no belief in the truth of what is stated in accused 1's paragraph 4.7. Counsel has appeared before me for about 8½ years; he has read numerous records wherein I conducted the proceedings in Afrikaans; he has read my judgments given in Afrikaans, some of them reported. If it is suggested that if you are Afrikaans you must be tried by an Afrikaans speaker then concomitantly the English must be tried by English speakers and the Setswana speakers by the Batswana. This is not what the Constitution says or requires. Section 35(3) (k) thereof states that every accused person has a right to a fair trial, which includes: *"To be tried in a language that the accused person understands or, if that is not practicable, to have proceedings interpreted in that language."*

5.6 **The final ground reads:**

"4.11 My regsverteenwoordiger is self met 'n klag van minagting van die Hof gedreig aangesien die Regter beweer dat hy die Regter weereens as "jy" aangespreek het. Ek het egter duidelik gehoor dat die woord "U" gebruik word."

Response: At p 260(12) to (17) the record reads as follows:

"MNR VAN HEERDEN: U Edele, maar verwag u van my om 'n getuie te roep sonder dat ek instruksies van 'n kliënt het?

HOE: Mnr Van Heerden, as u vir my weer "jy" sê, "I will convict you of contempt of court, right here. You have to apologise and withdraw that."

MNR VAN HEERDEN: Ek ontken dat ek vir u "jy" gesê het.

HOE: Speel bietjie terug, Mevrouw. Speel terug."

For some strange quirk counsel's "u" sounded like "jy" in my ears on both the occasions referred to in this paragraph (5.6) and the preceding one (5.5). *Mea culpa*. The fact that the recording was played back audibly in open court and proved that counsel did not use the disrespectful term "jy" to the Court should have dispelled any apprehension that the accused's counsel risked being convicted of contempt of court. These were *bona fide* errors which are regretted.

6. The correct approach in dealing with an application for recusal has been authoritatively dealt with in **President of RSA v South African Rugby Football Union** 1999(4) SA 147 (CC) 177B-E (paragraph 48) where the Court declared:

"[48] It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case,

that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

It is for the foregoing reasons that I dismissed the accused's application for my recusal as being devoid of any merits.

AD MERITS OF THE CASE

7. The three accused have pleaded not guilty to the charge. They admit having been on the scene but deny that anyone of them assaulted or murdered the deceased. They stated in unison that accused 1 merely prodded the deceased gently on his chest with an ordinary walking stick which was rubber-shod at the tip thereof and which would under no circumstances have pierced one of the deceased ribs and penetrated his heart, as can be gleaned from the post-mortem report of Dr George Isaacs.

8. The State's key witness is Curtis Maritz, a youth of 14 years who was 12 years old when the incident took place on the 20th March 2005. His evidence will be treated with caution, firstly because he was a single witness at the crucial stage when the fatal injury is said to have been inflicted and secondly because of his youthfulness and immaturity. See **Woji v Santam Insurance Company Ltd** 1981(1) SA 1020(A) at 1027H -1028E. Curtis was in the company of the deceased and one Jaco Botha, a 17 year old boy who was 15 years old during the occurrence in question.

9. The evidence of Curtis and Jaco is to the effect that two of the three of them were golf-caddies for two gentleman. Curtis says only Jaco and the deceased were caddies and he merely accompanied them. The caddies were paid a sum undisclosed to him and he had no money on him. Jaco states that it is correct that he was one of the two caddies but Curtis, not the deceased, was the other caddie. This discrepancy, despite Mr Van Heerden's argument to the contrary, is of no moment really. The importance of this segment of the evidence merely goes to show that the deceased was in the company of Curtis and/or Jaco from before noon until he was fatally wounded and that one or both of them would have known how he sustained his injuries. There is no countervailing evidence in this regard.
10. According to Curtis and Jaco they departed on foot to Prieska town from the golf course at the close of play, which they put variously between 16h00 and 18h00. Mr Van Heerden criticized these two witnesses for their failure to pinpoint the time more accurately. This criticism is unfounded, because these children did not wear watches and merely gave an estimate of the time. What matters most is that their undisputed evidence is that the two of them and the deceased left in each other's company. They separated briefly in town when Jaco went to buy food for the three of them with their meagre earnings, which Jaco fixed at R 20-00 for each of the two caddies. The third friend, who was more indigent, was sponsored by the other two.
11. Curtis and Jaco testified that they separated in the vicinity of Prieska Caf  . They disagree on where exactly

they separated. When Jaco went to buy food Curtis and the deceased went on a frolic of their own to burgle a sports shop (the Sports Shop) which belonged to Mr Rudi Van Zyl. The information that the Sports Shop belonged to Mr Rudi Van Zyl was supplied by the defence. Curtis and the deceased got hold of that notorious piece of wire. Curtis confessed that the burglary was his and the deceased's decision. According to Curtis a hook was fashioned from the pliable wire to enable them to fish the clothing from the shelves but did not succeed. Curtis says that it was the deceased who attempted to hook the clothes through a window that they found broken. It was common cause between Curtis, the accused and the investigating officer, Inspector Schutte, that the window pane had been so broken during a prior burglary.

12. Curtis says he observed the three accused crossing the street in which they were (Steward Street) and heading in their direction. This caused them to desist from their truancy and they sat on the stairs leading into the Sports Shop and faced the accused, with their backs turned on the broken window. Accused 3 then accused them of having broken into a greengrocer market (groentemark) earlier.

13. What followed is crucial and must come directly from the mouth of Curtis himself in his evidence in-chief:

"MNR CLOETE: Nou nadat dit nou gesê is (the theft from the vegetable market), wat gebeur toe? --- Toe ruk die ou omie die kerie uit en toe druk hy vir Biron en steek hy hom. U sê hy vat die kerie en nou moet jy vir ons mooi verduidelik. Wat doen hy nou met hierdie kerie. --- Hy het die kerie en toe trek hy hom op, toe trek hy hom so uit dat dit `n mes is. Toe druk hy hom so en toe steek hy.

Ek wil hê ons moet eers net 'n bietjie stilstaan en bietjie gesels oor hierdie uittrek. Jy verstaan. As hy die kerie gevat het, watter gedeelte het losgekom? --- Die voorgedeelte en die agtergedeelte. Was dit twee gedeeltes gewees? --- Ja.

Watter gedeelte het die mesgedeelte gehad? --- Die handvatsel. Die handvatsel wat jy in jou hand hou as jy stap? --- Ja.

Kan jy met jou hande min of meer vir die hof wys hoe lank was hierdie mesgedeelte gewees? --- Ja, hy was net so lank.

Kan ons net so kyk? Kan ons net weer kyk. U Edele, hy wys min of meer so 30 sentimeter. En wie sê jy het dit gedoen? --- Die ou oom. Beskuldigde 1, die man wat daar heel links sit. Is dit reg? --- Ja.

Nou hy het nou hierdie twee stukke in sy hand. Die een is 'n kerie gedeelte en een volgens wat jy vir ons vertel was 'n mesgedeelte. Is dit reg? --- Ja.

Nou wat het hy gedoen met hierdie twee stukke wat in sy hand is? --- Hy het hom met die een vasgedruk en toe met die ander een toe steek hy.

Jy wys met jou linkerhand hy druk hom vas? --- Ja, hy het met die linkerhand vasgedruk die een hand en toe steek hy met die ander regterhand.

Nou kom ons gaan net 'n bietjie terug dat ons dit duidelik kry. Hoe het hy vir Biron vasgedruk met die linkerhand? --- Hy het hom so gedruk. Toe wil Biron keer. Toe steek hy teen die hand. Toe steek hy in sy bors."

14. Curtis says accused 1 stabbed the deceased three times. Once in the chest and twice in his hand as the deceased tried to ward off the stabbing blows. Curtis relates that he then tried to flee to call the police, but accused 2 pushed him back. The accused left together in a hurry along Stewart Street looking over their shoulders from time to time and broke into a canter. At that stage Jaco made his appearance. Curtis called Jaco and reported the incident to him. Jaco scanned the injury on the deceased's chest. Curtis showed Jaco the direction in which the accused fled.
15. It was common cause that the deceased only moved 11,2 meters from the stairs where he was said to have been stabbed to the point in front of a Prieska Hotel, where he collapsed and died.

16. Jaco says as he approached Prieska Hotel looking for Curtis and the deceased he heard Curtis scream in his direction and shaking his hands in front of his chest nervously, like someone who was at his wits end. He demonstrated what he saw Curtis do. He found the deceased on the pavement where he had collapsed (as earlier stated – 11,2 meters from the stairs). He says the deceased, who was still alive, said to him: “Die boer het (my) gesteek.” Both Curtis and Jaco say that at that stage one Mr Thomas (the hotel owner) appeared on the balcony above them, because there was some commotion. Thomas enquired what the problem was and was reported to by the deceased and Curtis. All indications are that Thomas, unfortunately now deceased, called the police because they attended the scene shortly afterwards.
17. Both Curtis and Jaco say the blood bubbled from the deceased’s chest wound. This they noticed at different stages when each one of them had lifted the deceased’s (powder-blue) T-shirt. Jaco says when he noticed that the deceased no longer spoke to him he was saddened (I think “angry” is what he meant) and ran in the direction which the fugitives took as pointed out to him by Curtis. At Heuwel Street he turned right and spotted the three accused still on a canter and moving further away from the scene. Accused 3 was about 20 meters (indicated) from him and accused 1 and 2 a few paces further on.
18. Jaco informed the Court that he and accused 3 went into an argument. Accused 3 picked up a stone, hurled it at

Jaco and asked him what he wanted. Jaco told him he wanted to verify who they were. He told accused 3 that they may now flee because he knew them. After an exchange of insults they went their separate ways – Jaco returning to the scene of the incident.

19. The accused's version on this aspect is that they did see a boy of about 16 or 17 years who was naked on his upper body. Jaco conceded he had discarded his shirt earlier at the scene. It was therefore common cause that it was Jaco who accosted the accused. The accused deny that they were running away. They say they were merely strolling after doing some window shopping after which they passed by the house of Mr Pieter Eckherd, accused 1's son-in-law, whose child was unwell. They say it was accused 2 who spoke to Jaco. Jaco also said something, but they could not hear what he was saying. I will revert to this aspect and the significance thereof.
20. The deceased was already dead when he was removed from the scene. The defence admitted formally that he sustained no further injury until a post-mortem examination was performed on his body. Curtis was taken to depose to a statement the same Sunday evening, completing it at 20h33. Curtis testified that he knew accused 1 as the man whose wife managed Pep Store in Prieska. Inspector Schutte says Curtis gave him a description of accused 1 and was told by him that accused 3's mother worked for Pep Stores. He knew immediately who these people were and where they stayed.
21. Inspector Schutte gave evidence that he explained to

accused 1 what brought him to his house and asked him whether he was in town and on the scene during the relevant times. When he was satisfied that accused 1 was the suspect described to him by Curtis he warned him of his constitutional rights. Accused 1 denied that he possessed a Sword Cane walking stick in the nature described by Schutte, who in turn was given the description by Curtis. Accused 1 informed him that he used a normal walking stick in town and handed over a fixed walking stick which was not capable of being dismantled as Curtis described. The tip of that stick was rubber-shod, ostensibly to afford a firm grip on slippery surfaces. Schutte also examined other sticks found at accused 1's home, but none answered the description of the murder weapon. He arrested and charged accused 1 with the murder of the deceased. Accused 2 and 3, who were present at accused 1's home at the time, were not charged as they were not suspects.

22. It was common cause that the police, in the course of their investigations, received information that accused 1 gifted one Mr Jerry Bouwer a Sword Cane, similar to the one described by Curtis, some time during 1998 and thus before the incident in question of the 20th March 2005. This Sword Cane was handed in as Exhibit 1, with the expressed understanding that it is not the murder weapon. When the Sword Cane was produced and Curtis' comments solicited he said without a moment's hesitation that the object was the murder weapon. He really should be understood to say that the instrument was its true likeness.
23. The instrument, Exhibit 1 or the walking stick described by Curtis, is an extremely lethal weapon. The blade is very firm and strong. It is razor sharp on both edges and its point is very sharp and pointed. Dr Isaacs had

the following to say concerning the Sword Cane:

“MNR CLOETE: Ek wil u net verwys na BEWYSSTUK 1 wat `n kerie is. Ek het in konsultasie dit ook aan u getoon. Ek trek dit uitmekaar en `n lemgedeelte kom te voorskyn. Dit is nie die bewering van die Staat dat hierdie betrokke kerie die beweerde moordwapen is nie. Al wat ek vir u wil vra is as u kyk na hierdie tipe wapen en ek gaan net die lemgedeelte aan u toon. Die tipe lem en so meer en die skerpheid daarvan, sou so `n tipe wapen die wonde kon veroorsaak het wat u gevind het?

HOF: Kom laat ek eers vir u so vra, dokter. Hoe sou u daardie voorwerp beskryf het wat aan u oorhandig is? --- Ek dink die beste manier om dit seker te beskryf, u Edele, is dit is `n tipe dolk, dalk `n klein swaard. `n Mens sou dit sekerlik in `n swaard tipe van beweging kon gebruik eerder as die tipiese steekbeweging wat ons sien met messe gewoonlik wat oorarm tipe van steke is en sou `n mens hierdie gebruik meer soos jy `n swaard sou gebruik wat dan `n voorwaartse steekbeweging sou uitvoer met hom.

En die lem, is so 45 sentimeter. --- Ja, die lengte is ongeveer `n halwe meter, so 45 sentimeter sal ek sê. Die breedte van die lem is so ongeveer 1½ sentimeter met natuurlik `n baie skerp punt wat snykante aan beide kante het.

MNR CLOETE: Ek wil net terugkom na die vraag. Sal so `n tipe wapen die tipe wond kan veroorsaak wat u gevind het aan die oorledene? --- Dit sal dit baie maklik kon doen, ja.”

THE ACCUSED'S EVIDENCE

24. I now put some flesh to the accused's defence. They say at about 17h45 or 18h00 on Sunday they left accused 1's home to check on accused 1's sickly grandson's condition. At the scene already described they saw the deceased and Curtis. Curtis was busy trying to hook clothing from the shelves of the Sports Shop. Note this: They say the deceased sat on one of the stairs with his head cupped in his hands. This was meant to convey that the deceased must have been injured when they arrived. I say this because accused 3, accused 1's son also said in his written statement: *“Dat die seun wat nou toe vooroor gebuig gesit het (a reference to the deceased) regop gekom het, en het ek opgelet dat daar bruin-rooi kolle op sy hemp se voorkant was.”*
25. In trying to convince the Court further that the deceased was injured before they encountered them accused 1 says that he saw two injuries on the deceased's hand but the blood was already dry. Asked why he did not see the brown-red stains or blots referred to by his son, because he (accused 1) maintained that when the deceased tried to flee the scene of the burglary he pushed him back with his benevolent walking stick on the very chest, he could think of no reason why he

missed seeing the said stains.

26. Mr Van Heerden put it to Curtis that it was likely that the deceased could have been injured about an hour-and-a-half before the accused arrived on the scene because he has instructions that there was a fight in the same vicinity then. No witnesses were produced by the defence to substantiate this allegation nor did the accused, who all testified, allude to the scuffle. The defence version that the deceased must have been harmed before the accused accosted the miscreant deceased and Curtis was abandoned in mid-air for reasons that I will advert to in due course.
27. The accused's account of events became a bit comical. They explained that they prevented the delinquents from fleeing because they wanted to phone the police or Mr Rudi Van Zyl. They then discovered that none of them had a cell phone and abandoned the idea because the police would in any event have taken a very long time to respond and would nonetheless have released the boys because they were mere children.
28. In the next breath: No, the boys would have fought them. It was pointed out to them that the post-mortem report shows that the deceased weighed a featherly 31,7 kg, was 148 cm tall and a boy of 13 and Curtis was 12 years old and even at 14 (when he testified) he was very slight of built and short of stature. The accused then intimated that they feared the intercession of the crowds and that they did not want to get involved. Their excuse was shattered by the fact that the streets in little Prieska were empty and it was early Sunday evening.

29. In the result the accused never called the police, either from the adjacent hotel, or from accused 1's son-in-law's place or from accused 1's home. It turned out that the accused were staying a mere 700 - 800 meters from the police station. State counsel suggested to the accused and later argued, convincingly I may add, that the accused never intended to call the police because they knew they had done something wrong.

30. It dawned belatedly on the defence that their hypothesis that the deceased was injured before they reached the scene was hollow and fatally flawed. They devised a new prong. They theorised that the deceased was injured after their departure from the scene. Mr Van Heerden argued that the evidence establishes unquestionably that when the accused took their leave from the deceased and Curtis there was no one else with them and that Curtis is the prime suspect of the deceased's death. He contended that therefore Curtis' evidence must be treated as that of an accomplice.

31. Curtis, Jaco and Bolla testified that just before he died the deceased unleashed a volley of "Ma se ..., Ma se ..." unprintable epithets. He did not say : "Curtis, ma se..." These witnesses thought that the deceased insulted Curtis. Curtis himself thought so. Mr Van Heerden fastened on this situation to propound that the deceased was venting his anger at his attacker, being Curtis. This proposition is startling in its absurdity:
 - 31.1 Firstly, this was a traumatic experience which produced some nervous excitement. There was no opportunity for this 12 year old to fabricate

what occurred and to exculpate himself;

31.2 If accused 1 and 3 saw what amounts to all the injuries that the deceased sustained before they departed from the scene, what further injuries could Curtis have inflicted on the deceased? Besides, even from the mouths of the accused the deceased and Curtis sat side-by-side without any acrimony when they arrived on the scene. It was common cause that Curtis and the deceased gained no spoils. There was therefore nothing for them to fight over.

31.3 Dr Isaacs opined, and the accused conceded, that the limp length of thin wire on the scene could not have caused the injury on the deceased. The accused saw no weapon in the possession of Curtis or the deceased, nor did Jaco, Bolla and Inspector Schutte.

32. I have no doubt that it was Bolla's evidence, or impending evidence before he was called, that caused the defence to shift ground and change horses in midstream. Bolla was a potential State witness who was made available to the defence at the close of the State case and testified as a defence witness. Addressing the Court and urging a conviction as charged State counsel maintained that Bolla did not deviate from the essence of his police statement in his testimony and asked that it be accepted. In his volunteered Heads of Argument defence counsel says:

"11. Die getuie Bolla is 'n onafhanklike getuie. Daar word met respek aan die hand gedoen dat Bolla 'n geloofwaardige getuie was. Daar is geen afbreuk gemaak aan sy getuienis nie en hy is nie betrap dat hy homself weerspreek nie. Meneer Cloete het dan ook op rekord geplaas dat Bolla getuig volgens die verklaring wat die polisie by hom afgeneem het."

33. Contrary to how Mr Van Heerden reads Bolla's evidence, the latter infact hammered the final nail in the accused coffin. Let us examine briefly the verbatim account given by Bolla as led in-chief by Mr Van Heerden:

"MNR VAN HEERDEN: Nou toe u vir Biron en Curtis sien, kan u vir ons op Foto 2 wys waar het u - waar was hulle en waarheen het hulle beweeg? --- Hulle het daarso gestaan by die China winkel, daar by daai telefoonboks. Toe beweeg hulle oor - oor na die Hotel se kant toe. Toe beweeg ek in die winkel.

Kan u vir die Hof sê toe u nou hulle sien beweeg, het u enigiets fout gesien by Biron? --- Nee

Hoe het hy gestap? --- Normaalweg.

Het hy sy bors houvas? ---Nee.

En Curtis, hoe het hy gestap? --- Hy het ook normaalweg beweeg.

Goed, wat doen u toe? --- Toe beweeg ek in die winkel, gaan kry die koeldrank, toe kom ek uit en ek betaal die koeldrank ---."

Later: "Goed, wat doen u toe? U kry u kleingeld, wat doen u toe? --- Toe beweeg ek uit die winkel uit. Wat ek uit die winkel beweeg, toe roep Biron my.

Goed, nou nadat u by die deur uitgekom het, hoe lank was dit voordat Biron u geroep het? ---Dit was nie lank nie. Ek was seker so twee of drie tree van die deur af weg.

Biron roep vir u. Wat doen u toe? --- En toe staan en kyk ek mos nou. Toe sien ek Biron sit daarso by die Hotel, daar by daai trappies. Toe sien ek hy houvas sy hand voor sy bors."

34. I agree with both counsel that Bolla was a credible witness, although they advanced different view points. The significance of Bolla's evidence is the following:

34.1 When he saw the deceased in the company of Curtis before he went to purchase a cold drink the deceased was uninjured. When he returned in the space of a few minutes the deceased was fatally injured and was immobalised or died in a short space of time. This eliminated once and for all the accused's ridiculous suggestion that the deceased was already injured when they encountered him and Curtis. The deceased did not survive for more than an hour and a half as per the accused's earlier far-fetched conjecture;

34.2 Bolla corroborates the evidence of Curtis and Jaco that the

deceased clutched the location where the injury was inflicted on his chest. It will be recalled that Jaco and Curtis had to remove the deceased's hand to see the injury (that still bubbled). This puts a lie to the accused's evidence that the deceased cupped his head in his hands when they confronted him and Curtis. It seems totally illogical and improbable that the deceased could have ignored the pain in his chest and held his head in his hands;

34.3 Bolla further corroborates Curtis and Jaco in this further respect that the accused were fingered as the culprits. He said (still being led by defence counsel): *"Toe sien Jaco dat Biron sit en houvas sy bors. En toe vra hy (Jaco) wie is dit en toe sê Curtis hy is daar om. Toe hardloop Jaco in daai rigting wat Curtis wys."*

THE MEDICAL EVIDENCE

35. The significant findings that Dr Isaacs recorded in the post-mortem examination report, Exhibit "F", are the following:

- “(iv) That the main post-mortem findings with respect to this body were:
 1. WOUND OF 2X1CM ON THE FRONT OF THE CHEST ON THE LEFT, 4CM DEEP, PENETRATING THE 5TH RIB AND ENDING IN THE HEART.
 2. WOUND OF 1X1CM ON THE RIGHT WRIST, 1CM DEEP.
 3. WOUND OF 1.5X1CM ON THE BACK OF THE RIGHT HAND, 1 CM DEEP.
 4. 300 ML BLOOD IN THE PERICARDIAL SAC AROUND THE HEART.
 5. WOUND OF 1X1CM IN THE RIGHT VENTRICLE OF THE HEART.
- (v) That, as a result of my observations, a list of which follows I have decided:-
 - (a) That the death has occurred 3.63 days prior to my examination, and
 - (b) That the cause of death is **CARDIAC TAMPONADE DUE TO STAB WOUND IN THE HEART.**

36. Dr Isaacs testified that even though at 13 the deceased's ribs were not fully matured (they mature at about 18) a reasonable amount of force must have been used to drill through the deceased's rib and penetrate his heart. Elsewhere I pointed out that Dr Isaacs had

examined the Sword Cane, Exhibit 1.

37. I am satisfied that the following witnesses were honest and gave credible testimony which I accept: Dr George Isaacs, Curtis Maritz, Jaco Botha, Insp. Francois Schutte, defence witnesses Bolla Emmanuel Bosman and Dr Cornelius Van der Westhuizen, an orthopedic surgeon who treated accused 1 in 1995/1996, December 2000 and on the 19th February 2007.

38. The evidence of defence witness Mr Riaan Coetzee relating to the advertisement of the Sword Cane in Getaway and other glossy magazines between the years 2000 and 2007 and their probable sale during this period is irrelevant and suspect. There is no evidence that Curtis saw a Sword Cane before he saw the deceased being stabbed. There is also no evidence that Curtis read the magazines and, if so, whether he would have seen the advertisement tucked away at p 154 of the April 2000 Getaway magazine or any later editions. There is no indication that Curtis had an interest in Sword Canes. Mr Cloete correctly pointed out that the magazines are quite expensive and beyond the means of the Curtises of this world.

39. Coetzee's evidence is suspect because it contradicts accused 1's evidence that the Sword Cane had priced itself out of the market as long ago as 1994. Accused 1 explained in-chief as follows on this aspect:

*"MNR VAN HEERDEN: Tot wanneer het u kieres aangekoop? --- U Edele, die eerste kieres het ons ongeveer in 1992 gekoop en ons het die laaste besending in 1994 gekoop.
Wanneer het u die laaste keer so `n kerie in die distrik gehad? --- U Edele, hierdie spesifieke kerie was my laaste kerie en ek het hierdie kerie vir mnr Jerry Bouwer van Niekerkshoop as `n geskenk gegee in 1998.
Het u op enige stadium sedert 1998 weer so `n kerie by u gehad?
--- U Edele nee, nog nooit nie."*

40. When Insp. Schutte sought the Sword Cane tipe of weapon from accused 1 he said nothing about his previous involvement in the sale of Sword Canes. I specifically enquired from him whether he had no recollection that he once sold the Sword Cane or that he donated one (Exhibit 1) to Mr Jerry Bouwer in 1998 when Insp. Schutte sought the murder weapon. He said he had no recollection. As State counsel puts it, accused 1 had a right to remain silent but he had no right to mislead Insp. Schutte by presenting to him an ordinary walking stick under the false pretence that he used it as support (or whatever) the particular evening.
41. Dr Cornelius Van der Westhuizen, who was called by the defence to show that accused 1 could not have run as stated by Curtis and Jaco, suggested that accused 1 could in fact have run at slow pace. He said that if a patient experienced back problems which made walking difficult, such patient would always take the shortest routes accompanied by resting intervals in the form of sitting on objects on the pavements. Dr Van der Westhuizen's evidence did not advance accused 1's case at all.
42. Exhibit 2 is a walking stick that belongs to accused 1. The defence handed it in after all the State witnesses and all the accused had testified, through the accused 1's son-in-law, Mr Eckherd. Dr Van der Westhuizen responded thus to my questions on this stick:
- "HOF: Nou hoe sal u daardie kiere (Bewysstuk 2) beskryf daar by die puntgedeelte? --- Dis `n baie groot oppervlakte om jou te stabiliseer --- as jy hom vir loop gebruik.
En wat sal u sê die deursnit is? --- My vinger is 2cm, so hy is omtrent 4,4cm.*

Sal u hoegenaamd sê dat daardie kerie (Bewysstuk 2) hierdie beserings (read from Dr Isaacs' report) veroorsaak het? --- U Edele, -- hier kan ek die eerste keer seker wees dat daardie kerie kon nie die die --- beserings veroorsaak het nie. Dis onmoontlik."

43. All the accused were pathetic witnesses. It is not often that one finds such poor witnesses. In a way it could be expected that their evidence would not withstand any measure of reasonable scrutiny, let alone the stern examination thereof by State counsel as has happened. The accused wallowed in the mire, because their defence was based on a conspiracy of lies involving the three of them and Mr Pieter Coenraad Eckherd, who perjured himself in no uncertain terms.
44. The defence had an intractable dilemma. Accused 1 had to explain why Curits would place a Sword Cane in his hands as the murder weapon and it turned out that he traded with Sword Canes. He said Sword Canes were displayed in the Prieska Pep Stores where his wife worked and his wife's hair salon between 1992 and 1995; implying that Curtis would have seen them at these businesses. He was caught out in a lie when State Counsel pointed out that the now 14 year old Curtis would have been 2 years old in 1994 and about 5 or 6 years in 1998. What is unmistakable is that Mr Coetzee's evidence has the effect of flatly contradicting accused 1's evidence, dealt with earlier, on the availability of the Sword Cane.
45. Accused 1 could not explain why Curtis would have picked on him. His counsel could not explain who could have influenced Curtis to fabricate evidence against accused 1, when he argued that children are highly

suggestible and impressionable. It must be borne in mind that Curtis is the only witness who saw the stabbing and reported what he saw to the police within a matter of minutes.

46. The mistake that the defence makes is to approach this case as if the State relies on circumstantial evidence. Curtis was not only an eye witness, but a good one at that. His maturity in the witness box belies the fact that he was only 12 years old when this incident occurred. His memory of the events was vivid, despite the lapse of two years since the incident. His powers of observation and description are remarkable. He withstood a lengthy and searching cross-examination with great fortitude. More importantly his evidence was not only corroborated as aforesaid, but also by the following persons:

- 46.1 Dr Isaacs on the injuries;
- 46.2 The accused by placing themselves on the scene;
- 46.3 The accused who intimated that the deceased was prodded with a stick on the chest by accused 1;
- 46.4 The existence of a Sword Cane, Exhibit 1, that was traced to accused 1 – although Exhibit 1 is not the murder weapon;
- 46.5 The accused's lies and fabricated evidence.
- 46.6 The fact that the accused saw the injuries and blood stain on the chest of the deceased.

FINDINGS

47. I therefore make the following findings:
- 47.1 That Curtis and the deceased attempted to pilfer some unspecified items from the Sports Shop belonging to Mr Rudi Van Zyl when the three

accused interrupted them;

47.2 Curtis and the deceased attempted to flee, but accused 1 prevented the deceased and stabbed him three times as Curtis explained and caused the injuries testified to by Dr George Isaacs who conducted the post-mortem examination on the body of the deceased;

47.3 That the nature of the weapon used by accused 1 (the Sword Cane), the defensive injuries inflicted, the situation of the fatal injury – namely the chest- and thus on the most vulnerable part of the body, the force used to drill through a rib and penetrate the heart, the small stature of a boy of the age of 13 years weighing a featherly 31.7 kg, the fact that the deceased was in a seated position when he was stabbed and that he was unarmed, did not try to fight and accordingly posed no danger to the three big adult men (although accused 3 was 20) made it manifestly clear that accused 1 intended to murder the deceased and did so with the direct intent to murder (*dolus directus*).

47.4 I find that the State has not produced any evidence that the three accused conspired beforehand to murder the deceased. The State has also not shown that accused 2 and 3 knew that accused 1 was armed with the afore-described lethal Sword Cane and that they made common cause with him when he pulled out the sword segment from the sheath segment of the Sword Cane.

47.5 There is also nothing on record to show that accused 2 and 3 overtly assisted accused 1 in the murder of the deceased, nor does it appear to me that there was anything that they could have done to prevent the murder. They are therefore not guilty of murder. As regards what elements the State has to prove where no prior conspiracy has been proved to commit an offence see **S v Mgedezi and Others** 1989(1) SA 687(A) at 705I – 706B. Their complicity relating to being

accessory to murder is examined hereinafter.

47.6 I find that after accused 1 had fatally injured the deceased the three of them fled the scene. Whether they did so by walking briskly or jogging is immaterial. By taking a wide berth to accused 1's home they intended to evade detection and to discard the murder weapon, which was never traced.

47.7 I find that Mr Pieter Coenraad Eckherd committed perjury when he testified that accused 1 had in his possession the stick Exhibit 2. Accused 1 used a Sword Cane to murder the deceased and Exhibit 2 was not such an instrument. Mr Eckherd ought therefore to be investigated for perjury or an attempt to defeat the ends of justice or any offence which the Director of Public Prosecutions decide upon.

ARE ACCUSED 2 AND 3 ACCESSORIES TO MURDER

48. In **S v Morgan and Others** 1993(2) SACR 134 (A) at 173j - 174f, **Corbett CJ** had the following to say:

*"The authors **Burchell and Milton** in their work **Principles of Criminal Law** define an accessory after the fact as '... someone who unlawfully and intentionally, after the completion of the crime, associates himself or herself with the commission of the crime by helping the perpetrator or accomplice to evade justice'.*

As the authors point out, the case law would seem to indicate two different approaches to the definition of an accessory after the fact: a wide approach which merely requires that the accessory should have associated himself in a broad sense with the offence committed; and a narrower approach which requires that the association takes the form of helping the perpetrator to evade justice. The authors appear to favour the latter approach and the definition which they give is based on it---

Insofar as it may be necessary in this case to do so I would express a preference for the so-called narrower approach and would endorse the definitions compiled by Burchell and Milton and Snyman. As the above-quoted definitions show, intention or dolus is an essential element of the offence of being an accessory after the

fact. It follows that it must be shown by the prosecution that the accused, the alleged accessory, knew that the person whom he helped had committed a crime; and I shall for the purposes of this case accept that in this connection *dolus eventualis* is sufficient to render the accused criminally responsible (see **F R v Jongani** 1937 AD 400 at 405, 406; **S v Jonathan en Andere** 1987 (1) SA 633 (A) at 643I-J). This would mean that if the accused had knowledge of facts which indicated to him the possibility that a crime had been committed by X, and the accused proceeded to help X, reckless of what the position was and with the required object, he would be guilty as an accessory after the fact."

See to the same effect **S v Williams and Others** 1998(2) SACR 191 (A) at 193c-f.

49. In **S v Nooroodien en Andere** 1998(2) SACR 510 (NC), **Buys J** in a Full Bench Appeal (**Kriek JP** et **Van der Walt J** concurred) at 528a-i had the following to say in this regard:

"In **Munango** se saak op 440A - B het **Claassen RP**, met verwysing na die misdaadskrywing van begunstiging in **Nkau Majara v R** 1954 AC 253, gesê:

'With humble respect I accept this quotation from the head-note of that case as correctly stating our law. It is of course clear from the details of that case that it is not mere impassivity in the sense of failing to report a crime to the proper authorities that amounts to an offence. It is that failure, coupled with the other circumstances of accused's conduct, which constitutes such an association with the crime that thereby material assistance is rendered to the principal offender after the completion of the offence.'

Ek verwys na bogenoemde aanhaling omdat ek dink dat daar veel te sê is vir die proposisie dat 'n lid van die publiek wat sien hoe 'n misdaad gepleeg word en dan stil en rustig op sy weg gaan hom sekerlik nie skuldig maak aan begunstiging nie. Die situasie is egter anders as hy deur die polisie ondervra word en hy dan ontken dat hy die misdaad sien plaasvind het. Dan staan sy versuim om die pleging van die misdaad aan te meld en deur wie dit gepleeg is, nie meer alleen nie. Die vraag kan dan ontstaan of hy die pleging van die misdaad verswyg met die opset om die misdadiger te help om die gereg te ontduik. As die antwoord op die vraag bevestigend is, is so 'n persoon volgens my oordeel skuldig aan begunstiging. Ek vind aansluiting vir hierdie mening in die meerderheidsuitspraak in **S v Jonathan en Andere** 1987 (1) 633 (A) is op 645A - E. Daar is beslis dat die maak van 'n valse verklaring in 'n gepaste geval kan neerkom op begunstiging. Op 645B - E sit **Botha AR** die feite uiteen:

'Beskuldigde 1 het van die begin af die misdaad probeer verdoesel deur uit te maak dat die oorledene een of ander toeval gekry het; by die pleitverduideliking het hy 'n valse storie opgedis

dat hy en sy medebeskuldigdes van die een sel na 'n ander, waarin die oorledene gelê het, oorgeplaas is, en daarin is volhard in kruisondervraging namens hom by die verhoor. Die strekking van sy optrede was om die moordenaar(s) te beskerm; klaarblyklik het hy dit besef en hom daarmee versoen. Beskuldigde 2 het by die pleitverduideliking en in sy latere verklaring aan die landdros, ook wesenlik dieselfde valse storie opgedis en in kruisondervraging namens hom is daarin volhard. Dieselfde geld vir hom as beskuldigde 1. As gekyk word na beskuldigde 3 se pleitverduideliking en na die kruisondervraging namens hom is dit ook duidelik dat hy besig was om wesenlik dieselfde valse storie te verkondig. Dieselfde geld ook vir hom as vir beskuldigdes 1 en 2.

Bowendien in die lig van die agtergrond, veral die bendeverband tussen die beskuldigdes, en die ooreenstemmende valse elemente in hul relase is dit myns insiens ook duidelik dat daar in een of ander stadium voor die verhoor 'n verstandhouding tussen hulle tot stand moes gekom het om die moord met sodanige valshede te verdoesel.'"

50. Having examined the principles applicable to the offence of an accessory to a crime I now have to apply these principles to the facts of this case. Accused 2 and 3 were approached by the investigating officer Insp. Schutte on the 21st March 2005 to make witness statements to him. They were present on the scene when accused 1 inflicted the fatal injuries on the deceased. Accused 2 and 3 were not suspects and had not been charged. They opted to make statements before accused 1's attorney, Mr Mundus Van Niekerk. It was common cause that these statements were made freely and voluntarily and whilst they were in their sound and sober senses. At the inception of the trial when these statements were handed up by the defence the veracity thereof were formerly admitted in terms of Section 220 of the **Criminal Procedure Act**.

51. I deprecate the fact that the investigating officer allowed accused 1's attorney to take down the statements, particularly in that the attorney had consulted with accused 1 since the previous evening, the 20th March 2005, being the evening of the occurrence. By all accounts accused 2 and 3 had already been in communication with

accused 1. Taking down statements is an integral part of the investigation of crime. It is the duty of the police to investigate crime and not that of attorneys. If witnesses are unwilling to co-operate the State can always invoke the provisions of Section 205 of the Criminal Procedure Act to achieve the same result; with the understanding that a summonsed witness is entitled to legal representation.

52. What is more disturbing is that the attorney, an officer of this Court, who ought to know better than the police inspector, agreed to take down accused 2 and 3's statements knowing that there is a clear conflict of interest with his client. As the evidence has turned out, it is axiomatic that if accused 2 and 3 were truthful they would have implicated accused 1 in the murder of the deceased. The attorney knew what the allegations against accused 1 were and of the fact that accused 2 and 3 were in his company. If accused 2 and 3 are convicted, as it seems inevitable, the attorney must know that he played no small part in their fate. Conduct like this cannot be tolerated.

53. In their statements to the attorney both accused 2 and 3 admit that they were in the company of accused 1 when the deceased and Curtis Maritz (not mentioned by name in the statement) were accosted.

53.1 Accused 2 on what is crucial on this aspect says the following in the statement:

“7. *Dat oom Joop (accused 1) so `n krom kiere by hom gehad het waarmee hy gestap het en wat so `n rubberknop aan sy punt het. Oom Joop het toe die een seun met die rubberknop voor sy bors gedruk, en het ons verder geloop.*

8. *Dat toe ons daar by die besigheid weg stap het die twee seuns absoluut niks makeer nie, en het hulle ook in die*

*teenoorgestelde rigting
weggestap.*

*12.Dat geeneen van ons
enige mes of skrep
voorwerp by hom
gehad het."*

53.2 Accused 3, the son of accused 1, stated *inter alia* in the statement:

"8. --- Die ander seun (the deceased) het met sy arms
oor sy bors gevou, vooroor gebuk gesit.

11. Dat die seun wat tot nou toe vooroor gebuig
gesit het regop gekom het, en het ek
opgelet dat daar bruin-rooi kolle op sy hemp
se voorkant was.

12. Dat my Pa met `n kerie wat voorheen aan
my Oupa behoort het, geloop het, dog het
geeneen van ons enige skerp voorwerpe of
messe by ons gehad nie ---.

15.Dat die ander seun toe
probeer weg hardloop, en
het my Pa hom gekeer
deur hom met die kerie
terug te druk---

19.Dat kort voordat die TV
nuus klaar was, het
lede van die Prieska
Polisiediens by onse
huis aangekom en my
pa gearesteer het;
volgens hulle op `n
klag van moord.

20.Dat sover ek weet die
twee seuns niks
makeer het toe ons by
hulle weg is nie."

54. In Court accused 1's defence dovetailed the
aforequoted false statements. Accused 2 and 3
persisted throughout the trial in these false statements.
There is no doubt that all three accused conspired to
mislead the Court. The intention of accused 2 and 3
was clearly to defeat the ends of justice so that their
deception could assist the murderer, accused 1, to
evade justice. The three accused have to date

concealed the murder weapon, the Sword Cane. Alternatively, accused 2 and 3 have actively associated themselves with the concealment of the murder weapon by accused 1. Accused 3 hurled a stone at Jaco when he approached them to try and identify them. This was done with the intention of allowing accused 1 to evade detection. Accused 2 and 3 were present when accused 1 gave Insp. Schutte the harmless walking stick, probably Exhibit 2, and they omitted culpably to expose accused 1. Accused 3 in fact went further by interfering unlawfully with the duties of Insp. Schutte when he arrested accused 1.

55. There is no doubt that the State has proved beyond a reasonable doubt that accused 2 and 3 are guilty of being accessories to murder. I am not surprised that Mr Van Heerden has intimated that should the Court convict accused 1 of murder then he concedes that accused 2 and 3 are guilty as accessories to the murder.

56. Why Mr Van Heerden called Mr Eckherd at the death of the trial to literally perjure himself when it was already evident to the reasonable, discerning, right-thinking audience which way the case was drifting is beyond me. See: **S v E.M Mayesa** CA&R 68/2003, Kimberley, Delivered 10/09/2004 (Full Bench, Unreported) at paragraph 10 where it was stated:

*“For the foregoing reasons the defence counsel should have refrained from calling R and Siyaka as defence witnesses. But there is a more fundamental concern that I wish to express. I am unable to fathom what defence counsel wished to achieve by calling the 14-year old child R save (a) to perjure herself and risk prosecution for making two inconsistent statements under oath; and (b) to discredit herself and far from advancing appellant’s case to damage it further; and (c) to wantonly take up precious time (See **S v Motlhabakwe** 1985 (3) SA 188 (NC) at 196E-F).”*

57. In addition, I make bold to say a prudent and astute

counsel would have refrained from representing accused 2 and 3, having regard to what I have already stated. Another counsel may have been more detached and may even have clinched a deal with the State to use accused 2 and 3 as so-called Section 204 Criminal Procedure Act witnesses.

58. I know that what follows relative to accused 1 is not quite what the poet Jan F E Cilliers had in mind in his poem "Trou" when he says: "Ek hou van `n man wat sy man kan staan." But it amply makes my point. If accused 1 took responsibility for his deeds and pleaded guilty there would not have been any need for his son, his son-in-law and his son's friend to get themselves into trouble by deceitfully trying to protect him. From now on it is between him (accused 1) and his conscience. He cannot lie to himself.

59. **In the result I make the following order:**

1. Accused 1 is found guilty of Murder – *dolus directus*.
2. Accused 2 and 3 are found not guilty of Murder and are acquitted.
3. Accused 2 and 3 are found guilty as Accessories to the Murder committed by accused 1.
4. The Director of Public Prosecutions is requested to consider investigating a crime of perjury or an attempt to defeat the ends of justice or whatever crime, if any, may have been committed, against Mr Pieter Coenraad Eckherd of Prieska who gave evidence in this case.

Kgomo JP:

1. This case involving murder and accessory to murder speaks of man's inhumanity to his fellow human being that society should not be heir to. What is it that triggers that inner vice in a father of adult children to take a sword and plunge it into the heart of a 13 year old urchin who is seated, unarmed and not posing any danger to his assailant. Wherever the answer may lie, this was undeniably one moment of madness on the part of accused 1 which is bound to cause a lifetime of sadness in the lives of both families – the victim's and the culprit's.
2. Accused 1 has been convicted of murder with direct intent. I have found that the murder was not premeditated nor was it planned. In the latter two instances the Legislature has, in Part 1 of Schedule 2, of the Criminal Law Amendment Act, 105 of 1997, ordained a sentence of life imprisonment, unless substantial and compelling circumstances are found to exist. The murder that accused has been convicted of resorts under the category of "murder (committed) in circumstances other than those referred to in Part 1" of Schedule 2. For this type of murder, for a first offender, which accused 1 is, a minimum sentence of 15 years is decreed, unless substantial and compelling circumstances are apparent which would permit the imposition of a lesser sentence.
3. Those are the provisions, in black and white, and not, as Mr Van Heerden for the accused, has contended that 15 years is the upper limit. The said Criminal Law Amendment Act has not taken away the powers of a judge reposed in him/her under the common law or Sections 165, 169, 171, 172 and 173 of the Constitution, Act 108 of

1996. It could also never have been the intention of the Legislature that irrespective of how foul a murder might be a sentence of life imprisonment cannot be imposed if it was not “planned or premeditated” or when it fell under the category of murders listed in clauses (b), (c) and (d) in Part 1 of Schedule 2. See **S v Malgas 2001(1) SACR 469 (SCA)** at 481h where the Court stated:

“A. Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).”

4. The State adduced the evidence of the deceased’s stepmother, Ms Miekie Moliena Phetlo. She testified that she brought up the deceased as her own from a tender age. They were very close. The deceased lives vividly in her memory, so much so that she has on occasion dished up for him only for reality to plummet her back to earth. The deceased had hopes and dreams. His ambitions vacillated between becoming a police officer and an advocate. He wanted to make a difference to the lives of other people and make the country a better place to live in. His dreams came to an abrupt end. His demise was swift. Ms Phetlo was candid about the deceased’s flaws. That he was derailed by the death of four of his friends before they reached their teens. The death of his father and another family member merely served to exacerbate the situation. He found it difficult to come to terms with these losses. There was also the bad influence of peer pressure to contend with. He fell into some delinquency and ended up in a reformatory, from which he escaped but was never returned to. The family and a psychologist counselled him and he had started to pick up the broken pieces. The defence went out of its way to dig up all the dirt that it could lay its hands on to tarnish what was left of the image the deceased’s family and friends cherished so fondly. To

what end? Such insensitivity is hard to understand. What is certain is that the deceased did not deserve to die.

5. The following are aggravating factors in this case:
- 5.1 Murder in itself is a very serious offence, the most serious in South Africa;
 - 5.2 The murder was perpetrated on a defenceless child who posed no danger to accused 1. He stood 148cm tall and weighed a featherly 31,7kg;
 - 5.3 An extremely lethal weapon, a sword cane, was used to murder the deceased. The deceased was stabbed three times, which goes to show a great measure of deliberation;
 - 5.4 The murder was unprovoked. It was not contended by the defence that the accused was angered by the children trying to steal from the Sports Shop. Mr Van Heerden also stated that he was unable to address the Court on the motive for the murder because accused 1 protests his innocence;
 - 5.5 Having stabbed the deceased accused 1 fled the scene with his co-accused and made no attempt to render assistance to the mortally wounded deceased;
 - 5.6 The accused have concealed the murder weapon which has to date not been recovered;
 - 5.7 Accused 1 has denied liability even in

the face of overwhelming evidence and still persists therein;

5.8 Accused 1 has shown no remorse. On the contrary he has conspired with his co-accused that the latter give false declarations to protect him. He has also conspired with his son-in-law, Mr Eckherd, to give perjured evidence in an effort to exonerate himself. Mr F A Krös, a social worker and probation officer attached to correctional Services, Kimberley, has stated that an accused who does not feel or show remorse in the face of strong evidence proving his guilt, is normally not your prime candidate for rehabilitation. More will be said on this report when mitigation is dealt with.

5.9 There are two conceivable motives why the deceased was killed:

5.9.1 The first is that the deceased and his friend, Curtis Maritz, were falsely accused of having broken into a vegetable market on a previous occasion and were committing another crime. So accused 1 took the law into his own hands; and

5.9.2 The deceased was black and accused 1 is white. Disparaging things were said by accused 1 and his son, accused 3, concerning these troublesome youngsters, whom they called street children. The deceased and Curtis Maritz were not street children. There being no conceivable further reason why the deceased's life was cut short at its embryonic stage the only reasonable conclusion is that the attack had a racial motive. See **S v Mbotshawa**

1993(2) SACR 468 (A) at 470b-f and 471h
- 472c and **S v Salzwedel & Others**
1999(2) SACR 586 (SCA) at 593d-f whereat
Mohamed CJ held:

“I can find no fault with the finding of the Court a quo that the racial motive which influenced the appellant to commit a serious crime must in the circumstances of the case be considered as an aggravating factor.”

Substantially the same temper should inform the response of South Africa to serious crimes motivated by racism, at a time when our country had negotiated a new ethos and a clear repudiation of the racism which had for so long and so pervasively dominated so much of life and living in South Africa. The commission of serious offences perpetrated under the influence of racism subverts the fundamental premises of an ethos of human rights which much now 'permeate the processes of judicial interpretation and judicial discretion' including sentencing policy in the punishment of criminal offences.”

5.10 All the accused have suggested that Curtis Maritz murdered the deceased. On record there is absolutely no grain of evidence to remotely justify this suggestion. All the accused have repeated this preposterous accusation in the reports to the social workers, the correctional services officer and clinical psychologist, Ms Riana Cronje. They did this despite my finding (at paragraph 31 of the judgment) showing why the accusation was absurd. The accused are adamant even in the light of the deceased's stepmother, Ms Moliena Phetlo, who brought him up, testifying that Curtis

and deceased were related, grew up as brothers, were inseparable friends and would never resort to violence against each other. This evidence remains uncontroverted and was not challenged at all in cross-examination, let alone discredited.

5.11 I take a dim view of the fact that Curtis Maritz was accused by the accused of being the murderer. Counsel should not in good conscience have argued this point. I have no doubt that it is defamatory of Curtis Maritz and an aggravating factor against the accused. In **LAWSA**: vol 14 at p 276, under legal practitioners the following is stated, but is apposite to criminal cases as well:

*"An advocate will not be held liable for defamation if he sets out in a pleading allegations in the truth of which he has no belief, unless he knows that he will not be able to support them by evidence at the trial. Counsel who has no belief in the truth of an assertion and knows he has no evidence to support it is not entitled to put it to a witness during cross-examination. (**Moolman v Slovo** 1964 (1) SA 760 (W); **Basner v Trigger** 1946 AD 83, 107; **Gluckman v Schneider** 1936 AD 151, 164, 166; **S v Radebe** 1973 1 SA 796 (a) 814D; bar rule 3.3.3.4.) "*

6. Having made these adverse comments, in respect of accused 1 in particular, it becomes necessary to shift the search light to the personal circumstances and other mitigating features that individualise their positive personal attributes.

6.1 This brings me to these salutatory remarks by **Du Toit AJ** in **S v Thonga** 1993(1) SACR 365(V) at 369b-d:

"The trial court in a criminal matter after conviction seeks to identify an effective sentence. This requires of the trial court true and objective consideration of all relevant factors, so as to further and eventually

satisfy as best as is possible, the well-known purposes of punishment, namely retribution, deterrence and rehabilitation. In order to achieve this end, the trial court endeavours to serve the interests of society, without losing sight of the realistic fact that the offender is and remains a member of that same society. Injured feelings and interests of complainants (and close relatives), as well as the attitude of the community, are relevant, but equally relevant are the consequences of punishment for the offender.” I pause here to remind everyone that Mr Giel McDonald, a councillor for the Prieska region, testified how the community was up in arms against this senseless murder.

At p 370b-c the Learned Judge continues:

“A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.”

See also: **S v Du Toit** 1979(3) SA 846(A) at 857H - 858A.

6.2 More currently the Supreme court of Appeal stated authoritatively in **S v Malgas** (supra) at 482c-f that:

“F. All factors --- traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.---

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."

7. Ms Riana Cronje, a clinical psychologist, has compiled a report in respect of each one of the accused. She describes accused 1 as a person who is not aggressive by nature and not prone to being manipulated and that his intellectual capacity is above average. She goes on to observe:

"Hy gee voorkeur aan deurdagte eerder as impulsiewe optrede. Hy is waarskynlik realisties en prakties en nie sentimenteel nie. Hy is skerpsinnig, internaliseer gevoelens en emosies en verkies om sy eie besluite te neem. Hy mag ongeduldig wees, is perfeksionisties, en vertrou sy eie oordeel. Hy sal waarskynlik sosiaal korrekte optrede bo spontaneïteit verkies. Hy mag gou ontsteld raak, dikwels bekommerd wees, moedeloos raak en homself oor eie foute verwyf. Hy is baie sterk werk georiënteerd en is opmerkzaam ten opsigte van andere se gedrag en emosies sonder om werklik kommentaar daaroor te lewer of emosioneel betrokke te raak.

Hy beskryf homself as 'n stil en hardwerkende mens. "Ek is nie opvlieënd van geaardheid nie maar word soms kwaad maar weer net so gou normaal." Hy beweer dat hy baie goed met mense oor die weg kom en sê "ek is ernstig oor my familie en wil nie graag sien dat enige van hulle te na gekom word nie. Sal uit my pad gaan om hulle te help."

Accused 1 certainly exhibited none of these attributes when he inflicted the fatal injury on the deceased or when he dug a hole for his son and his friend to bury themselves in.

8. Accused 1 persisted in his denial of any involvement in the murder to Ms Cronje, Mr F A Krös a social worker attached to Correctional Services and to Ms A Conradie, a social worker in the Department of Social Services. On this point accused 2 and 3 denied having witnessed the murder and the fact that they are complicit as accessory to the murder perpetrated by accused 1. Accused 2 and 3 were also assessed psychologically by Ms Cronje and Mr Krös on their susceptibility to correctional supervision, whereas their pre-sentencing

reports were compiled and presented by different social workers as the one who reported on accused 1. No disrespect is intended but it would be superfluous to deal with all the reports separately because the compilers in essence come to the same conclusion. This is partly so because of the facade that the accused have conspired to keep up and to some extent because the compilers admittedly compared notes. No criticism is intended either.

9. As far as accused 1 is concerned all the reports paint a glowing picture of him. They point out that the murder and the manner in which it was perpetrated, according to the judgment is inconsistent with the profile of accused 1 and his character. The refrain was akin to and reminiscent of the *contra naturam suam* principle which is, of course, not applicable to people.
10. I accept that accused 1 was good human material until he committed the offence in March 2005. At that stage he was 55 years and a first offender. Being a first offender is a strong mitigating factor. He is turning 58 years on the 29th June. He was born on the 29th June 1949. Whilst he is not old, he is also not a "spring chicken". I accept that he had been a good father to his children and a good husband to his wife. I am also satisfied that he is afflicted by a sore back, which Dr Van Der Westhuizen testified to. I note, however, that accused 1 greatly exaggerated this infirmity.
11. It was stated in all the pre-sentencing reports that accused 1 has a short temper but knew how to defuse a conflict situation. I am not sure how valid this point is because he failed to handle a situation where two urchins were not confrontational but, on the contrary, trying to flee from accused 1 and his co-accused.
12. As regards his community involvement Ms Cronje notes that accused 1 and his family were involved in a project to assist children from disadvantaged backgrounds from their misery but discontinued his involvement when he was arrested. I am sceptical about the sincerity of this

information supplied to the psychologist. During the trial and thus before his conviction I enquired from accused 1 concerning his community involvement. He said he was too busy at work and worked long hours. Thereafter there was an oblique and half-hearted reference to his participation in the upliftment of poor children. Asked why, with this experience, he did not contact the parents of the two delinquents he said, amongst many flimsy excuses, that he did not want to be involved and that in any event, the parents of such children did not care.

13. All the compilers of the various reports on accused 1 (they all testified) were ad idem that for accused 1 only a lengthy prison sentence was appropriate. Mr Van Heerden did not argue otherwise. Both counsel were agreed that there are substantial and compelling circumstances and that life imprisonment would be inappropriate. I agree.
14. The following factors can be noted as reducing the moral turpitude of the crime and therefore constitute mitigation factors:
 - 14.1 The accused is a first offender;
 - 14.2 He committed his first offence at age 55. He is turning 58 and therefore, in the punishment context, relatively advanced in age;
 - 14.3 His health is not that good. He suffers from backache, he has some knee trouble and is hard of hearing;
 - 14.4 He has been working all his life and supported his wife and children;
 - 14.5 He has been involved in some limited community and church services;

14.6 The murder was not premeditated. Cumulatively considered, these factors do constitute substantive and compelling circumstances.

ACCUSED 2: MR HENDRIK VAN DER WESTHUIZEN

15. He was born on the 15th December 1977. He turns 30 at the end of the year. He was a mature 27 years old when the offence was committed. Mr Cloete for the State has rightly pointed out that accused 2 had been exposed to the trials and tribulations of the outside world because he worked in London, England, from 2002 to 2004 as a security officer, a construction worker and a busconductor. Accused 2 also worked for 10 months (with accused 3) in North Carolina, USA. One would have thought that having been a security officer for such a length of time he should have known better how to deal with unarmed young boys trying to steal property through a broken window.
16. Accused 2 is unmarried but has a young daughter which he has been maintaining. He has worked throughout and shows signs of being a responsible member of the community. He attained his matriculation in 1996 and abandoned further studies due mainly to his poor performance at school, lack of concentration and hyperactivity.
17. The reports portray him as a follower and not a leader, easy to influence, a person who prefers to please everyone and would try by all means to avoid any confrontation. Unlike accused 3, apart from making the false declaration to exonerate accused 1 from the murder charge, which is an extremely serious offence, he did nothing else overtly.

ACCUSED 3: PIETER LE GRANGE

18. He is the son of accused 1. He was born on the 12th December 1985.

He is turning 22 in December and was only 19 years old when the offence was committed. He only attained Grade 8 at school. According to him and his parents he left school because he had a learning problem. Not so, said the principal to the social worker, Mr R Van Staden. He left *“vanweë sy swak aanpassing en ondermyning van onderwysers se gesag sowel as sy konflik met ander kinders op skool.”* A positive aspect concerning his studies is that he managed to pass his matriculation examinations through private studies.

19. Accused 3's parents, and he as well, portrays accused 3 as a mild-mannered person. As pointed out above he was everything but mild-mannered at school. I am mindful that he was still a child. However, during the murder incident he was already in his 20th year. He is the one who confronted the deceased and Curtis Maritz and accused them of having broken into a green-grocery store on a previous occasion. When Jaco Botha (then about 15 years) followed the three accused shortly after the murder, in order to identify them, it was accused 3 who hurled a missile at him to deter his advance. Further, when Inspector Schutte informed accused 1 that he was arresting him for the murder accused 3, acting independently, obstructed the police officer and maintained that his father was innocent.

20. Mr Van Heerden has contended that accused 2 and 3 acted under the influence of accused 1 because the latter was accused 3's father and accused 2 regarded him as his father. Ms Cronje says of accused 3: *“Hy sal waarskynlik oorwegend toegee eerder as om konfrontasie te ontlok.”* It may well be that accused 1 influenced accused 2 and 3 to lie to protect him. There is no direct evidence to that effect before me. That evidence should have emanated from the mouths of accused 2 and 3. Accused 3 could for example have said, if that was the case, that his father said he must accuse the youth of having broken into the vegetable market, his father said he must repel Jaco Botha with stones and his father said he must not allow Inspector Schutte to arrest him. The two accessories to the murder could have said accused 1 drummed his own version into their heads. They have not done so. Already on the 1st February 2007 when they were convicted I suggested strongly in my judgment that another attorney and counsel would serve their interest better. They must now bear the consequences of the choices they have made. The only influence

imaginable that accused 1 exercised over them is inherent in the father/son relationship alluded to. The influence was minimal.

21. The accused, aided by their counsel, tried to pull a cheap stunt on the court and the youthful Curtis Maritz. The latter said accused 2 was the tall one. Curtis made this distinction from the same evening of the murder. Mr Van Heerden asked the three accused to stand up in the accused's dock. They appeared to be the same height. I asked them to step out. Lo and behold, the soles of accused 3's shoes, as the record shows, were markedly thicker than those of accused 2. Curtis also referred to accused 3 as "Die Geel Kop" because of the colour of his hair. Accused 2 was then raven-haired. The following day they exchanged hair colour. This typified their entire case. It is not amusing.
22. The crime of accessory to murder is a very serious offence. Society eschew the fact that murderers must walk in their midst unpunished. Both the Correctional Services officer and the social workers of the Department of Social Services have recommended that accused 2 and 3 be sentenced to Correctional Supervision in terms of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977. Mr van Heerden also urged me in that direction. State counsel was not strongly averse to accused 3 being sentenced as per foregoing recommendation.
23. Mr Van Heerden has directed attention to the case of **S v Kleinhans** 1994(1) SACR 195 (O). In that case the accused was convicted by **Wright J** of being an accessory after the fact to murder. The accused pleaded guilty to the crime. He admitted that he had been approached by the murderer, his friend, to assist the murderer to dispose of the body and discarded it in a remote area. The accused was 21 years old and a first offender. He also had a stable work record. He was

sentenced to three years correctional supervision in terms of section 276(1)(h) of CPA. What is noteworthy in the **Kleinhans** case is that the deceased's body was already in the boot when the accused became involved. The accused also made a clean breast of things.

24. I am not persuaded that that case is more serious than the current case. In this case the accessories saw the murder being committed, they saw or were part of the murder weapon being disposed of or concealed, they were part of the conspiracy that Mr Echert give perjured evidence by introducing a walking stick that they knew fully well accused 1 did not use for support that late afternoon, they showed no remorse, they accused an innocent Curtis Maritz as the murderer etc.

25. In **S v Nooroodien en Andere** 1998(2) SACR 510 (NC) at 529h-j a case relied on by State Counsel, **Buys J** writing for the full bench (**Kriek JP** and **Van Der Walt J** concurring) stated:

“Mev Birch het, op versoek van die Hof, na 'n aantal beslissing verwys waar die beskuldigdes skuldig bevind is as begunstigers tot moord. Hulle vonnisse het gewissel tussen agt jaar en 20 jaar gevangenisstraf. Vonnisse wat in ander soortgelyke sake opgelê word is nie van veel waarde nie, behalwe in die mees algemene sin dat howe begunstiging in moordsake steeds as 'n ernstige misdryf beskou wat in 'n gepaste geval met 'n lang termyn gevangenisstraf gestraf word. Dit is so omdat 'n gepaste vonnis in elke saak bepaal word met inagneming van sy eie unieke feite.”

The accused were sentenced to eight years imprisonment each

26. In terms of Section 257 of the Criminal Procedure Act the punishment of an accessory after the fact shall not exceed that of the perpetrator of the initial crime. It is trite that the accessory after the fact is usually sentenced more leniently than the perpetrator, for understandable reasons. In **S v Phallo and Others** 1999(2) SACR 558 (SCA) at 569h – 560a (par 42) the Court sent out this clear message:

“[42] I am of the view that a sentence of eight years' imprisonment in

*the case of each of the appellants is reasonable and fully justified by the circumstances of the case. In **S v Van Dyk** 1998 (2) SACR 363 (W), **Cameron J** stated at 381i-j:*

'Die regspleging in ons land is in ernstige gedrang. Openbare vertroue in die opspoor en vervolging van misdadigers beleef 'n krisis, met skeptisisme wat om verstaanbare redes hoogty vier. Deur swaar vonnisse op te lê moet die howe enersyds 'n boodskap aan voornemende misdadigers binne die regs-administrasie uitstuur dat hul optrede nie geduld sal word nie; en andersyds aan gewone landsburgers dat die regspleging sover doenlik beveilig word.'

With these remarks I fully agree."

27. Both accused 2 and 3 are first offenders. If the activist role of accused 3 is measured against the more withdrawn participation of accused 2 and regard being had to their age disparity (29 against 21, respectively) then these factors just about cancel each other out. There is therefore only little room for differentiation in the sentences. The room being accused 3's relative immaturity and his invidious position *vis-à-vis* his father.
28. Having regard to the merits of the trial, the evidence adduced during the sentencing phase, the argument of counsel on both sides of the divide and my foregoing remarks, I am satisfied that accused 2 and 3 are not prime candidates for correctional supervision as contended for by their counsel.
29. As far as accused 1 is concerned all I need say at this final stage is that if he was 10(ten) years younger I would have sentenced him to life imprisonment without any hesitation.

The accused are sentenced as follows:

1. Accused 1 (Joseph Le Grange) is sentenced to 24 (twenty four) years imprisonment.

2. Accused 2 (Hendrik Van der Westhuizen) is sentenced to 8 (eight) years imprisonment, two years of which is suspended for 5 (five) years on condition that he is not convicted of an offence involving dishonesty and for which he is sentenced without the option of a fine; and which offence is committed during the period of suspension.

3. Accused 3 (Pieter Le Grange) is sentenced to 7 (seven) years imprisonment, two years of which is suspended for 4 (four) years on condition that he is not convicted of an offence involving dishonesty and for which he is sentenced without the option of a fine; and which offence is committed during the period of suspension.

F D KGOMO
REGTER-PRESIDENT
NOORD-KAAPSE AFDELING

On Behalf of the State:	Adv J J CLOETE		
Instructed by: Kimberley	Director	Public	Prosecutions,
On behalf of all the Accused:	Adv F VAN HEERDEN		
Instructed by:	Herman Van Heerden Ing.		