DATAVYF/JHB/JMDT

IN THE SUPREME COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 70/93

DATE: 1993-10-14

BEFORE: HIS LORDSHIP MR JUDGE PRESIDENT ELOFF

AND ASSESSORS: (1) MR W VAN DER LINDE

(2) MR D R LAMBSON

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED
DATE 21.10.1993 SIGNATURE

Return for final revision

In the matter between:

THE STATE

and

(1) JANUSZ JACUB WALUZ

(2) CLIVE JOHN DERBY-LEWIS

(3) GABRIELLE MAVOURNA DERBY-LEWIS

J U D G M E N T

ELOFF, JP: The three accused stand charged on four counts. The first is one of murder, the allegation against them being that on 10 April 1993 and at or near Hakea Crescent, Dawn Park, Boksburg, they unlawfully and intentionally killed Martin Thembisile Hani, (hereinafter referred to as "the deceased").

The/..

The second count is brought under section 18(2)(a) of Act 17 of 1956, the allegation being that during the period January 1992 to April 1993 they conspired to aid or procure the commission of, or to commit murder in respect of the people whose names appear on a list. A copy of that list, which was in the trial often referred to as the "hit list" is annexed to the indictment. It contains nine names including that of the deceased.

The third and fourth charges attribute to the accused the unlawful possession of a firearm, namely a 9 millimetre Z88(10) pistol, P6-101368, without a licence; and of the possession of ammunition without the lawful possession of a firearm capable of firing such ammunition.

The accused were each defended by separate counsel, each pleaded not guilty. They were not at the stage of plea prepared to disclose the basis of their defence.

I find it convenient to commence my discussion of the evidence in relation to the first charge, that of the murder of the deceased. I shall, to begin with, confine myself to the fundamental question whether it was adequately proved that the(20) first accused killed the deceased.

It was clearly established and indeed not disputed that on 10 April 1993 shortly after 10:00 in the morning, the deceased was shot to death in front of the garage of his residence in Dawn Park, Boksburg. The admissions made on behalf of the accused as also the unchallenged evidence of the specialist pathologist, Dr P J Klepp, firmly establish that the deceased died of multiple gunshot wounds. One bullet struck the deceased in the front of his abdomen or chest causing extensive damage to internal organs; it passed through his (30)

body/..

body. The absence of powder marks shows that the killer was not close to the deceased when the shot was fired. The other bullet wounds are all in the head of the deceased.

I should interpose to say that there were abrasions on the right side of the face of the deceased which were pre-mortem which are consistent therewith that he fell after the first shots were fired, injuring his face. The first head wound was from left to right through the head. (I say first, not relative to the order in which the wounds were inflicted but merely to indicate the order of discussion). The shot that caused this wound would have killed the deceased instantly. The bullet causing the wound was retrieved during the post-mortem examination by Dr Klepp and was identified as Exhibit 18. This bullet was fired from close range; the nozzle of the gun was probably not more than 30 centimetres from the deceased when the shot was fired, leaving gunpowder marks and other evidence of firing at close range.

The bullet from the third shot was also from left to right from just alongside the left ear. It exited through the right mandible. The fourth bullet was also through the lower face from right to left. One of these was also fired at close range.

I now summarise the evidential material placed before the court to show that it was accused no.1 who fired these four shots. I should at once observe that when the state evidence was presented no contrasting version was put to the state witness, not even when a witness directly implicated accused no.1. And when the state case was closed accused no.1 chose not to give evidence. And at the argument stage no serious argument was presented to suggest that the participation of

accused/..

accused no.1 had not been firmly established.

The eyewitness to the shooting of the deceased was a young woman, Mrs M J Harmse. She lived in the township of Dawn Park not far from the deceased whose residence was in Deon Street, Dawn Park. It is necessary firstly to give a brief description of the surroundings. Deon Street is a short street approximately 100 metres in length with three residences in it. One of these, incidentally is the residence of the witness Buchanan, whose evidence I shall discuss later. Travelling eastward along Deon Street once comes to a junction and if you cross the junction you come into the Hani residence. Looking at the scene from the other perspective, if one leaves the Hani residence one can either move more or less straight into Deon Street, or one could move to the right in a street which intersects Deon Street at more or less right angles, or one could move to the left in a street which, judging by the diagram handed in as an exhibit, intersects Deon Street at an angle of roughly 45 degrees.

Mrs Harmse testified that while she drove her car she found herself travelling eastward in Deon Street intending to move rightwards in the southern part of the intersecting crescent. She had to pass the Hani property with a view into the short driveway leading to the double garage. As she approached she saw two motorcars in the driveway, the one behind the other. The one nearest the street was a red Ford Laser with a hatchback. Coming closer she saw a man between the two motorcars, and she heard two shots being fired. The noise came from the direction of the person referred to. She then observed that he was holding an object which could be a firearm in his two hands, held in an extended position,

pointing/..

pointing towards the Hani garage, in what she described as a shooting position. All the time the driving forward slowly. And then she saw a black man lying on the ground in front of the garage door. The man she saw firing the first two shots now bent forwarded, still with what appeared to be a firearm in both hands. He fired two further shots at the person lying there, at close range. Mrs Harmse proceeded onward but looked back in her rear view mirror. She saw the man with the firearm getting into the Ford Laser and reverse into the street, obviously intent on driving off. Mrs Harmse realised that she had to do something to ascertain who the person was. She stopped, put her car into reverse gear, reversed and got close enough to read the registration number. She had her parents with her in the car; she stated the number to them and asked them memorise it. Meanwhile the man with the revolver drove off.

Mrs Harmse at once drove off to her residence which was nearby and wrote down the number. She recorded it as PBX 237 T. She next told her husband and then phoned the police. She got hold of the flying squad and told them what she had seen. She gave a description of the car and gave them the registration number. And that, as I shall mention later, led to accused no.1 a few minutes later being seen some six kilometres away, driving a Ford Laser with a hatchback with registration number PBX 231 T.

I wish first to evaluate Mrs Harmse's evidence and to state our impressions of her reliability. Mrs Harmse was cross-examined intensely, mainly with a view to establishing that she could not have seen that which she had described. We think it no overstatement to say that she had survived cross-

examination with flying colours. Her account was clear, she was plainly an honest witness and we are firm in our view that she described what she in fact saw. She said that that which she saw appeared to be like something in a film. She was asked how it is that she did not concentrate on the facial appearance of the killer; her answer was, understandably, that she was engrossed in the action of the man and did not carefully study his face. The best that she could do was to say that the man had light-coloured hair and was of average build.

Photographs taken shortly after the shooting were put to her and an effort was made to show that her vision was limited due to the presence of the two cars and a wall. There was no reason to doubt her version that the upper part of the body of the man standing roughly between the two cars was visible, and that as she drove further she would be in a position to see the body of the deceased lying a little to the right of the car with the killer standing close by.

Apart from the favourable impression we have of Mrs Harmse there was a great deal of other evidence that supported and in fact dovetailed with her version. We know that two of the shots that hit the deceased were fired from some distance away and two at close range. Spent cartridges were found roughly in the area where Mrs Harmse said the killer stood when he fired the first shots and where he was when the other two shots were fired.

And then there was the evidence of Mr Buchanan. His residence is in Deon Street, some 25 metres away from the Hani residence, roughly west of it. About 10:00 he heard four shots being fired. The noise came from the Hani residence. He grabbed a firearm, went to the door of his residence and saw

a red hatchback motorcar driving past. There was only one male person behind the wheel. He hurried over to the Hani residence and saw the deceased lying in front of the garage. He saw four spent cartridges lying on the ground and he cordoned off the area to prevent curious onlookers disturbing any physical features on the scene. The police arrived soon afterwards and placed cones where the cartridges were found and marked the position thereof with chalk. All of this was afterwards photographed, and the photographs were duly proved.

There was other evidence besides, strongly confirmatory (10) of Mrs Harmse evidence. I shall allude to that a little later.

Before leaving Mrs Harmse's evidence I think it appropriate to remark that but for the courage and public spiritedness of this young woman the killer would possibly not have been apprehended. By way of contrast to what one so often hears of eyewitness wishing not to become involved in scenes such as this, her sense of duty dictated that she do that which I have described.

I return to the evidence of Buchanan. He was intensely cross-examined, mainly on the opportunity which he had of (20) observing the red Ford Laser and the appearance of the driver. As to the identification of the driver I should add that Buchanan testified that on the next day he was asked to attend a parade at the Boksburg police station. Ten people were on parade. They all faced Buchanan; he could then not make an identification. He then asked the police to request the men on parade to turn their faces. When they did so he recognised accused no.1 who was on the parade, when he saw his side profile. We found him a reliable witness.

I return to the narrative at the point where Mrs Harmse (30) notified/..

notified the flying squad of what she had seen and that the killer drove a red Ford Laser with a hatchback, and that the number was PBX 237 T. Radio messages were sent out. Constables Olivier and Du Toit were on patrol duty some six kilometres from the scene of the killing. They heard the message. And just then they observed a red Ford Laser with a hatchback to their right with only one male person in it. They followed the car and observed its registration number to be PBX 231 T. They eventually brought the car to a halt. Accused no.1 was behind the steering wheel. (10)

Constable du Toit asked him if he had a firearm. Accused no.1 replied in the affirmative, and produced a pistol which was lying on the left front seat of the car. That, I should at this stage observe, was not the Z88 which was used to kill the deceased. But the other constable looked at the back seat of the car, and saw a hold-all or container with something protruding from it. Closer inspection showed that something to be a Z88 pistol. Other evidence clearly proved that that was the murder weapon, Exhibit 2.

The evidence that Exhibit 2 was the murder weapon was (20) adduced with care. In view of the fact that at the argument stage there was no serious challenge of this evidence, I can deal with it in summary.

Ballistic evidence established that the four cartridges found on the scene were fired by Exhibit 2 and that the bullet found in the body of the deceased was fired by Exhibit 2.

There was evidence that in the morning of the shooting accused no.1 purchased 25 rounds of ammunition for a Z88. The cartridges found one the scene were of the make so purchased.

Thirdly, gunpowder residue was found on the arms of (30)

accused/..

accused no.1 which showed that he had fired a shot or shots that morning.

And then there was the "hit list".

After the arrest of accused no.1 the police went to his apartment in Pretoria. Amongst other things they found a document, Exhibit J, in a drawer of a cupboard. On realising a little later that it had been found, accused no.1 remarked to the investigating officer, Warrant Officer Holmes: "Mike, I think you found something which made you happy". The condition in which this exhibit was found differed somewhat from the condition when it was first completed.

The evidence of the genesis of this document needs to be sketched shortly. The evidence in this regard was that of the witness Kemp and also of accused no.3. Their versions coincide to the extent that accused no.3 asked Kemp, who was also a Conservative Party supporter, to provide her with the addresses of 19 persons whose names she faxed through to Kemp at his office at a newspaper where he was employed at the time.

Accused no.3 testified that she did not inform Kemp for what purpose she wanted the addresses. She got in touch with Kemp a few times thereafter in connection with her request. Round about 20 January 1993 she was told that he had obtained addresses of nine of the persons. She arranged that Kemp would meet her at the Rotunda, Johannesburg, on 29 January 1993 from where she was due go to Cape Town by bus, to hand her the list. That was done. According to the evidence of accused no.3, the list was in all respects that which was found in the possession of accused no.1 except that certain numbers were afterwards recorded to the left of each name. Certain words and figures were also added afterwards next to the name of the deceased.

The list contains the following names and addresses, namely: Nelson Mandela, Joe Slovo, Mac Maharaj, Karen Brynard, Chris Hani (the deceased), Pik Botha, Richard Goldstone, Ken Owen and Tim Du Plessis.

The content and condition of the list, according to Kemp and accused no.3, was that it showed nothing more than the names and addresses of these nine persons, apart from some additional descriptions of the Mandela and Slovo homes, and that it contained a photographic presentation of the Mandela home. There was, when accused no.3 got the list from Kemp, nothing on the face of it to show that it was a "hit list", or intended as one.

The words and figures on the list when it was found in possession of accused no.1 were descriptive of a BMW motorcar and its registration number.

It was part of the police investigation to ascertain what the significance was of the description and number of the car next to the name of the deceased. It was established that that car belonged to a person who was called as a witness. He testified that he had on occasion used that car to collect the deceased, to take him to meetings. The last time that happened was some three weeks before 10 April, the date of the shooting.

The foregoing summary describes the most important evidential material against accused no.1. As I said, he gave no evidence. The case against him was overwhelming. It was in our judgment proved beyond reasonable doubt that he killed the deceased. He did so with direct intent to kill.

I next discuss the evidential material which was relied upon to show that accused no.2 actively and knowingly participated in the scheme to assassinate the deceased, and

promoted/..

promoted the commission of the offence. The state relied on circumstantial evidence in this regard. The factors in question can be summarised as follows:

Firstly there was evidence that accused no.1, who endorsed right wing politics, was a friend of accused no.2 and of no.3 who were both prominent in right wing politics. They developed a good relationship. According to the diary of accused no.3, accused no.1 was a regular visitor at their house; the dates mentioned in the diary, Exhibit DD, include 19 January 1993, 25 January 1993, 12 February 1993, 12 March 1993 and 6 April (10)
1993. (Accused no.3 confirmed the correctness of her diary when testifying).

The visit on the last-mentioned date, which is in the diary recorded as "breakfast", is confirmed by the evidence of the house maid of accused no.2 and 3, Elizabeth Motswane, who testified that accused no.1 had breakfast with accused no.2 and 3 at their home. On that occasion she saw accused no.1 sitting in the lounge of the Derby-Lewis residence holding a pistol in his hand. I shall say more about that later.

The second aspect which possibly concerns accused no.2, (20)
is the list, Exhibit J, to which I alluded previously. It will be recalled that I said that Kemp and no.3 said it was handed to accused no.3. She testified that she placed it in her bag and proceeded to Cape Town where accused no.1 was there at the time for the purposes of sessions of the President's council, of which he was a member. On her arrival at their place of residence in Cape Town she took it from her bag and showed it to accused no.2. Later when she returned to Krugersdorp she placed it on a glass table in a room in their Krugersdorp residence. And afterwards, as we now know, it landed in the (30)

possession/..

possession of accused no.1.

Accused no.3 denied that she handed it to accused no.1. It is unlikely in the extreme in our view that accused no.1 would on his own, on a visit to the residence of accused no.2 and 3, have seen and taken it without telling them.

The most probable alternative in the light of all the circumstances is that accused no.2 handed it to accused no.1. In our view the probability is such that there was a duty on him to testify and to deal with this aspect. I shall later discuss more fully the need to testify. (10)

The third component in the factors possibly linking accused nos's 1 and 2 is the aforesaid murder weapon, Exhibit 2, a Z88 pistol numbered P6-101638. It will be recalled that it was found in the possession of accused no.1 very shortly after the killing, and that it was proved conclusively that it was used to fire the four fatal shots. This weapon is first referred to in evidence of Flight Sergeant Van der Schyff of the South African air force. He was on 14 April 1990 in charge of the South African air force weapons at one of its stores. Exhibit 2 was recorded as being part of the stores and the (20) number P6-101638 was recorded. On that date a number of arms was stolen from the store in question, including Exhibit 2.

The witness Faan Venter, also a political rightist friend of accused no.2 and 3, obtained a Z88 pistol in 1990 from one Gene Taylor. I shall later discuss the question whether that was the murder weapon. For reasons to be given later we infer that it was, and that it was the South African air force pistol stolen on 14 April 1990.

Round about March 1993 or possibly earlier, (the date is not of great moment), accused no.2 asked Faan Venter if he had (30)

an/..

an unlicensed firearm. According to Faan Venter accused no.2 explained that "they were stocking up". Faan Venter said that he had such a weapon and undertook to get it to no.2 via one Durant. He handed it to Mrs Durant wrapped in a pullover which in turn was contained in a plastic bag.

When Faan Venter handed the weapon to the witness, Mrs Durant, she was alone in her house. She testified that the date was 26 February 1993 which she fixed by reference to the birthday of her daughter which lay just a few days ahead. She and her husband had planned to visit the daughter the next day. When Venter handed her the plastic bag she tried to get in touch with accused no.2 by telephone (they were acquainted) but he did not answer the phone. He was probably not at home right then.

She decided to try again later. In the meantime curiosity got the better of her and she decided, to use her own words, to "koekeloer". She found a firearm in a custom-made container wrapped in the pullover. It was similar to Exhibit 2. She again wrapped it in the pullover which she restored in the plastic container. Later her husband returned from wherever he had been. Still later they made contact with accused no.2 by telephone; told him that his parcel had arrived and agreed to deliver it at his house the next day. They did so on 27 February 1993.

So, pausing here for a moment, the murder weapon was on 27 February 1993, delivered to accused no.2.

The history of Exhibit 2 is next taken up by the witnesses Darroll and Smith. The date given is 22 March 1993. Darroll, who claimed to be knowledgeable about firearms, had made the acquaintance of accused no.2 and 3 some time before and had

since/..

since then done some work for accused no.2.

During discussions on that day accused no.2 asked him to do him a favour, namely to arrange to have a silencer fitted to a weapon. Darroll agreed. No.2 accused handed him a pistol in a custom-made box; he handed it to the witness Smith. Smith testified that as requested by Darroll, he adapted the weapon in question to accommodate the silencer. He happened to have a silencer in stock. He had manufactured it himself. To accommodate the silencer he cut grooves into the last centimetres of the nose of the weapon. Onto those grooves the silencer could be screwed. When the silencer was not necessary a cap could be screwed onto the point of the nose of the pistol and it would seem to be untouched.

The evidence of Smith was that it was the Z88, Exhibit 2. His evidence in this regard was intensely challenged in cross-examination. He gave reasons which in our view are cogent, for remembering specifically that it was this exhibit and no other. To begin with he said that he had never at any other stage fitted a Z88 with a silencer. He identified his own peculiar handiwork. Of importance is that he had to alter the type of screwing in the cap from metric to imperial. He could point that out to us. Smith impressed us as a reliable honest witness. We think that we can with confidence accept his evidence.

I need to mention that a ballistics expert was called on behalf of accused no.2. He gave evidence of a general nature, but nothing that he said could counter the very positive evidence of Smith that this was the very weapon which he fitted with a silencer. I should add that the silencer was also placed before us as Exhibit 4. I omitted to mention earlier

that/..

that when accused no.1's vehicle was found and he was arrested, this very silencer was found in his motorcar.

Notwithstanding vigorous attempts to discredit Smith by cross-examination, counsel for accused no.2 did not endeavour, at the argument stage, to question Smith's evidence. The thrust of the argument was that proof that Smith fitted Exhibit 2 with a silencer at the request of no.2 was not sufficient, even in the light of all the other evidence, to prove complicity. I shall discuss that argument later.

The next step is that Exhibit 2 must have been handed to accused no.1, together with the silencer. Exhibit 2 was used by accused no.1 to commit the murder, and the silencer which must have been the silencer previously referred to, was in his car when he drove off.

Counsel for accused no.2 urged that there was no proof that accused no.2 handed Exhibit 2 to accused no.1. We cannot support this contention. Clearly Exhibit 2 was at some stage in the possession of accused no.2 and it then passed to the possession of accused no.1. The clear inference is that accused no.2 must have handed this to no.1. No other feasible explanation was suggested. Again there is the significance of the fact that accused no.2 chose not to give evidence. We find it firmly established in the light of all the circumstances that accused no.2 did in fact hand the murder weapon to accused no.1.

The question which next arises is when and where that took place. The first occasion after accused no.2 had the silencer fitted (22 March 1993) that we know of where accused no.1 and no.2 got together, was on 6 April 1993. That was the occasion mentioned by accused no.3 in her diary when accused no.1 was

to have breakfast with them.

It is now opportune to refer more fully to the evidence of the witness Elizabeth Motswane. She testified that after the Easter week-end of 1993, when she was away on leave (she said it was 6 April 1993), accused no.1 had breakfast with accused no.2 and no.3. After breakfast, while she was busy in the kitchen, there was a 'phone call for her. The telephone in the house could be plugged into the dining room or in the passage. The 'phone was plugged in in the passage to enable her to use it there. To get to the phone in the passage she walked by the open door of the lounge. While so doing she saw accused no.1, seated on a chair with an open briefcase on the floor next to him. In his hand he held a firearm. He held it with the butt, with the barrel pointed downwards. Accused no.2 was also in the lounge. Before this accused no.3 had left to attend to some business. After her telephone discussion the witness returned to the kitchen via the passage. On walking by the lounge she again saw accused no.1 still holding the firearm as before.

The possibility is that Exhibit 2 was handed over on this occasion. Four days later accused no.1 used Exhibit no.2 to murder the deceased. It is of course possible that the weapon could have been handed over after this date or before. It matters not. It is relevant that four days before the killing accused no.1 is found in the residence of accused no.2, handling a hand weapon.

The fourth component in the evidence relevant to the possible involvement of accused no.2 is given by Ms Ras, accused no.1's girlfriend. She testified that on the day of the shooting accused no.1 went off early in the morning saying that/..

that he was going to karate lessons. We know that he went off to murder the deceased. Ms Ras expected him back at about 11:00 but he did not return. Shortly after that accused no.2 phoned to no.1's flat and asked to speak to him. He did not say why he wished to speak to him; he merely asked to speak to him. On being told that accused no.1 had not returned, no.2 asked Ms Ras to leave a message.

This evidence is to considered together with what accused no.3 herself testified to. She said that on 10 April 1993, the day of the shooting, she and accused no.2 were at the residence of Mr Venter, to whom I alluded previously. They left round about 11:00. Whilst leaving the telephone at the Venter's house rang. Mrs Venter answered it and announced that someone had just given her the news that Chris Hani had been shot. Accused no.1 and 2 then went off. As we know accused no.2 then tried to telephone accused no.1.

We find it relevant that according to Ms Ras accused no.2 merely asked to speak to accused no.1. On being told that he was not in, he asked her to request accused no.1 to phone him. Afterwards accused no.2 phoned again to say that he actually wished to invite accused no.1 and Ms Ras over for a braai the next day. That is not, however, what he said on the first occasion.

The fifth element concerning accused no.2 was given by the witness Kemp. On 12 April 1993, that is two days after the Hani killing, he was at the residence of accused no.2 and 3 for lunch. Whilst there a journalist from the Pretoria News phoned accused no.2 and asked if accused no.1 was a member of the Conservative Party. That prompted Kemp to touch on the theme of the Hani killing. He remarked on the fact that a Sunday

newspaper/..

newspaper had reported the finding of a list in possession of accused no.1, containing nine names, including that of the deceased. Kemp asked whether the list that he had some time before supplied with nine names was somehow involved with accused no.1. Both accused no.2 and 3 first denied it but accused no.3 immediately afterwards said yes, but they did not want to tell Kemp about it. Kemp was shocked and bewildered and did not know what to do. Accused no.2 then suggested that they tell the police that the list in question was the one which Kemp had drawn up; accused no.3 and Kemp were opposed to this idea; accused no.3 used words like: "Don't be silly, Dad". Then accused no.2 said that there was no need to do anything. "Waluz will not speak". He excused himself and then went to lie down.

It is important that although counsel for accused no.2 cross-examined Kemp he did not challenge that much of Kemp's version that accused no.2 obviously knew of the list and that he had said that Waluz would not speak.

I need to add that accused no.3 was also asked about this discussion when she gave evidence on her own behalf. She was not prepared to deny Kemp's version that accused no.2 had said: "Don't worry, Waluz won't speak". It also emerges from her evidence that on the Sunday she and accused no.1 realised that the list mentioned in the press was probably the list compiled by Kemp, but decided not to inform the police. She explained that because they were high profile Conservative Party members that would not have been advisable. They would rather wait for the police to come to them.

In the sixth place on the theme of the various aspects which possibly incriminate accused no.2, there is the evidence

that after his arrest accused no.2 made a written statement to the police. That statement was placed before us. In it he said that he last saw accused no.1 in December 1992. That was plainly false.

It clearly emerges from all this that accused no.2 assisted accused no.1 to commit the murder. He obtained Exhibit 2, the Z88; had it fitted with a silencer, involving him in the expenditure of about R450 and he handed it to accused no.1.

It can reasonably be inferred that accused no.1 had planned this assassination quite some time before 10 April 1993. The other evidence to which I alluded earlier was that he probably surveilled the Hani residence, and observed that a certain car which we now know had been there three weeks previously, came to the residence. We know that he had previously acquired the wherewithal to conceal the registration number of his car. In short, the assassination was planned well in advance. The fundamental question is whether it should not be assumed in accused no.2's favour that he rendered the assistance innocently without knowing what no.1 was going to do. Or, to put it different, can it be inferred beyond reasonable doubt that the assistance must have been and accordingly was given with knowledge that Exhibit 2 would be used to kill the deceased? Or to put it more precisely, that accused no.1 and no.2 conspired to kill the deceased?

It is in this context necessary to allude again to the fact that accused no.2 chose not to give evidence. It is significant that the matters which are under scrutiny concern his knowledge and state of mind. The aforesaid circumstances point strongly to his having had knowledge and to his having been/..

been closely involved. It is in this context necessary to discuss the law on the significance to be attached to a person not giving evidence in such circumstances.

The decision frequently quoted in this regard is S v Theron 1968 4 SA 61 (T). It is a judgment of Trollip and Trengove JJ (as they then were). It was subsequently quoted with approval by the appellate division in S v Khoza 1982 3 SA 1019 (A) at 1039F-G. I quote from S v Theron (at p 63D-H):

"In the present case, although other witnesses were called by the defence, the accused himself did not testify. The magistrate in his judgment and the State in this appeal relied heavily on that omission. The general rule is that, the onus being on the State, it must initially produce prima facie proof of the commission of the offence, that is, it must go so far as it reasonably can in adducing such evidence of the facta probanda constituting the offence as calls for an answer from the accused; if he remains silent the prima facie proof may become conclusive proof (See Gardiner & Lansdown supra vol 1, p 466, where the authorities are collected). That the factum probandum is one that is peculiarly within the knowledge of the accused, like for example his state of mind, is an important factor to be taken into account in the State's favour when considering whether it has gone so far as it reasonably can (Union Government v Sykes, 1913 AD 156 at 173/174), and if it has, whether the accused's failure to testify has converted the prima facie proof of that fact into conclusive proof.

Generally/..

Generally in the latter case his silence weighs heavily against him because, ex hypothesi, the accused could so easily have refuted the prima facie proof by his own evidence if it were not correct. (cf R v Ismail 1952 1 SA 204 (A) at 210C). That applies especially where the accused's state of mind is in issue, for it has been authoritatively pronounced that 'it is not easy for a court to come to a conclusion favourable to the accused as to his state of mind unless he has himself given evidence on the subject'. (Per Schreiner J, as he then was, in R v Mohr 1944 TPD 105 at 108, approved and applied in R v Deetlefs 1953 (1) SA 418A at p 422, S v Kola 1966 4 SA 322A at 327F."

The factors which I mentioned earlier create a strong probability that accused no.2 must have been aware of what accused no.1 was going to do; that the plan was to assassinate the deceased. The central question relates to the state of mind and the knowledge of accused no.2. He and he alone could have supplied the answers. He and he alone could have refuted the prima facie inference that the weapon which Faan Venter handed over was Exhibit 2. He and he alone could have dealt with the vital question whether the weapon was handed over to accused no.1 and for what purpose.

In our view his omission to do so is highly significant and has the effect of converting prima facie proof into conclusive proof.

The reasoning applied in cases such as the present is that discussed by the appellate division in R v Blom 1939 AD 142. In summary the rules of logic are that if an inference is

sought/..

sought to be drawn it should be consistent with all the proved facts, and it should be such as to exclude all other reasonable inferences.

The question before us could be dealt with by asking: for what relatively innocent purpose might accused no.2 have handed Exhibit 2 to accused no.1? In argument it was suggested that accused no.2, who was "stocking up" wished account no.1 to test the weapon for him. In considering this suggestion one seeks in vain to find reasonably acceptable answers to inter alia the further questions: (10)

- Why does accused no.2 not tell us that in evidence? It is at best a notional possibility.
- Why does he lie to the police as to when last he saw accused no.1?
- Why is Exhibit 2 first fitted with a silencer before it is handed to accused no.1, if the object is simply to test the weapon?
- Why all the secrecy? If accused no.3 is to be believed (and on this point we think she should be), she was never told by her husband of his acquisition of Exhibit 2, and of it being handed to accused no.1. (20)

The total effect of all these circumstances is that, in the absence of an explanation, the inference can and must be drawn that accused no.2 handed over the murder weapon to accused no.1 knowing full well what the object was for which accused no.1 acquired it and to what use it would be put. Any inference consistent with innocence is so far fetched and unlikely that it must be left out of account. In our judgement the facts point inevitably thereto that accused no.2 knowingly (30)

and/..

and by virtue of a conspiracy with accused no.1 actively promoted the object of assassination of the deceased. The guilt of accused no.2 on count no.1 was in our view established beyond reasonable doubt.

I shall later return to the other counts.

I turn now to the evidence against accused no.3 on count 1, the murder of the deceased. By way of contrast with the position of accused no.2 there is no state evidence of her involvement in the acquisition of the murder weapon or of the silencer, or with it being handed to accused no.1. (10)

The evidence of the house maid concerning the events of 6 April 1993 is that accused no.3 had left by car before the stage when accused no.1 was seen handling a firearm in the house of accused no.2.

Accused no.3 testified that she had no knowledge of a weapon at any stage. There is no reason to reject this testimony. It can be accepted. She also testified that she did not hand accused no.1 the list, Exhibit J. We have already found that in all likelihood it was handed to accused no.1 by accused no.2. So at the end of the day one is left with the (20) significance of the procurement of the list, Exhibit J.

I mentioned earlier that when it was handed to accused no.3 by Kemp it did not contain the incriminating numbers and notations which were added later. We also found earlier that in its original condition the list was, on the face of it, nothing more than a list of names and addresses. Per se it was not a "hit list". Moreover, to find otherwise is to find that Kemp was involved in the conspiracy. He was a state witness and nothing of the sort was ever suggested to him.

Accused no.3 endeavoured to explain her object in getting (30)

the/..

the addresses of the aforementioned persons. Her first answer was that she wished to establish that persons on the left of the political spectrum maintained - judging by their residences - a luxurious lifestyle. When it was pointed out that the list included the names of persons who were journalists, she stated that those journalists were wont to criticise the Conservative Party strongly; that, said the witness, could only be accounted for on the basis that they had been bribed. A visit to their homes might show that their lifestyle furnished proof that they had been rewarded improperly. Accused no.3 was not consistent in her explanations. Her explanations were far fetched. She was not truthful.

At the end of the day, however, we have little more than that accused no.3 prevaricated about a list which, as I remarked earlier, is on the face of it, not necessarily a "hit list". Is that sufficient to saddle her with implicity in the murder? And how we do condemn accused no.3 without at the same time condemning Mr Kemp?

We have given careful thought to what inferences should be drawn from the prevarications of accused no.3. Does that not, putting it simplistically, elevate Exhibit J into a "hit list"? We conclude that there are explanations other than that, and consistent with innocence. She may be protecting someone, possibly her husband or someone else, in giving the explanations which she did for procuring Exhibit J. We stress that there is really nothing other than her procurement of Exhibit J against her. In our view she ought to be given the benefit of the doubt on all counts.

I now turn as regards accused 1 and 2, to count 2. It will be recalled that that attributes to them a conspiracy to murder/..

murder all the nine persons mentioned in the list. We have already found a conspiracy to murder the deceased, one of the persons on the list. The question then arises whether the facts attract as the only reasonable inference that the murder of the other eight was also planned. There are only two factors which support such an inference. The first is that one of the persons on the list was assassinated; the other is that the description of the residences of two other persons on the list suggests something sinister.

We conclude that these two factors are insufficient to establish as the only inference that the conspiracy between accused 1 and 2 involved as at 10 April 1993 all the other persons on the list. That being so the only possible finding concerning accused 1 and 2 on count 2 is a conspiracy to murder only the deceased. Such a finding would in substance involve a duplication of the finding of guilty of murder on count 1. For that technical reason a conviction of accused no.1 and 2 on count 2 should not be entered.

As regards count no.3, the unlawful possession of the 288, that was firmly established in all the evidence as regards both accused no.1 and 2.

That leaves me with count 4. The state abandoned that charge against accused no.1. As regards accused no.2 the only evidence of possession of ammunition for use in a weapon for which he did not have a licence is the possession of five subsonic bullets handed to accused no.2 at Cape Town. His guilt to this limited extent was established.

Before formally announcing the verdicts I think it necessary to remark on the investigation in this case and the presentation of evidence. The police investigation was of a very/..

very high order. It was done thoroughly; no stone appears to have been unturned to explore all possibilities. A high degree of professionalism was demonstrated all round. The promptness and skill with which the police acted was impressive.

Then, lastly, before I announce the verdicts, the witness Venter was warned by me under section 204 of the Criminal Procedure Act. I conclude that he gave his evidence satisfactorily and he must be discharged from prosecution for unlawfully possessing a firearm.

Before I announce the verdict, I record that the reasoning reflected herein and the conclusions reached is that of all the members of this court.

Will the accused stand. Accused no.1, JANUSZ JACUB WALUZ, we unanimously find you GUILTY AS CHARGED ON COUNT 1, the murder of Chris Hani, and on count 3, the possession of the Z88 pistol without a licence. On the other counts you are found NOT GUILTY and discharged.

Accused no.2, CLIVE JOHN DERBY-LEWIS, we unanimously find you GUILTY AS CHARGED ON COUNT 1, the murder of Chris Hani. You are also found GUILTY AS CHARGED ON COUNT 3, the possession of the Z88 pistol without a licence. You are also CONVICTED ON COUNT 4 of the illegal possession of five rounds of ammunition. On the other counts you are found NOT GUILTY and discharged.

Accused no.3, GABRIELLE MAVOURNA DERBY-LEWIS, you are found NOT GUILTY and discharged on all counts.

COURT ADJOURNS