Reportable:	YES / NO
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 Nr: 48/2005

Delivered: 24/04/2006

In the matter:

THE STATE

versus

GEORGE ROBERTSON **1st Accused**

RICHARD THUSI **2nd Accused** SECOND ACCUSED
GREOGORY OLIPHANT **3rd Accused**

JUDGMENT

KGOMO JP:

1. The three accused are charged with one count of murder and another of Robbery with aggravating circumstances as contemplated by Section 1 of the Criminal Procedure Act 51 of 1977. They all pleaded not guilty to both counts. Accused 1 was originally represented by Mr J Cloete of the Legal Aid Board whilst accused 2 and 3 were represented by Ms B Segone also of the Legal Aid Board.

2. Whilst represented as aforesaid accused 1's basis of defence was that on the 22nd July 2004 (the night of the murder and robbery) he was in the company of accused 3 at Stella's Shebeen at a place called Die Erwe around Roodepan, Kimberley, from about 17h00 to until just before 20h00. The two then went to one Moira's home to look for her husband called Oupa. They left Moira's place before 21h00 and went to CS Tavern which is also at Roodepan. They drank liquor at the latter place until about 24h00, when they went their respective ways.

3. Through Ms Segone accused 2 exercised his constitutional right to remain silent and not to disclose the basis of his defence. Ms Segone however produced this plea-explanation on behalf of accused 3: Accused 3 visited accused 1 at the latter's parental home at Midlands, a farm outside Kimberley. At about 16h00 on the day in question the two of them went to Stella's Shebeen aforesaid where they consumed liquor together until about 19h00, when accused 3 left accused 1 at Stella's Shebeen to have a bath. After 19h00 but before 20h00 accused 1 collected accused 3 at the latter's parental home. The two of them left to another shebeen (later identified as Gordon's Shebeen). Only accused 3 entered Gordon's Shebeen as accused 1 told accused 3 that he wanted to see someone nearby (it later turned out to be Mr Oupa Donis at Ms Moira McGulwa's home). Accused 1 later joined accused 3 at Gordon's Shebeen whereat they drank liquor until about 24h00, when they left and parted company midway between their respective homes.

4. The official photographer, Inspector McAnda, testified and was not cross-examined. The second state witness, Mr Gregory Krull, was in midstream with his evidence when accused 1 terminated the mandate of his counsel, Mr Cloete. The reasons are immaterial. Mr Krull's cross-examination had then not even started. The case was postponed for a substitute counsel. Mr Jooste took over from Mr Cloete when the case next resumed.

5. On the latter date accused 3 terminated the mandate of Ms Segone. He said that she had represented him competently but he nevertheless required a different counsel. In came Mr Theo Fourie for accused 2 and Mr Kock for accused 3. Both counsel were satisfied with the proceedings up to that stage and had no representations to make.

6. Adv J De Nysschen, an experienced state counsel, commenced the trial on behalf of the state although he had shortly before the trial started been transferred to the Free State. Due to his work commitments De Nysschen became unavailable and a junior and relatively inexperienced state counsel replaced him. The new state counsel without being uncharitable to him, was out of his depths and was unable to master certain procedures and legal concepts and principles. Mr Theo Fourie, whom I am justified in naming because of his considerable years of experience (and came out of retirement to join the Legal Aid Board) appeared to have no grasp how to

deal with the issue of an alibi when it came to putting his client's version to the relevant state witnesses in order to lay a foundation for the forthcoming testimony of his client.

7. After accused 2 had testified I summoned counsel to my chambers and requested the presence of the Director of Public Prosecutions (his deputy attended as the DPP was out of town) and the attendance of the Director of the Legal Aid Board. To avoid controversy or any misunderstanding I presented the following written note to them:

> g1. It is in the interests of Justice that I am not prepared to continue with the case of ***S v George Robertson & 2 Others*** *under the current circumstances. I therefore request the DPP to re-appoint or re-assign Adv J de Nysschen to the case failing which to appoint Adv Hannes Cloete.*
>
> *2. I request the Director of the LAB to assign his most senior counsel (attorneys included) to look into accused 2 (Mr Richard Thusi's) case. I am concerned that he may not be getting competent legal representation.*
>
> *3. These newly appointed counsel will see for themselves what problems there are. It will be improper to discuss the merits of the case in my chambers. What I can say is that the LAB counsel must first read the evidence of accused 2, Mr Richard Thusi, and the exchanges between the Court and Adv T Fourie before reading the entire record."*

8. It suffices to mention that the Director of Public Prosecution re-instated Adv De Nysschen (who then led the junior state counsel) and the director of the Legal Aid Board assisted Mr Theo Fourie with the consent of accused 2 (Mr R Thusi). Accused 2 also declared himself satisfied with the competency of Mr Fourie to continue representing him. The reason for my expressed concern with the performance of the said counsel will become apparent in the course of this judgment.

9. Before I discuss the evidence of the state witnesses I prefere to deal with the trial-within-a –trial leading to the pointings-out made by accused 1 which event was accompanied by certain utterances: utterances which amounted to a confession. The notes made by police officer, Senior Supt Dirk Jacobus De Waal, were confirmed before Magistrate Ms K Padayachee. Mr Jooste's

objection to the admission of the pointings-out-cum-confession is that accused 1 was unduly influenced by the investigating officer Capt Rudolph J Louwrens in that he promised to release accused 1's mother, who was arrested on the same charges, if he co-operated fully with the investigations. It was specifically recorded that neither Capt Louwrens nor Supt De Waal or any police officer dictated to accused 1 what to point out or say. His counsel stated that accused 1 fabricated the pointings-out or the annotations which accompanied them. It was intimidated that nothing therein was the truth. It was further stated that accused 1 was not threatened or assaulted or otherwise forced to point out certain things. Mr Jooste also stated that the rights of accused 1 were not explained to him before he embarked on pointings-out trip.

10. At the end of the trial-within-a-trial I admitted into evidence the testimony pertaining to the pointings-out and Supt De Waal's notes which were duly confirmed by Magistrate Padayachee as having been made freely and voluntarily and that there was no undue influence and reserved my reasons, which reasons now follow.

11. Accused 1 lied in the trial-within-a-trial when he said his rights were not explained to him. The intimation was made that had he been fully aware of his rights he would not have inculpated himself respecting to the pointings-out-cum-confession. I accept Capt Louwrens' evidence that he explained accused 1's rights fully and properly to him. Capt Louwrens and accused 1 are for instance *ad idem* that the captain left his contact card with accused 1 overnight in the event that accused 1 needed to discus the case with him. The two are also agreed that it was accused 1 who summoned Louwrens and offered his full co-operation in the investigation. This is not the conduct of a police officer who is bent on abridging an accused's rights or the conduct of an accused who was unduly influenced. Accused 1 had ample time to think the matter through, throughout the night.

12. Even if Capt Louwrens did not explain the accused's rights to him it is of no consequence because Insp Hugo did so on the very evening of his arrest on the 28th July 2004. Hugo also gave accused 1 a printed form which encapsulates all his constitutional rights. The document is entitled: "Notice of Rights in Terms of the Constitution (Section 35 of Act no 108 of 1996)." These letters are written in bold type. Accused 1 acknowledged that the signature at "Signature/thumbprint of detainee" is his. When he realized

that he was caught out in a lie in cross-examination accused 1 said he did not read the document either. He passed the matriculation examinations and conceded that when he subsequently read the document he had no difficulty understanding the contents.

13. If the aforegoing is not enough then the following warnings by Supt De Waal (aforesaid) is certainly more than sufficient. Accused 1 confirmed that the superintendent asked him all the questions pertaining to the pointings-out and that his responses thereto were faithfully recorded. Clauses 3,4 and 5 of the form reflect the following:

"3. Die genoemde persoon word meegedeel dat hy in die teenwoordigheid van `n Vrederegter, `n offisier in die S A Polisie, is. Hy word gewaarsku dat hy nie verplig is om enige toneel (tonele) en/of punt(e) op die toneel (tonele) aan te wys of om enigiets daaromtrent te sê nie. Die genoemde persoon word voorts gewaarsku dat wat hy ook al mag aanwys, of mag sê, genoteer sal word en foto's van die toneel (tonele) en/of punt(e) van die aanwysing, wat later tydens `n verhoor as getuienis aangebied mag word, geneem sal word.

4. Hy word gevra of hy die waarskuwing wat nou aan hom gegee is, verstaan en begryp. Sy antwoord daarop is soos volg:

"***Ja ek verstaan**".*

5. Die persoon word meegedeel dat hy geregtig is op die dienste van `n regspraktisyn van sy keuse, en indien hy nie een kan bekostig nie, die Staat `n regspraktisyn sal voorsien.

Hy dui aan dat hy verstaan en verkies om nie van die dienste van `n regspraktisyn gebruik te maak nie.

"***Ek sal later `n prokureur aanstel. Ek het op hierdie staduim nie een nodig nie, aangesien ek my volle samewerking wil gee."***

The contention therefore that accused's rights were not explained or properly explained to him is devoid of any merit.

14. Accused 1 then proceeded to point out the scene of the murder and further explained that: The deceased was his biological father. He was familiar with the surroundings of the scene of the murder (the deceased's business called "Satures Manufacturing – Kimberley." He says on the late afternoon of Thursday the 22nd July 2004 he was in the company of his friend Greg

(accused 3). He persuaded an initially reluctant accused 3 to assist him to murder his father after he told accused 3 "oor my probleem."

15. The two of them waited to ambush the deceased when he walked from the factory to his residence. When dusk was setting in without the deceased making an appearance they went within close proximity of the factory and continued the observation. They noticed that the residence lights were on and soon thereafter saw the deceased leaving the residence for the factory. When the deceased eventually left the factory:

gToe storm Greg hom... *Toe hardloop ek om na die agterkant van die fabriek om te kyk of daar nie mense uitkom nie. Met die tyd toe ek weer omkom toe sien ek hy lê plat op die grond. Toe is Greg besig om sy hande vas te maak. Met daardie tyd toe kom ek ook om toe trek ek Greg af van hom. Toe vat ek die sleutels by my pa. Toe gaan ek om na die ander fabriek toe. Ek het oopgesluit, toe gaan die alarm af. Toe gaan ek in om die kluis oop te maak. Nadat ek die kluis oopgemaak het, toe raak ek bang vir die alarm, toe draai ek by die deur van die kluis terug. Toe hardloop ek weer om na die woonstel toe, want toe is ek bang die "Securities" van die alarm mense gaan oorkom. Toe gaan haal ek die kombi uit die garage uit en met die tyd wat ek die kombi uittrek toe sien ek my pa lê nog altyd. Hy het `n swart plastiek sak om sy kop gehad toe ry ek met die kombi Roodepan toe. Greg het eerste weggeharloop toe ek na die huis gegaan het. Toe gaan soek ek vir Greg toe kry ek hom hy is by die huis en besig om te was. Na hy klaar gewas het toe gaan ons na `n vriend van my, Oupa. Toe is hy nie by die huis nie.*

Toe sê sy vrou hy is in Bloemfontein. Na daai toe loop ons. Toe vra ek vir Greg, wat se plan kan ons maak met die kombi, waar kan ons dit bêre. Toe sê hy ons kan sy oom ek ken hom nie, ... in Prieska bel. Ons het met die kombi na `n telefoon hokkie by die garage in Roodepan gegaan. Dit was buitewerking. Na daai toe ry ons na die treinspoor toe. Toe vra ek hom wat se plan ons nou met die kombi kan maak. Hy sê toe hy ken nie. Toe sê ek vir hom die beste plan om net die kombi uit te brand. Toe stem ons saam daaroor. Toe draai ons die "petrolkap" af en steek (dit aan die) brand. Na die kombi gebrand het toe loop ons huistoe."

16. I must just add that it was common cause that accused 1 pointed out all the salient points referred to in the above statement. On Supt De Waal's return from the *in situ* pointings-out accused 1 was taken to Magistrate Padayachee (aforesaid) for confirmation of Supt De Waal's annotations.

This was ostensibly done to satisfy the provision in Section 217(1)(a) of the Criminal Procedure Act which stipulates that a confession which has been made to a peace officer, other than a magistrate or justice, is not admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice.

17. When accused 1 came before Magistrate Padayachee she explained his rights to him once more. He elected to employ the services of a legal representative. Mr Dean Van Rooyen (an attorney of the Legal Aid Board) was assigned to him and the process was completed before the magistrate. Clause 14, the pen-ultimate one, reads as follows:

g14. ***V**: Is die aanwysing(s) en mededeling(s) `n volledige en korekte weergawe van die aanwysing(s) en mededelings(s) wat u gemaak het?*

***A:** Nee."*

18. It was common cause that accused 1 misunderstood the question and meant with the "Nee" to convey that the contents of the annotations were false as the whole act of pointing-out was staged and a charade. Accused 1 said in evidence he never meant to impugn the proprierty of what Supt De Waal did. The same confusion appears at Clause 13. The "Nee", accused 1 says, ought to be a "Ja". In other words what Supt De Waal recorded is what accused 1 in fact told him and pointed out to the superintendent.

19. Mr Jooste, accused 1's counsel, has sensibly and correctly, not argued that the annotations and pointings-out were not properly confirmed and reduced to writing by the Magistrate. Accused 1's statement in essence became a new statement before Magistrate Padayachee. See **R v Jacobs** 1954(2) SA 320(A).

THE EVIDENCE OF THE STATE WITNESSES

20. Ms Bettie Van Wyk testified that about two years or so before the deceased's murder she was in the company of accused 1 and 2. Accused 1 and 2, it was common cause, are cousins. Accused 2 was van Wyk's boyfriend of several years. They drove in a single cabin bakkie from Roodepan to Kimberley and all of them were seated up front. It was a Friday evening and accused 1 was in his sound and sober senses. Accused 1 said to them *"hy wens hy kan mense kry wat hom pa doodmaak ... maar toe draai hy weer kortlinks om en hy sê hy gaan dit maar doen want as hy mense kry dan gaan die mense gou uitvind wie hom pa doodgemaak het en*

toe sê en vir Richard (accused 2) hoor hier wat sê George. Toe sê Richard vir my hy "worry" nie van dit nie." She says Goerge was a serious-minded person and that she was unable to say at the time whether he meant what he said because the conversion on that subject-matter ended abruptly.

21. Mr John Jenkins, who worked for a Spur Restaurant in Kimberley, knocked off duty after 24h00 on the morning of the 23rd July 2004. He was in the company of his co-worker Ms Mercia Miller, who also testified. Their evidence was that around 02h00 that morning they alighted from a vehicle next to the only Roodepan garage, a Caltex Garage, depicted in photos 41, 43, 44 and 45 of the photo-album Exhibit "A". Jenkins escorted Ms Miller to her home in the same street, Eagle Street, as it was unsafe for the lady to walk by herself at that time of night. Miller therefore did not see accused 1 and 2 whom Jenkins subsequently saw. On going home Jenkins used a short route and passed under the canopy of the garage that shade customers and workers from the elements and to which was affixed this longitudinal fluorescent electric lights. He saw accused 1 and 2 there. Accused 1 was seated in the vehicle and accused 2 was standing next to a public phone (photo 43, point DD) right underneath the garage canopy. It was common cause that they knew each other very well for a number of years. Visibility could not have been better. He greeted the accused and went his way, but not before he saw accused 2 boarding the kombi which accused 1 was seated in. Jenkins noticed that the kombi's rear registration plate was missing. He nevertheless identified the kombi from photos 1 and 2 of Exhibit "B" as being similar to the one that he saw accused 1 seated in (behind the steering wheel).

22. Jenkins saw this kombi drive to Ms Moira McGulwa's place, not far from the garage. He identified Ms McGulwa's house on photo 46 point GG of Exhibit "A". Ms McGulwa corroborates Jenkins' evidence in this respect and relates an encounter earlier on.

23. Ms Moira McGulwa testified that on the 22nd July 2004 at about 19h50 accused 1 came to her home and enquired after her husband, who was then out of town. Accused 1 said he needed to have a vehicle fixed. She and her young son were about to watch a television program that was due to start at 20h00. Her son remarked about the knife on accused 1's side and Ms McGulwa expressed her surprise at accused 1, unusually, carrying a knife. Accused 1 told her it was for self-protection as he was going to walk to their

farm through the veld but instead walked in an opposite direction and heard a vehicle start but was unable to see it.

24. Ms McGulwa says between 02h00 and 03h00 the following morning (23 July 2004) a person who identified himself as Richard knocked on her door and said George wanted to see her husband. She would not wake her husband. She later peeped through the window and saw accused 1 and 2 both of whom she know very well, standing next to the deceased's kombi. The lighting was good as there was a streetlight next to the house. Photos 46 and 47 depict this streetlight clearly. She knows the kombi very well because her husband, a mechanic, once fixed it and the deceased also used to collect some of his workers next to her house.

25. Jenkins and McGulwa corroborate each other that a day or two after the deceased's death there was a report in the Diamond Fields Advertiser (DFA) concerning the death of the deceased. Later the same day of the report Jenkins sought further information from McGulwa as he had seen the kombi at her home the early morning of the 23rd July 2004 and at the local police station having read the DFA report which apparently had a picture of the burnt out kombi. Jenkins then reported to Captain Louwrens who was the contact person according to the report. Capt Louwrens confirms that Jenkins provided him with this information on the 28th July 2004 in consequence whereof he arrested accused 1 and accused 2 thereafter.

26. Accused 1's girl-friend, Marie Frieslaar, testified that on the 23rd July 2004 at about 02h00 in the morning her cousin, Ms Victoria De Klerk, informed her that accused 1 wanted to see her outside the house. She refused because her baby, of whom accused 1 is the father, was hardly a month old and she had recently broken off her relationship with accused 1. Accused 1 then called from a public phone (she heard the rattling of the inserted coins) and asked that they meet outside the house. She refused once more and dropped the call. Shortly afterwards she heard a vehicle hooting and there was shouting. The vehicle drove off when she refused to see accused 1. Then followed another phone call from the same public phone – she recognised the number that reflected on her cellphone but did not answer the phone.

27. Victoria De Klerk supports the version of Frieslaar relating to the person who

alleged that accused 1 wanted to see Frieslaar outside. She saw some people but cannot identify them because visibility was poor. But they drove a two-coloured kombi which she was unable to describe. It was about 02h00 when the strangers visited and she also heard Frieslaar saying "are you mad" to the person with whom she spoke on her cellphone. She also heard Frieslaar saying it was George.

28. Captain Louwrens tied the jigsaw-puzzle together in his investigation. He discovered that the telephone number that Frielaar scrolled from her cellphone corresponded with the number on the telephone booth that John Jenkins pointed out to him at the Caltex Garage at Roodepan, being (053) 873 1791. The cellphone showed that the call from the booth was received by Frieslaar at 02h37.

29. Inspector P Mangope testified that at about 04h00 he and Constable Jenine Topken noticed a fire burning on the gravel road leading to Midlands, the farm where accused 1 and 2 stayed. They discovered that a kombi had just about burned out entirely and no effort was made or was necessary to extinguish the fire. Both the front and rear registration numbers were missing. This evidence somewhat tallies with the evidence of Jenkins that the kombi that accused 1 and 2 were in had no rear registration number plate. It was common cause, through forensic detection and the registration documents handed in by consent, that the burnt out vehicle belonged to the deceased.

30. I am satisfied that all the aforementioned witnesses, whose names need not be repeated, were honest and credible witnesses. I am satisfied that they spoke the truth and I accept their evidence except where I have specifically noted that one or the other is mistaken.

THE INVOLVEMENT OF ACCUSED 2 (RICHARD THUSI)

31. The evidence (See also Exhibit "N") show that at the time of the murder and robbery of the deceased accused 1 and 2 were staying together at Midlands Farm. They are also cousins. Accused 2 was present when accused 1 expressed the intention to have his father killed or to do so personally, as testified to by Bettie Van Wyk who, both accused 1 and 2 conceded, had a good relationship with them and amongst whom no animosity or rancour existed. Accused 2 did not conspire with accused 1 to eliminate the deceased on that occasion – about two years before the crimes were

committed.

32. Accused 1 has incriminated accused 3 in the admitted pointings-out accompanied by inculpatory statements. Accused 1 also stated in his plea-explanation and evidence that he was with accused 3 when they went shebeen-hopping from around 16h00 on the 22nd July 2004 until after 24h00 on the morning of the 23rd July 2004; but nowhere but nowhere does he mention the presence of accused 2. Accused 3's plea-explanation and evidence dovetails that of accused 1. He also does not mention the presence or whereabouts of accused 2.

33. However, the credible evidence of John Jenkins and Moira McGulwa places accused 2 in the deceased kombi and with accused 1 between 02h00 and 03h00 on the 23rd July 2004. There are two possible reasons why accused 1 exonerated accused 2 of any involvement. The first is that accused 2 is his sister's son. The second is that if he (accused 1) spilled the beans on accused 2 the latter would support Bettie Van Wyk that it is true that accused 1 planned long ago to kill his father. At 04h00 Insp Mangope spotted the kombi burning and it must have been burning for sometime.

34. There is no evidence that accused 2 knew between 02h00 and 04h00 that the deceased was murdered and robbed of his kombi. However, accused 2 admitted (under cross-examination) that he knew the deceased very well and in fact worked at his factory for sometime. It is also common cause that he knew the deceased's kombi because both the deceased and accused drove it regularly to transport the workers. It was an oldish red and white Toyota Hi-Ace kombi. The early photo taken shows that it still bore the "CC" as distinct from "NC" registration number. Accused 1 was asked: "Richard (accused 2) are you not with him most of the time. I understand you were staying at the same place – '*Ek en Richard bly op een plek, maar hy is werksaam.*'

35. Having regard to the aforegoing the question arises why would this cousins part company before the kombi is burned. Mr De Nysschen has argued that at the very least on the proved facts accused 2 is guilty as an accessory to the robbery. However, accused 2 cannot be guilty as an accessory to the robbery, or murder for that matter, if he was not shown to have known anything about the robbery or murder at the time the vehicle was set on

fire.

36. What then, did accused 2 make himself guilty of, if anything, accused 2 had known for some time that accused 1 expressed the intention to kill his father and did nothing about it. There was a moral duty but not a legal duty on him to report accused 1's evil intention. If accused 2 was a police officer a legal duty would have arisen. In addition to the aforegoing accused 2 was seen in the stolen kombi hours after it was stolen and the deceased was murdered. Shortly after he was seen in the kombi it was set on fire, ostensibly to obliterate fingerprints or other genetic material that could be used in DNA testing. That, in my view, is actively assisting accused 1, the perpetrator of the murder and robbery to evade the ends of justice. The state need not prove who in fact, between accused 1 and 2 or their accomplice(s), did the incineration of the vehicle. See: **S v Phallo and Others** 1999(2) SACR 558 (SCA). Accused 2 knew that accused 1 was not the owner of the vehicle and had no right to destroy it. At 565i-566b Olivier JA propounded the principle as follows:

"*On appeal, dealing with a reserved question of law whether in the circumstances set out above* ***Neser J*** *was correct in acquitting all three of the accused of being accessories after the fact,* ***Schreiner JA*** *(with the concurrence of* ***Fagan CJ****,* ***Beyers*** *and* ***Malan JJA*** *and* ***Van Blerk AJA****) launched what was later in the legal literature called the 'Schreiner doctrine': in a case where there are several accused who have tried to cover up a crime which may have been committed by only one of them, the accused persons other than the actual murderer commit the crime of being an accessory after the fact to his crime when, for instance, they hide the body. That crime of theirs is their own distinct crime and not part of the crime committed by the murderer. If then the actual murderer acts in concert with them, he is, it is true, taking steps in the concealment of the murder committed by him but he is at the same time participating in their crime of being accessories after the fact to murder as their accomplice. All the accused can in such a case be convicted as accessories after the fact to murder (see 221C-E)."*

It is evident that accused 2 had made himself guilty as an accessory to theft of the vehicle. Theft is a competent verdict to Robbery (Section 260 of the Criminal Procedure Act 51 of 1977).

THE INVOLVEMENT OF ACCUSED 3 (GREGORY OLIPHANT)

37. Mr De Nysschen has agued that accused 3 is a co-perpetrator with accused

1 in the murder and the robbery charges. He has invoked the provisions of Section 3 of the Law of Evidence Amendment Act, No 45 of 1988, for this contention. This section stipulates:

"3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iiii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of ss (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of ss (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of para (a) of ss (1) or is admitted by the court in terms of para (c) of that subsection.

(4) For the purposes of this section –

''hearsay evidence'' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

''party'' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'"

38. Mr Kock, for accused 3, has objected to the admission of the hearsay

evidence. The hurdle that the state has to overcome is that junior counsel, in the absence of Mr De Nysschen, merely hinted at his intention to use the statements in accused 1's pointing-out-cum-confession where he implicated accused 3 as the person who physically attacked and killed the deceased:

38.1. From p213 of the transcript counsel for accused 3, Mr Kock, cross-examined Captain Louwrens on the contents of the pointings-out and annotations made pursuant thereto in which accused 1 implicates accused 3. At p214 I had this interaction with Mr Kock for elucidatory purposes:

"*HOF: Vra u nou aangaande beskuldigde 1 of beskuldigde 3?*

MNR. KOCK: U edele, die verklaring, , die getuienis wat gelewer is het betrekking indirek op beskuldigde 3.

COURT: Well, if you will just be careful. I don't know whether you consulted with accused 1, because I must just say to you that there is a full bench judgment that if you show that there is co-operation between counsel and that there was consultation, then cognisance will be taken of the fact. Kyk, U is geregtig om aan te gaan, ek weet nie hoe dit betrekking het op beskuldigde 3 nie, want wat beskuldigde 1 sê van beskuldigde 3 is hoorsê getuienis. And at no point has the State said that it's going to invoke the Act on Hearsy evidence, 1988, in this regard. There is no such intimation. But you are free to continue with your cross-examination. I am merely pointing this out.

MR KOCK: As Your Lordship pleases. U Edele, dit was net `n aspek wat ek gevoel het `n plig op my plaas om dit net op te klaar. Kaptein Louwrens, beskuldigde 3, Greg, sal kom getuig dat hy op geen stadium saam met beskuldigde 1 betrokke was by die pleging van die moord op die oorledene nie en dat hy ontken alles wat aan u gemeld is deur beskuldigde 1 met betrekking tot die pleging van die misdryf. Beskuldigde 1 het dit aan my gemeld U Edele. Rondom die verdere stelling dra ek nie kennis nie."

38.2. The next occasion that the issue respecting to the hearsay evidence was broached was at p 219. The recording went as follows:

"*MR XX: Thank you M'Lord. M'Lord, before I continue with the next witness, I just need to put it on record based on what Your Lordship said to Counsel for accused 3 in respect of whether the State is going to use the statement by accused 1 against accused 3, in terms of the Hearsay Act. M'Lord, it was too early to indicate that, because the statement had not yet been handed in by the State. The position of the State is, in the event if it is handed in, I will... (interruption).*

COURT: No, no, no, you do it as you see fit Mr XX. I merely pointed that out to him, because in any case, the captain will have to come back and testify, if not called by you or the defence, one of the defence counsel, I will call him. You may continue."

39. The difficulty that I have is that at no stage after this issue was foreshadowed did the State overtly revert to the hearsay issue as per undertaking. In fact the state seemed no longer to be interested in the hearsay evidence because junior state counsel (Mr XX) informed the Court that he was dispensing with the evidence of Magistrate Padayachee. In the interests of justice I called the Magistrate in terms of Section 186 of the

Criminal Procedure Act. See record pp 246(1) to 247(6). Then the state (junior counsel) closed its case without re-calling Captain Louwrens. Once again the Court called Captain Louwrens after the following remarks:

"g*COURT:* *Mr XX, I don't know, --- you see if an undertaking is made towards your colleague, then you must abide thereby. It was indicated by the State to Mr Kock when cross-examination was undertaken that he need only confine himself, this is the cross-examination of Captain Louwrens, to the trial-within-a- trial. It may well be that Mr Kock no longer wants to cross-examine Captain Louwrens, but they need to be informed about that, because it was stated that Captain Louwrens will be called. This is how it works. I don't want arguments later on that Captain Louwrens was not called and therefore someone has been prejudiced and so forth. These are things that you really must learn to know."*

40. I point out that these are some of the things that made me to request the re-instatement of Mr De Nysschen in the case. See paragraph 37 (above). I will not deal with all these problems because the defence has not, fairly, made any issue of the Court's intercessions.

41. The next occasion when the admissibility of the hearsay evidence was brought up was when Mr De Nysschen argued for the conviction of accused 3 at the conclusion of the trial. In **S v Ndhlovu and Others** 2002(2) SACR 325 (SCA) at 337c – 338c (paragraphs 17 and 18) **Cameron JA** stated:

"g*[17] Aside from the importance of these cautionary words, a trial court, in applying the hearsay provisions of the 1988 Act, must be scrupulous to ensure respect for the accused's fundamental right to a fair trial (Bill of Rights, s 35(3)). Safeguards including the following are important:*

- First, a presiding judicial official is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence(***S v Zimmerie en `n Ander*** *1989(3) SA 484 (C) at 429F-H* ***(Friedman J***, ***Tebbutt J*** *and* ***Conradie J*** *concurrring). More specifically under the Act, 'it is the duty of a trial Judge to keep inadmissible evidence out, [and] not to listen passively as the record is turned into a papery sump of ''evidence'''(****S v Ramavhale*** *1996(1) SACR 639 (A) at 651c).*
- Second, --- .

[18] Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."

42. The state at no stage expressly or by necessary implication alerted the

defence (in particular accused 3's counsel) on record that it was now adducing hearsay evidence against accused 3. It would have been vital for the state to disclose what the purpose of adducing the impending hearsay evidence was. The affected counsel's attitude would then be canvassed and his representation heard. If no agreement or consent to the admission of the evidence was obtained the state would have to consider what to do and ask for a ruling not later than at the close of the state's case. This would afford the affected accused the opportunity to decide on whether to testify or not and if he/she testifies on what aspects the focus must lie. I am, in the result not satisfied that accused 3 was afforded a fair choice or any choice at all on how to meet the hearsay evidence emanating from accused 1's statement and pointings-out. If accused 1 did not dispute the admissibility of the pointings-out, as he has done, and had in fact confirmed the correctness thereof same would have been admissible against accused 3. (See **S v Phallo** (**supra**) at 568h – 569c (paragraph 36). That fact, in conjunction with accused 3's evidence that he was in company of accused 1 from about 16h00 to after 24h00 on 22nd July 2004 and 23rd July 2004, save for less than an hour when he had a bath, would have been sufficient to convict accused 3.

43. Mr De Nysschen has referred to an as yet unreported decision of this court **S v Johannes Waldeck**: case no. CA&R32/05, Delivered on 27/01/2006, Unreported (Kgomo JP et Molwantwa AJ) as authority for the fact that the trial court need not always make a ruling at the close of the state case. I agree with Mr Kock that the Waldeck case is distinguishable. In that case we stated at p27 para 35:

g*35. What distinguishes the current case from the two mentioned in 34.1 and 34.2 (above) is that:*

35.1 There was no ambush in this case. The prosecution apprised the defence and the Court before the inception of the trial that section 3 of the Act will be invoked;

35.2 *Unlike the **Ramavhale**-case where the defence objected against the leading of the hearsay evidence, in casu, as already explained the defence (two lawyers acting in tandem and jointly for the same accused) ostentatiously embraced the adduction of such evidence;*

35.3 *In casu the appellant fully exploited its entitlement to*

scrutinize the probative value of the hearsay evidence and also tested its reliability through cross-examination. This further distinguishes this case from the ***Ramavhale****-case where the accused was not afforded this opportunity;*

35.4 *The appellant had ample opportunity to re-open his case but chose not to do so when invited by the Magistrate."*

I also agree with Mr Kock that the state in *casu* never made any decision to invoke the hearsay evidence, with the result that he has not specifically focused his cross-examination on testing the veracity and reliability of accused 1's statement. In fact Mr Kock argued that accused 1 is protecting accused 2 and substituting accused 3 for accused 2.

44. In my view accused 3 has been ambushed and will be seriously prejudiced by the admission of the hearsay evidence. To that end Mr De Nysschen has conceded, fairly and correctly so, that the remaining evidence, if the hearsy evidence is excluded, is not sufficient to convict accused 3 on murder and/or robbery. I would add not even as accessory after the fact. If the hearsay evidence is admitted he shall not have been accorded a fair trial. See: **Key v Attorney-General, CPD & Another** 1996 (4) SA 187 (CC) at 195F-196B (para 13).

45. Whilst Moira McGulwa was a good and honest witness my view is that she may have made a mistake with the identification of accused 3. In her evidence-in-chief she mentions that she knew accused 3 as Greg before the incident. But she did not mention the name Greg or Gregory or any name she knew accused 3 by in her police statement even though she says she knew him well. The cross-examination by Mr Kock went as follows:

gMev *McGulwa, ek tree op namens beskuldigde 3, Gregory Oliphant. Is dit korrek dat u getuienis was dat u vir Gregory gedurende die oggend van die 23 ste Julie 2004 in die geselskap van George Robertson en Richard gesien het? –-Ja.*

U het vir Gregory geken voor die besoek wat hulle afgelê het die oggend van die 23ste. –- Ja.

U het geken wat Gregory se naam was. –- Ja.

U het ook geweet waar woon Gregory. -- Nee.

Het u vir Gregory gereeld gesien voor die voorval, voor die besoek van die 23ste Julie 2004? –- Ja, ek het vir hom al baie saam met George gesien en hy was ook al by my huis.

U sal hom enige tyd uitken as u hom sien. U sal, as hy verby

gestap het, sou u geken het dit was Gregory. –- Ja.

Toe u die verklaring aan die polisie maak, het u geweet sy naam was Gregory Oliphant? –- Ja. Nee, ek ken hom net as Greg.

Of Greg, ja. Nou kan u net vir die Hof verduidelik hoekom u dit nie nodig geag het om aan die polisie te sê dat die persoon wat saam met George en Richard was, was Gregory. Dit was Greg. -- Ek verbeel my iewers het ek vir hulle gesê.
Ek kan u verwys na u verklaring. Nêrens in u verklaring is daar melding van Greg. –- Ek weet regtig nie."

This is why I have some doubts concerning the correctness of his identification.

46. What remains is how the deceased met his death and the cause of death. Dr T D Berlyn who conducted the post-mortem examination is one of the most thorough doctors who have testified before me. It is a great pity that he has now emigrated and this was one of the last cases he has testified in. The summary that follows of the deceased's injuries does not begin to do justice to his detailed evidence. The veracity of his evidence was not challenged including the fact that he drew the inescapable conclusion from the nature of the injuries that two types of instruments were used to inflict the injuries. He stated that a titanic struggle was waged before the deceased succumbed to his injuries and was immobilised. He says this points clearly to the fact that at least two assailants have been involved in the attack.

47. Dr Berlyn further testified as follows:

gSummary of chief autopsy findings

These are 3 factors contributing to the death of this patient:

1. *Asphyxia (due to suffocation/drowning in own blood).*
2. *Cerebral oedema with subarachnoid and subdural haemorrhage.*
3. *Massive blood loss due to sharp injury of scalp.*

All 3 factors, present on their own, could have caused death eventually.

I feel that Asphyxia was the primary reason that he died, for the following reasons:

1. *Signs of asphyxia in cerebral cortex and lungs.*
2. *Inhaled blood, absent of mouth trauma and presence of head would at the back of the head probably indicate that respiration was still present*

when bag was placed over head (this large volume of blood probably wouldn't have been inhaled without bag over head).

3. Central cyanosis and protruding tongue: a <u>tentative</u> indication of smothering.
4. 0,5 litres blood found in bag. He was unlikely to have bled this much after death and we must draw the conclusion that the bag was placed over his head before that.
5. There were also no signs of brainstem herniation.'

As I explained before, that the brainstem herniation would have occurred if the pressure on the brain was sufficient enough to cause death.

The following were also noted:

1. *Multiple defence type injuries on both forearms which had been caused by a blunt object.*
2. *Multiple sharp injuries to the back of the head which were caused by a sharp object for example a panga.*
3. *Blunt trauma to the hands which were possibly sustained by trying to protect the head."*

48. I agree with Mr De Nysschen that the murder was unquestionably pre-meditated and that the murderers had the direct intent to murder the deceased.

49. I am satisfied from the reconstruction of the scene that the deceased locked his factory after 19h00 and switched on the security alarm as he closed the door behind him. He was attacked by accused 1 and an accomplice or accomplices who inflicted the injuries reflected in the post-mortem report and Dr Berlyn's evidence. He had the keys of the factory and the safe with him. The robbers robbed him of these keys but when they entered the factory the alarm was triggered at 19h26 as shown by the Echotech Electronics Security computer print-out handed in by consent and the evidence of Ms M H Jones who operated the operations room on the night in question. The robbers fled empty handed because they feared being caught.

50. Certainly when the Echotech Electronics security officer, Mr Eugene Limburgh, arrived at the factory the motor gate, which had been locked earlier was open and the criminals were gone. Mr Limburgh, who investigated the burglary, only checked the building where the alarm was installed, but he missed discovering the dying deceased at the adjacent building. Limburgh reacted to the triggered alarm before 20h00 on the

evening of the 22nd July 2004.

51. There is no doubt on an overview of all the facts that the pointings-out and annotations thereto are consistent with all the objective facts which were separately and independently established. These factors are strong pointers to the fact that the statement and pointings-out made by accused 1 to Supt De Waals evidences the truth and are therefore some guarantee or safeguard against a wrong conviction.

THE PERFORMANCE OF ADV THEO FOURIE

52. It is now my uneviable task and I am now constrained to examine what it was that irked me to call upon the Director of the Legal Aid Board to check whether accused 2 was competently represented. When accused 2 was still represented by Ms Segone he chose, as he was entitled to, to not disclose the basis of defence. When Mr Theo Fourie took over from Ms Segone he had no representation to make. Accused 2 was then positively identified by Mr Jenkins and Ms McGulwa at different places being in the company of accused 1 who had made pointings-out and implicated himself in the accompanying statements. In addition the two were seen driving in the deceased's stolen vehicle.

53. In the face of this evidence all that Mr Fourie asked these witnesses in cross-examination is the following:

53.1. To Mr Jenkins who testified before Ms McGulwa the only question was:

"V: Mnr Jenkins, beskuldigde 2 sê hy was nie daar nie.

A: Ek het vir Richard gesien. Ek ken vir Richard. Ons het saam groot geraak by die plaas. Ons het nou en dan saam sokker gespeel."

53.2. To Ms McGulwa who said she had known accused 2 for more than two years the entire cross-examination was the following:

"Mevrou, as ek u reg verstaan, dan het u net Richard se stem gehoor. U het hom nooit gesien die aand nie. -- Ek het hom gesien. Hy het op die stoep gestaan voor ons voordeur.

U sien, want Richard sê hy ken u nie. -- Maar ek ken vir hom. En hy sê ook dat hy was daardie aand nie daar gewees nie, daardie nag. -- Richard was daar. Hy was die een wat geklop het by my deur en as ek kon reg onthou, het hy 'n mus op sy kop gehad. Ek ken hom.

So die persoon die mus wat hy op gehad het, het dit sy, 'n gedeelte van sy gesig bedek? -- Nee, ek kon sy gesig sien."

54. Mr Fourie called accused 2 to the witness box, who raised an alibi for the first time to the effect that he was at work on Thursday the 22nd July 2004 and knocked off at about 17h00. He went straight home and retired to bed because he developed "arc-eyes" from welding. He went on to say he was in the company of a host of family members, one of whom, his sister Ms Ishmael, was subsequently called to testify. When the Court enquired from accused 2 whether he was aware that his counsel did not put this version and alibi to Jenkins and McGulwa, Mr Theo Fourie had the temerity to interrupt the Court and the mendacity, yes mendacity, to say he has put the full version. When the record proved him wrong he maintained that it was unnecessary and not a requirement that he should have put his version and alibi to the said witnesses.

55. It was the latter (underlined) statement which raised the question whether accused 2 statement which raised the question whether accused 2 instructed his counsel fully on his version and alibi and that counsel defaulted on carrying out his client's instructions. The problem is that if an accused has properly instructed his counsel on what his (legal) defence is and counsel withholds this or fails to put his client's version this may not be held against the client as an afterthought and a recent fabrication. The obverse of the coin is that the accused's counsel must then either be held to be incompetent or to have acted unethically or both. In **S v Mkhise**; **S v Mosia**; **S v Jones**; **S v le Roux** 1988 (2) SA 868 a at p873J the Appellant Division held:

> g*Once admitted to practise, an advocate, by virtue of his office, enjoys certain rights and privileges (for instance, qualified immunity for defamatory statements made in the course of a trial). And his authority to act on behalf of an accused as he deems fit is wide-ranging. (See **R v Matonsi** 1958 (2) SA 450 (A) and **R v Baartman and Others** 1960 (3) SA 535 (A) at 538A.) ... The aforementioned rights and privileges entail a corresponding duty. It is one owed by counsel not only to the accused he represents but primarily to the Court, the standards of his profession and to the public. The proper administration of justice requires that he be a person of unquestionable honesty and integrity. Thus, as was pointed out in **Ex parte Swain** 1973 (2) SA 427 (N) at 434H,*

'it is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of

justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court'."

56. The duty and responsibilities of a cross-examiner, whether it be in a criminal or civil case, has been authoritively stated by the Constitutional Court in **President of the RSA v South African Rugby Football Union** 2000 (1) SA 1 (CC) at 36J-38A (paras 61-64) as follows:

"g *[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in **Browne v Dunn** (1893) 6 R 67 (HL) and has been adopted and consistently followed by our courts (**R v M** 1946 AD 1023 at 1028; **Small v Smith** 1954 (3) SA 434 (SWA) at 438E-H; **S v van As** 1991 (2) SACR 74 (W) at 109b-g).*

*[62] The rule in **Browne v Dunn** is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.*

*[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, (**Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation** (1983) 44 ALR 607 (SC (NSW)) at 623-34) particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.*

[64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where 'a story told by witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box'."

57. The latter attitude would have been employed by the state because accused 2 and his witness were lying through their teeth because accused 2 was positively identified by Jenkins and McGulwa as already stated. In **S v Thebus & Another** 2003 (2) SACR 319 (CC) at 350d-e (para 63) the Constitutional Court stated:

"g*[63] That a failure to disclose an alibi timeously has consequences in the evaluation of the evidence as a whole is consistent with the views expressed by* ***Tindall JA*** *in* ***R v Mashelele*** *1944 AD 571. After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously,* ***Tindall JA*** *goes on to say:*

'But where the presiding Judge merely tells the jury that, as the accused did not disclose his explanation or the alibi at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence, this does not constitute a misdirection.'"

At p 351f (para 68) the Court held:

"g*[68] The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole."*

58. I therefore conclude this aspect by stating that Adv Theo Fourie not only shirked his duty towards the Court but towards accused 2 as well. However, his failure did not prejudice accused 2 because the latter's alibi was false and stands to be rejected. If anything, the State could have been prejudiced by the belated disclosure of the alibi.

59. **Having said what goes before I make the following order:**

1. Accused 1 is found guilty of Murder and Robbery (with aggravating circumstances) of the deceased, Mr Werner Rolf Heinze.

2. Accused 2 is found not guilty and is acquitted of Murder and Robbery but is found guilty as an accessory to the theft of the deceased's vehicle.

3. **Accused 3 is found not guilty and is discharged on both counts and any competent verdicts.**

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F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the State :	**Adv J De Nysschen**
Assisted by:	**Mr XX**
Instructed by:	**Director of Public Prosecutions**
For Accused 1 :	**Mr L Jooste**
For Accused 2 :	**Mr T Fourie**
Instructed by:	**Legal Aid Board**
For Accused 3:	**Adv R J Kock**
Instructed by:	**Thiso Attorneys, KIMBERLEY**