

**IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION**

**CASE
SS13/2002**

NUMBER:

THE STATE

versus

EUGENE JOSEPHS

Accused 1

JULIAN TROUT

Accused2

JEROME CLASSEN

Accused 3

JUDGMENT DELIVERED : 14 MARCH 2000

MEER J:

INTRODUCTION

1] Tanya Sylvester, aged 29 was sexually assaulted and murdered on the night of 9 November 2000 at her home at 12 St Kilda Road Athlone. Her body was found in the bath, battered and bruised. Dr Lorna Martin , a state pathologist performed the autopsy on the deceased the following day ,10 November 2000.

She found the cause of death to be consistent with drowning and that the deceased had been sexually assaulted prior to death. The autopsy report indicated external injuries to the deceased's eyelid, nose, upper arms, wrists, and thighs. There were also injuries to the external genitalia which, according to Dr Martin could have been caused by the forceful penetration of a blunt

object. The fact that a broom handle with what appeared to be blood on it, was found next to the bath, suggested to Dr Martin that the broom handle was used to inflict the injury to the genitalia. The time of death could not be ascertained by Dr Martin due to the refrigeration of the deceased's body prior to the autopsy.

2] Four people were charged with the murder. They are the 3 accused before Court and Ricardo Little. Accused 1 and 2, Eugene Josephs and Julian Trout, were found at the deceased's house by the police on the night of the murder. Accused 3, Jerome Claassen was the husband of the deceased.

Charges against Ricardo Little were withdrawn and he became a witness for the prosecution in terms of section 204 of the Criminal Procedure Act 51 of 1977

3] The charges faced by the three accused are:

“Count 1: MURDER,alternatively **contravening section 18(2)(a) of Act 17 of 1956**¹

IN THAT on Thursday 9 November 2000 and at 12 St Kilda Road, Crawford in the district of Wynberg, the accused unlawfully and intentionally killed **Tanya Debbie Sylvester** a female person by drowning her in a bath tub **alternatively**, that over the period 6-9 November 2000 and in the district of Wynberg, the accused unlawfully conspired with one another and /or with a person unknown to the state to commit the offence of murder.

Count 2: INDECENT ASSAULT

IN THAT on Thursday 9 November 2000 and at St Kilda Road Crawford in the district of Wynberg, the accused unlawfully and intentionally indecently assaulted **Tanya Debbie Sylvester** by forcing a broom handle or other object into her vagina.”

4] The Accused pleaded not guilty to both charges in terms of section 115 of the Criminal Procedure Act, disputed all the elements of the counts charged and put the State fully to the proof of its allegations. Certain formal admissions only as to the identity of the deceased, and date and place of her murder, were made by the accused.

5] The Court was presented with three different and conflicting versions of how the deceased came to be murdered. These were the versions of the state witness Ricardo Little, the version of Accused 1 and 2 and that of Accused 3. This judgment deals with the three versions, in its elucidation and assessment of all the evidence presented. It seeks to ascertain the truth as between the conflicting versions.

1 Riotous Assemblies Act No 17 of 1956. Section 18 (2) (a) states: “ Any person who conspires with any other person to aid or procure the commission of or to commit any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

Evidence of the Police

6] Five policemen testified for the state. They were Inspector Vlotman, Sergeant Adams, Constable Lekay, Sergeant Engelbrecht and Detective Fredericks, the investigating officer in this case. The former four were among the first to arrive at the scene on the night of Thursday 9 November 2000. It is convenient to deal with their testimony together and then set out that of Fredericks separately.

7] From the testimony of Vlotman, Adams, Lekay and Engelbrecht, the following emerges:

On 9 November 2000 at about 22h00 Vlotman and Adams received a report from police radio control of a possible “hostage situation” at 12 St Kilda Road, Crawford. In response thereto, two police patrol vehicles arrived at the scene soon after 22h00. Vlotman, and Adams (policemen of 16 and 10 year’s respective experience, stationed at Athlone) arrived in the first vehicle. Lekay and Engelbrecht (with 5 and 7 year’s respective experience, also of Athlone) were in the second vehicle. They were instructed to look out for a red Ford Escort vehicle which was alleged to be involved in the hostage drama.

8] On arriving at 12 St Kilda Road they observed the red Ford Escort vehicle parked diagonally opposite the house. Seated in the front passenger seat was a lady, subsequently identified as Nasreen Adams. They encountered Ricardo Little (subsequently the state witness) walking away from the front door of the house towards the car. Vlotman testified that Ricardo Little informed him there was no one inside the house. Adams asked Little if he had phoned the police, and Little said he had not.

Little informed them that he had got a phone call to pick up a friend Julian at the house. According to Vlotman, Little appeared to be calm. Engelbrecht and Lekay took the car keys out of the ignition. Whilst his 3 colleagues approached the front of the house, Engelbrecht proceeded to the side thereof and the street behind to check if anybody was escaping out back.

The front door of 12 St Kilda Road was ajar, but it shut closed before the police entered, and the lights in the front section of the house went out.

9] The police knocked on the door, no one answered. Mindful of a possible hostage situation, Vlotman, Adams and Lekay then took out their firearms, pushed the front door open and entered.

They found Accused 2, Julian Trout standing in the entrance hall with a baby in his arms.

Vlotman observed that he was wearing a light blue T shirt and jeans, that the top section of his body was wet and he was smelling of alcohol. He appeared to be in a state of shock. Vlotman described his condition as “distressed, in a state of panic, petrified and under the influence but not paralytic drunk”. Adams also observed that Accused 2 reeked of alcohol. Accused 2 pointed to the inside of the house and said “there are people with firearms in the house”. Vlotman specified that he pointed with his right hand. According to Vlotman the

baby which appeared to be only a few weeks old was being carried in such a way that he feared Accused 2 might drop the child. He also said he feared the baby's neck might break because of the way Accused 2 was handling the child. He observed moreover that the baby was dressed in white and smelt fresh as if it had just been bathed. Adams told Accused 2 to stand outside the front door with the baby.

10] The 3 policemen went towards the back of the house where they encountered Accused 1 in the back or children's bedroom. The room was in shambles. Adams who encountered Accused 1 first, said that he was on the floor of the room "scratching in a bag". Adams said when Accused 1 saw the police, he got up, looked like a person in great shock and pointed in the direction of the bathroom, making a movement with his fingers indicative of firearms, but did not say anything. Adams testified that he was wearing a dark blue T shirt and black jeans. By the time Vlotman and Lakay (who were behind Adams when they approached the children's room), encountered Accused 1 he was standing up. Vlotman testified that Accused 1 was standing more or less in the doorway and his clothes were wet from top to toe. He said Accused 1 was petrified, and he pointed as if he knew what was happening in the bathroom. Although Vlotman testified that he could not say if Accused 1 was under the influence, he conceded that he had made a statement on the night of 9 November 2000 to the effect that Accused 1 seemed to be under the influence of alcohol. Accused 1 was observed by the other policemen also to be in a state of shock and dripping wet. Adams took Accused 1 outside and later arrested him, after he had allegedly tried to escape, as stated below.

11] The bathroom door was closed. Lekay opened the door and to their astonishment the 3 policemen discovered the deceased lying submerged in the bath, the tap still running and the water flowing over the bath. Vlotman closed the tap and tried to pull the deceased out of the bath.

She was heavy and he struggled to get her out of the water. He checked for a pulse but there was none. He thought she was dead but to make certain he called for the metro police to do a medical check up. Vlotman remained in the bathroom with the deceased until the metro unit arrived.

12] Whilst Vlotman remained in the bathroom with the deceased, Adams and Lekay checked the rest of the house. They discovered that the windows were all secured and burglar-barred, the back door was closed, (not locked) but the security gate to the back door was locked. Vlotman also testified that there was no breakage into the house. Their observation was that the only access to the house was via the front door, given that the back security gate was locked and that all the windows were burglar barred.

13] Whilst the policemen were busy in the bathroom and searching the rest of the house, Adams testified that Accused 1 who was outside, attempted to run away. However he was brought back to the house, apparently by people who had gathered outside the scene. Adams then asked Accused 1 why he was running away and what he had been doing in the house. In response, Accused 1 said he had come to the house to fetch Jerome. Adams searched accused 1 and found a balaclava in his back pocket and a black bomber jacket lying next to him. Adams thereafter arrested Accused 1 and placed him in a police vehicle on his own.

Adams denied under cross examination that Accused 1 had informed him he was not running away but running to seek the protection of the police because people outside the house wanted to assault him.

Adams disputed that this could have been the explanation for his running away.

14] Lekay testified that when he went to check the back of the house Accused 2 followed him to the kitchen. He asked him to go outside in case there was shooting and the baby got hurt. Both Lekay and Engelbrecht testified that later when they encountered Accused 1 and 2 who had been made to lie on the front lawn of the house, Accused 2 informed them that he knew who the persons were that had run away, naming, Jerome. Accused 2 offered to go with Lekay and Engelbrecht in their police vehicle to look for Jerome, a reference to Accused 3. Lekay testified that in the car Accused 2 informed them that he did not know what was going on in the house as he himself had arrived there just before the police. Whilst in the vehicle Lekay asked Accused 2 if he had any weapons on him, searched him and discovered that the light blue sweater he was wearing was wet. Accused 2 explained that his sweater was wet because of the lady in the bath. Lekay became suspicious about Accused 2's involvement with the murder of the deceased and returned with him to the scene of the crime and arrested him.

15] Upon re-entering the house after arresting Accused 2, Lekay and Engelbrecht discovered Accused 3 in the kitchen. At this stage various other policemen had arrived at the scene.

16] Vlotman also testified that after the metro police arrived and he left the bathroom he became aware of Accused 3's presence in the house. According to Vlotman when Accused 3 arrived his concern was about his son. He had said, "My little boy, where is my boy" and "My boy must not testify". The police looked for the boy and found him under the couch in the front room.

[] According to Vlotman the boy, about 5-6 years old was in pyjamas, recently bathed, and was in a very bad state. Vlotman did not allow the boy to be questioned as arrangements would be made for the police psychologist to attend to the boy. The boy was later taken away. Vlotman also testified that Accused 3 made some contact with his son, but the boy did not really speak to him. Vlotman denied in cross examination that upon hearing his father's voice the little boy came out from under the couch and ran to him. Vlotman said Accused number 3 told him that he had been taken to the kitchen by the "suspects and ordered to sit on the floor whilst they took his wife away". They had also taken his wallet. Vlotman testified that accused 3's demeanour was not that of a person who was terribly shocked or showed great remorse at what had happened to his wife. Vlotman testified also that after Accused 3 came to the house he had still drunk milk. He showed no empathy according to Vlotman. There was a time that he did cry but according to Vlotman he never cried with feelings, more to show that he was crying. Vlotman testified he had come to the conclusion upon observing Accused 3 that he had to know something about the murder, he was guilty as well.

17] Vlotman and Adams left the scene once photographs had been taken and the fingerprint unit arrived. The dog unit was also brought in to search the premises, but found no

trace of firearms. At the scene of the crime Accused 1, 2, Ricardo Little and Nasreen Adams were arrested on the night of 9 November 2000 and taken to the Lansdowne police station. Accused 3 was arrested the next day.

TESTIMONY OF INVESTIGATING OFFICER FREDRICKS

18] From the testimony of Inspector Fredericks, the investigating officer in this case, and a member of the police force for twenty years, the following emerges:

19] Fredericks arrived at the murder scene at 22h00 on 9 November 2000. He encountered

Accused 3 at the house and took a statement from him, being Exhibit “P”. He said accused 3 appeared to be without emotion that night. The statement mentioned that Accused 3 had gone to the Shell Select Store nearby, that night but made no mention of his meeting Little there.

20] On the morning of 10 November 2000 Fredericks viewed the Shell Select Store video of 9 November 2000, the previous night. He recognised Accused 3 and Little in the shop making a purchase. He had obtained the till slip for the purchase, Exhibit “Q” which indicated that a coke and cigarette had been purchased at 10:47. On this aspect, Mr Richards, the owner of the Shell Select Store who was called as a witness to prove the video footage and the till slip, testified that whilst the time on the video camera could not be relied upon as accurate, the time indicated on the till slip he believed, was accurate. Fredericks decided to arrest Accused 3 after seeing him with Little on the video. Accused 3 told him upon his arrest that he had not been involved in the murder, but that he had been framed by Fredericks himself.

21] Fredericks met Accused 1 and 2, Little and Nasreen Adams on the morning of Friday 10 November 2000, the day after the murder. Accused 1 and 2 did not tell him that they had come to 12 St Kilda Road to attend a party.

22] Frederick testified that he found a few pieces of black insulation tape on the ground at the entrance to the front bedroom as well as on the floor of the main bedroom. The tape looked like it had been wrapped around something. A matching roll of insulation tape was found on the seat of the Red Escort.

THE THREE DIFFERENT VERSIONS OF HOW THE DECEASED CAME TO BE MURDERED

As has been stated the court was presented with three different versions.

THE VERSION AND TESTIMONY OF RICARDO LITTLE

23] Ricardo Little was warned by the Court in terms of section 204 of the Criminal Procedure Act 51 of 1977 that his evidence could incriminate him and that if he gave his

testimony frankly and honestly he could be discharged from prosecution of the offence.

24] Ricardo Little aged 24 years testified that during November 2000, he worked at Dialogue Communications, a call centre, with Accused 3, and one, Trudy Noemda. He was approached at work by Accused 3 who asked Little if he knew someone that would kill “a bitch who had information that could get him into serious trouble and in jail”.

Accused 3 said that he was prepared to pay R20 000 to have this person killed. At first, Little took this as a joke because his impression from work was that Accused 3 was a jocular person Little however said that he would get back to Accused 3 and gave Accused 3 his home telephone number. That same day their contracts at Dialogue Communications was terminated.

25] On the evening of 9 November 2000, Little got a telephone call on a friend’s cell phone from his mother. His mother informed him that Accused 3 had telephoned in connection with a job offer to work at Accused 3’s brother’s construction company. The next morning Little spoke to Accused 3 on the phone and asked him about this job. Accused 3 told him that it was not about the job he had phoned, but about the killing. Little again told Accused 3 that he would get back to him. He realised that Accused 3 was serious about the killing. Little testified that he had heard from an acquaintance about a person known as “Green Eyes” who had just come out of jail and was looking for something to do for money. Little decided to approach “Green Eyes” on Accused 3’s behalf, which he did the next day, as unfolds in the following detailed account of activities on 9 November 2000, culminating with the murder of the deceased.

26] Accused1 and 2 live in the same road as Little, Baakens Road in Primrose Park. Little and Accused 1 are neighbours and had been friends for about 3 years as at November 2000. Accused 2 and Little have known each other for about 15 years and went to primary school together. They often spent time together and on 9 November 2000 they spent the entire day in each other’s company. The morning of November 9 , 2000 commenced with Accused 1 coming o Little’s house. Accused 1 and Little went to pay accounts in Athlone and thereafter bought some beers. On returning to Little’s house they met Accused 2 and his girlfriend, Nasreen Adams, standing outside the house. They asked them in and the men started drinking. They consumed about four 450ml bottles of beer. All four of them left the house in Accused 1’s red Ford Escort, just before 13h00 and went to Mongrel’s shebeen at Mannenberg. There they bought a crate of 12 beers,also the 450 ml size and continued drinking at the shebeen. At around 4pm Accused 1 said that he had to leave them to fetch his sister but that he would return later on. Accused 1 dropped them all off at a shop and there Little learned that “Green Eyes” was at a shebeen across the street. Little went to the shebeen and told “Green Eyes” about Accused 3’s plan and gave “Green Eyes” Accused 3’s cell number. According to Little “Green Eyes” telephoned Accused 3 but Little did not hear what was said. “Green Eyes” however told Little after the telephone conversation that he was not interested in the job as “it does not sound right”.

27] Thereafter Accused 1 fetched Little and the others in the red Ford Escort and they all went to another shebeen, this time in Silvertown,where they bought a bottle of brandy and

coke. It was now about 17h00. They decided to go to Ackerman's field, a municipal sport's field in Athlone Industria, and spend the rest of the afternoon drinking. They spent the next 3 to 4 hours parked at Ackermans Field, relaxing in each others company, the men sharing the alcohol, and watching the sporting activities on the field. At various times they got in and out of the car. Nazreen was the only one that did not drink and she appeared to spend a great deal of time playing games on Accused 2's cell phone. At some stage before 6 pm Little told accused 1 and 2 and Nasreen about Accused 3's request to pay R20 000 for a killing, and Little suggested that the 3 of them (he, Accused 1 and 2) actually do the job² and split the money equally amongst them. They all agreed to this plan. Little asked Accused 2 if he could use his cell phone to phone Accused 3 but Accused 2 said he should wait until after 8pm before phoning Accused 3 as the call would be cheaper at that time.

28] At 20.01 15h00 as appears from Exhibit "F", the cell phone records of calls made to Accused 3's cell phone, Little phoned Accused 3 and said he had found someone to do the killing. It was agreed that they would go to No. 12 St Kilda Road Rondebosch East, Accused 3's house at about 21h00. Little testified that at that stage their plan was simply to get their hands on the money and not do the killing. They reasoned that if they did this Accused 3 would not go to the police because how would he explain why they had gone off with his money. He asked Accused 3 to give them half the money up front and said that Accused 1 and 2 wanted to see the money, but Accused 3 had said he did not want to do this because people had run away with his money before. Accused 3 said the money was in Woodstock at a safe place and that they would receive it after the job had been done. This was agreeable to them.

29] Thereafter they left Ackerman's Field. According to Little they were drunk but Accused 1 was still capable of driving. They went first to Accused 2's house at Nasreen's suggestion where Accused 2 collected a balaclava and a BB gun. They then proceeded to 12 St. Kilda Road and got there at about 21h00. The house was in darkness. From outside the house Little phoned Accused 3, to announce their arrival, once again using Accused 2's cell phone. The cell phone records indicate this call to have been made at 21.11.18h00. As they were speaking Accused 3 came out of the house and told Little to meet him at the Shell garage on the corner. They drove to the garage and parked across the road. Accused 3 arrived and he and Little went into the 'Shell Select' shop. Accused 3 bought a coke for himself and a cigarette for Little. As mentioned already, the till slip from the shop handed in as "Exhibit "Q" indicated the time of the purchase to be at approximately 21h47. As also indicated a video from the "Shell Select Shop", Exhibit "2" shows Accused 3 and Little purchasing these items. In fact Little testified that Accused 3 had told him to watch out for cameras at the shop.

30] Little and Accused 3 came out of the shop and walked towards the red Ford Escort. Accused 1 and 2 got out of the car whilst Nasreen remained in the car. Little introduced Accused 1 and 2 to Accused 3 and told the latter that these were the people who were going to do the job. They asked Accused 3 about the money and he assured them it was safe in Woodstock. Accused 3 told them that he had left the front door unlocked so that they could gain access to the house. Accused 1 and 2 left for the house whilst Accused 3, Little and Nasreen remained at the car. It had been agreed that Accused 1 and 2 would do the killing,

whilst Little and Nasreen would wait in the car for them. Thereafter Accused 3 would take them to Woodstock where he would hand over the money to them.

31] A few minutes later Accused 1 and 2 returned to the car, upset according to Little, because contrary to what Accused 3 had said, the front door of the house was locked. They reported that a lady had answered the door and they had asked for directions. Accused 3 said that he would go back to the house, Accused 1 and 2 should follow a few minutes later and that he, Accused 3, would open the door for them.

32] Before Accused 1 and 2 returned to the house Nasreen taped their palms and fingertips with black insulation tape. Little and Nasreen were left behind waiting in the car.

33] After a while Nasreen became anxious and asked Little to check what was happening at the house. Little accordingly drove the car to the house. As they arrived there Little saw Accused 3 leaving the house, speaking on his cell phone. Little flicked the car lights at him but Accused 3 looked at them, seemed a bit nervous and just went on. Little tried catching up with him, but without success. Little then phoned Accused 3 twice on his cell phone but got the voice mail.

These calls appear to have been made at 22 .07.45 h00 and 22 .09 from the cell phone records, the aforementioned Exhibit"F".

34] Little then decided to investigate what was happening in the house. The door was slightly open, he pushed it further open. He saw someone with a balaclava. At first he did not recognise the person but when the person spoke he recognised his voice as that of Accused 2. Little told Accused 2 that Accused 3 had disappeared. Accused 2 told Little to leave the house. Little could hear a baby crying and running water splashing from within the house. He thought that the killing was taking place.

35] Little went back to the car and waited for a while, the plan being that as soon as Accused 1 and 2 emerged, they would flee the scene. He became anxious as they were still not emerging so Little returned to the house to call them. As Little approached the house the police pulled up in front of the house. The police asked him whether he had made a phone call and Little indicated that he had not. Half an hour later Little was arrested and put in a police van with Accused 2.

36] Whilst in the van Little and Accused 2 concocted a story for the police, namely that Accused 3 had invited them to a party and when they came to the house, they had discovered the deceased in the bath. Little, Accused 1 and 2 were locked up that night. Little made a statement before a magistrate the following day, 10 November 2000 at 2 pm. Whilst he did not relate this version testified before me, in its entirety to the magistrate, it is common cause that he implicated both himself and Accused 3 in the murder of the deceased in that statement. Little and the other Accused applied unsuccessfully for bail on 28 November 2000, bail being granted subsequently only in July 2001. Just before his bail application Little discovered from newspaper reports that it was in fact Accused 3's wife who had been killed and there were children involved. Thereafter, he said, he could not live with himself, and decided to

“come clean”.

THE EVIDENCE OF RICARDO LITTLE’S MOTHER

37] The evidence of Little’s mother corroborated Little’s testimony about his being informed on 8 November 2000 telephonically by her that Accused 3, Jerome, had phoned about a job offer at his brother’s construction company. Her testimony also lends credence to Little’s evidence about speaking to Accused3 on the phone on the morning of 9 November 2000 to enquire about the job offer.

Mrs Little testified that on 8 November 2000 she received a phone call at her home at about 16h00 from a Jerome who wanted to speak to Ricardo, her son. She said that Ricardo was not there and Jerome informed her that he worked with Ricardo at Dialogue Communications. Jerome said that he had a job for Ricardo with his brother’s construction company. Mrs. Little was very excited as Ricardo had finished his job that day and was without employment. She said she would give Ricardo the message. Jerome informed her that he was phoning from his girlfriend’s house and asked that Ricardo call him on his cell phone. He gave her his cell phone number which Mrs Little wrote down on a scrap of paper, which subsequently became Exhibit “M”. Jerome asked that Ricardo contact him before 12 that night and let him know if he was interested in the job. Mrs Little relayed Jerome’s message to her son later that evening by phoning him on his friend’s Randal’s cell phone. Little told her that he was interested in the job.

38] After Little’s arrest Mrs Little visited him at the police cells at about 1 am on the morning of 10 November 2000. Her son had told her Jerome had invited them to his house. He had also said, “but now Jerome is missing, he’s gone. Where is Jerome?” At that stage she had not realised that the murder had involved Jerome. Mrs Little informed the investigating officer Inspector Fredericks at 2am that morning about Jerome’s phone call to her about the job offer for Little. Her son’s enquiries about Jerome prompted her to phone Accused 3’s cell phone in the early hours of the morning soon after her visit with Little but his cell phone was off. She said she wanted to know how Jerome was connected to her son’s arrest. The following morning she reached Accused 3 on his cell phone hoping that he would shed some light on events. She enquired if Accused 3 had spoken to Little the day before about the job. He said he had.

39] Then Accused 3 told her there had been a tragedy, and his wife had just been murdered. He told her two men had held him up. Mrs Little was shocked. However she did say to Accused 3 that she did not know he had a wife as he had told her the previous day that he was phoning from his girlfriend’s house. Accused 3 replied that he must have been joking when he had mentioned a girlfriend.

Mrs Little testified also that about a week before the murder she and her husband had fetched Little from work and had in fact given Accused 3 a lift on the request of Ricardo. Accused 3 was not introduced to her on that occasion and it was only after all these events that she realised that he was the person they had given a lift to. Mrs. Little impressed the court as an

honest and reliable witness. Her testimony was that of a concerned parent.

THE TESTIMONY AND VERSION OF ACCUSED 1 AND 2

[40] Accused 1 and 2 deny the version of Ricardo Little as set out above. Their version, as appears more fully below, very simply is that they knew nothing about a planned killing whatsoever, and had no part in the conspiracy or murder as suggested by Little. On the evening of 9 November 2000 Little took them to 12 St Kilda Road on the pretext that they were going to a party at his friend, Jerome's house. Upon entering the house in search of a party they discovered the deceased instead. Before they could leave the house to get help, the police arrived, found them at the scene and arrested them.

[41] For the sake of convenience I shall deal with the testimony of Accused 1 and 2 together, indicating those areas in which they differ.

The following biographical details emerged from their testimony.

Accused 1, Eugene Josephs was born on 9 May 1975, and was just over 25 in November 2000.

He lives with his parents and his sister. He left school in standard nine at the age of 18. His last job before the events of November 2000 was at Edgars in the security and maintenance section.

On 9 November 2000, he was unemployed having left Edgars. Since being released on bail he has been employed at Bruce Dundas Construction doing general carpentry work. He also has a part time job as a waiter. Accused 1 and 2 are childhood friends and Accused 3 is unknown to him. Accused 1 is unmarried and has no children.

[42] Accused 2 is 24 years old and lives with his retired parents. He left school in standard eight. He is currently employed by a security firm. His girlfriend Nasreen Adams is expecting their child in mid March.

[43] The testimony of Accused 1 and 2 of events on 9 November 2000, when they were in Little's company coincides with that of Little until 20 01.15 h00, the time Little made the first phone call to Accused 3 whilst the group was at Ackermansfield. Contrary to Little's testimony Accused 1 and 2 said they were both outside the car with Nasreen Adams talking to two friends, Mogamat Tape and Ziyaad when Little made the call to Accused 3. They did not hear Little's conversation with Accused 3. According to Accused 1, Little was sitting by himself in the driver's seat at the time as Accused 1 had prior thereto been sitting in the front passenger seat, securing the tape deck with black insulation tape. It was only when they got back into the car that Little told them he had phoned his friend who had invited them all to a party that night at 9 pm.

According to Accused 1 Little said the party was to be a braai. According to Accused 2 it

was not established what kind of party it was, and he had assumed it to be a birthday party. Only Accused 2 testified that Little had made a second call to Accused 3 from Ackermansfield about 30 minutes after the first call to ask if they could all go to the party. Accused 1 did not mention a second call nor did Nazreen Adams (see below).

[44] Like Little, Accused 1 and 2 testified that from Ackermansfield they drove to Accused 2's house. However their testimony was that they went there to fetch Nasreen's jacket. They denied that a balaklava and BB gun were fetched as testified by Little. Accused 2 said that they proceeded directly to St Kilda Road thereafter, whilst Accused 1 was not sure whether they returned first to Ackermansfield and then to St Kilda Road.

Like Little they said Accused 3 had been phoned by Little when they reached his house which was in darkness, and it was arranged for Little to meet with him at the Shell Select Store.

However both Accused 1 and 2 denied that they themselves had ever got out of the car to meet with Accused 3 at any stage outside the shop. Their testimony was that Little had met with Accused 3 himself, gone into the shop with him, where after Accused 3 had left and Little returned to the car alone.

Little informed them that his friend, Jerome had said they should wait 10 to 15 minutes before coming to his house as there were people who had to leave before the party could start. They waited, in the car, pouring another round of drinks, and after 10 to 15 minutes returned to 12 St Kilda Road, this time Little driving the car. Accused 1 also said that whilst waiting he got into the passenger seat and continued fixing the tape deck, using pieces of insulation tape, which he had removed from the roll and stuck to his pants.

[45] When they reached the house only Accused 1 and 2 alighted and went in. Accused 1 explained that Little did not accompany them into the house as he had asked Little to reverse the car into the driveway, and he had alighted to get permission from Jerome to park there. Later on however, under cross examination Accused 1 was vague about this, and he testified that it was Little's idea that he and Accused 2 go into the house on their own. He also said his car had a starter problem and he did not want Little to switch it off, as he would have to open the bonnet to restart it, something he had done each time the car had switched off that day.

Accused 2 seemed totally unaware of this reason for Little not alighting from the car, or indeed of the starter problem which they had on Accused 1's version experienced all that day. In contrast to Accused 1, Accused 2 said there were no problems with the car³ and moreover that when they returned to the house, Little parked the car diagonally opposite it and the engine was switched off. Accused 2 assumed that all four of them would go in together but when Nasreen and Little remained in the car, he assumed that Nasreen was finishing off a game on the cell phone, Little was waiting for her and they would follow.

[46] Accused 1 and 2 testified that they knocked on the door which was very slightly ajar. When nobody answered they entered cautiously, calling out "Anybody home?" They could hear loud disco music coming from the back of the house. They could also hear a baby

crying. Accused 1 followed the direction of the music and went to the kitchen and back door which he discovered to be open but the security door locked. Accused 2 on the other hand went straight into the bedroom where the baby was crying. He shook the bed to pacify it, put the dummy in the baby's mouth and picked up the baby, who stopped crying. Accused 1 testified that he had by this time come back from the kitchen area and could see Accused 2 in the bedroom. He could also see the bathroom door which was slightly open. There was water running out from under the door. He said as there was nobody in the rest of the house and this was the only room left, he went in, not knowing for sure at the time what room that was.

[47] He pushed the door open and he saw the person lying in the bath. He could not remember if the tap was running. His first instinct was to help the person in the bath. He has some medical training which included assisting drowning victims, and a certificate in firefighting. He did not know whether she was alive or dead. He tried helping her out by pulling her by her wrists but the person was heavy and he himself fell into the bath head first. He testified in reference to photograph 6 of exhibit "D" that his head landed in the space marked "X" on the photograph, his feet were in the air and that the top section of his body was on the upper part of the deceased's body. He struggled to pull himself up, bringing his feet to the area in which his head was and standing up there in the space marked "X". He called to Accused 2 for assistance, as he was stumbling. Accused 2 came into the bathroom carrying the baby. Accused 1 however got out of the bath himself, although he said that Accused 2 helped by giving him his right hand.

[] Accused 2's account differs somewhat. He said that Accused 1 leaned on his right shoulder in getting out of the bath. In so doing Accused 1 had wet Accused 2's T- shirt, and this explains why he was wet. Moreover contrary to the testimony of Accused 1, Accused 2 testified that Accused 1 was standing up in the space marked "Y" on photograph 6 of Exhibit "D" before getting out of the bath. Unlike Accused 1, Accused 2 said the tap was running and that he did not close it as he did not want to tamper with the evidence. Accused 2 also said he was in the bathroom with the body for just 1 minute. Furthermore, contrary to the testimony of Accused 1, Accused 2 said there was no water running from under the bathroom door.

[48] Accused 2 said they should leave everything, take the baby and go and phone the police. Accused 1 could not remember if he had closed the bathroom door. Even at the stage when they left the bathroom, Accused 1 said he was not sure if the person in the bath was dead or alive. He came out of the bathroom and proceeded to the doorway of the children's room.

Accused 2 was not with him. It was whilst standing in this doorway that he was found by the police. He denies that he was fumbling on the floor when the policeman found him as testified by the latter. He denies also that he at any stage switched the lights off. He testified that he was spellbound and he simply pointed towards the bathroom when he saw the police. He denied pointing in such a way as to indicate firearms. Accused 2 said that on leaving the bathroom he proceeded to the front door with the baby, it swung open and he was confronted by 3 police officers who asked if he had made the call. He said "there's people in the house" referring to Accused 1 and the body. He denies saying there were people with firearms as testified to by the police.

[49] Accused 1 denied that he had tried to run away as testified by the police. His testimony about this is that after he was put in the police van, the crowd that had gathered outside tried to pull him out and assaulted him. He had run to the police for protection and he was then put in a police vehicle with Accused 2 and Little. Accused 1 also denied as stated by Little, that they concocted the version about coming to a party, whilst in the van. Accused 2 moreover denied that he had offered to assist the police to search for Jerome, insiting he had been ordered to go with them.

THE TESTIMONY OF NASREEN ADAMS

[50] Nasreen Adams testified on behalf of Accused 1. Her testimony in Court was not entirely satisfactory, in that she clearly went out of her way to cast her boyfriend Accused 2 in a favourable light (and he conceded to this), and changed her testimony as she went along to this end. Despite this, a part of her testimony was corroborated and found to be satisfactory. In addition to her testimony in Court she made a statement, being Exhibit "R" to the police on the night of 9 November 2000. Given the predominantly biased nature of her testimony in Court, I accept the veracity of the statement over that of her oral testimony. I also accept any oral testimony not contained in the statement only, in so far as it is corroborated.

On the acceptance of a portion of evidence only, in R v P (1957) SA (3) 444 at 450- 451H (A) it was said: "Now, when oral evidence is led to confirm the evidence of an accomplice, that does not mean that a magistrate must accept or reject this oral evidence in toto. He may accept a portion of it and reject some other portion, and it cannot be said that the portion he rejects as not establishing certain facts, can be relied upon as confirmatory evidence."

Like Accused 1 and 2 she said during evidence in chief that Little was alone in the car when he made the call to Accused 3 from Ackermansfield, but she heard some of the conversation. She heard Little mention her name, and that of Julian's (Accused 2) and Eugene's (Accused 1)', No. 12 of the address, but not the street name they were going to, and he spoke about a party. However, when pressed under cross examination, she said that all four of them (Little, herself, Accused 1 and 2) were in the car when the call was made. This is in corroboration with her statement to the police, Exhibit "R" which also states all of them were in the car when that call was made.

[51] About Accused 1 and 2 meeting with Accused 3 prior to the murder on the night of 9 November 2000 she testified as follows. In corroboration with Little, she said that both Accused 1 and 2 had got out of the car when Little and the man he was with came out of the Shell Select Store and spoke with them behind the car. She also said they had enquired whether the man was getting into the car. Upon

learning under cross examination that Accused 2 denied that he ever spoke to the man who went into the shop with Little, she attempted to adjust her testimony. However when pressed further under cross examination, she conceded that Accused 1, 2, 3 and Little spoke to the man behind the car. This is also in corroboration of her statement which also states that Accused 1 and 2 got out of the car and went to Little and the other person. The statement even refers to an argument between Little and Accused 1 during that encounter. Although she did not identify Accused 3 as the man who had been with Little in the shop that night, her statement states that Little was outside the car talking to a well built light person. This fits the description of Accused 3. It is in any event common cause that Accused 3 was the man with Little at the shop that night. Her statement and corroboratory oral evidence of the meeting of Accused 3 with Little and the other two Accused stands above her adjusted testimony in Court.

[52] Her testimony corroborated also that of Little and Accused 2 that the car was parked opposite as opposed to in the driveway of 12 St Kilda Road. Like Accused 2 she did not back up Accused 1's testimony that he had starter problems with the car which required the bonnet to be opened each time before starting the car that day. Also she had no knowledge of Accused 1 fixing the tape deck with insulation tape at the garage as he had testified.

[53] Mogamat Tape Mustapha who was called to corroborate Accused 1's testimony that he was not in the car when Little made the call to Accused 3 at 20.01.15 from Ackermansfield, was unable to do so. He conceded that he could have left Ackermansfield before 20.00h00.

THE EVIDENCE OF THE DECEASED'S MOTHER -WILHELMINA SYLVESTER

[54] Mrs Wilhelmina Sylvester, the deceased's mother testified for the state and was able to shed some light on the relationship between her daughter and Accused 3. She impressed me as a truthful and forthright witness. Mrs Sylvester portrayed the relationship between Accused 3 and her daughter as a troubled one characterised by constant struggle. From her testimony the following emerged.

[55] The deceased married Accused 3 in 1990 after she became pregnant. At the time she was a first year student at the University of Cape Town and had to give up her studies on account of her pregnancy. At the time of the deceased's death she had three children, the youngest being a baby who was born approximately 6 weeks before the deceased was murdered.

[56] Throughout the marriage Accused 3 had long periods of unemployment. He was unable to support his family and the deceased's parents had assisted them financially. The deceased was however in fixed employment at Alexander Forbes

Pension Fund Administrators where Mrs Sylvester also worked. The deceased was the main breadwinner. The deceased and Accused 3 had separated from June 1998 until December 1999 during which time the deceased and her children moved in with her parents. For some of this period, Accused 3 had kept in touch with his family. They became reconciled in December 1999 and rented the house at 12 St Kilda Road. Her daughter had paid the rent of R2 200 per month. Her daughter was an intensely private person and Mrs Sylvester had decided not to probe into the state of her daughter's marriage after the reconciliation.

[57] Mrs Sylvester testified that the deceased was planning to leave Accused 3 after the expiry of the lease on the house at St Kilda Road, in December 2000, and had indicated to Mrs Sylvester that she and the children would be moving into her parents home.

[58] Mrs Sylvester also said that after the murder, she had been shocked to learn from her daughter's diaries how acutely unhappy she had been. Nonetheless Mrs Sylvester did not go out of her way to present Accused 3 in a bad light. She said he was a good father, and even said she could not conceive of her daughter's husband having killed her.

Mrs. Sylvester was an honest and convincing witness.

[59] The 3 children now live with Mrs Sylvester and are supported by a life policy of the deceased. Mrs Sylvester said that Accused 3 does not contribute to their financial support. She said also that after the murder there had been a court order preventing the child found under the couch on that fateful night, from communicating with Accused 3. Despite this, there had been contact between them on one occasion.

[] Details of the deceased's policies were provided by Ms Burger, the Director of the Cape Town branch of Alexander Forbes where the deceased had worked. According to her Accused 3 stood to gain R77 837.82, being 20% of each of her 3 policies, should the trustees governing these policies decide to award this sum to him. The trustees of the policy were awaiting the outcome of Accused 3's trial before deciding whether he would gain therefrom. In addition a sum of R10 000 had already been paid out to Accused 3 from the state Unemployment Insurance Fund.

The testimony of Trudy Noemda

[60] Trudy Noemda who had worked with Little and Accused 3 at Dialogue Communications was called as a witness by the Court because Little testified that Accused 3 had made enquiries about him from Noemda prior to approaching him about the killing. Trudy Noemda was a credible witness.

[61] She corroborated Little's testimony saying that Accused 3 had questioned her about Little at work. He had asked her where Little lived, about his family and his social habits. She had thought these questions strange and when she asked Accused 3 why he was so interested in Little he had not replied. Accused 3 had told her to look out for Little, saying that if Little did anything to her she must tell him, as he had friends in high places and would sort Little out. She had asked Accused 3 what he meant by this to which the latter replied that she should just trust him.

[] She said the computer at work had listed employees phone numbers but not their addresses. The only way of establishing a person's address was to ask for it, thus suggesting that Little must have asked Accused 3 for his home address. Accused 3 had not questioned her about anyone else at work. When Little was absent from work Accused 3 had asked her to phone Little's mother to find out when he was coming back to work, which she did. She testified that the period between 6 and 10 pm was a quiet time at work, and for about 2 hours during this time they would just sit at their work stations and there was time to socialise.

[62] She described Accused 3 as a jolly person and said he was friendly with Little and had spoken to him at work. Accused 3 had told her he lived in a big house in Rondebosch but did not say he was married.

The testimony of Shanon Claassen

[63] The Court also called Shannon Claasen, the son of Accused 3 and the deceased as a witness. Shannon was the child discovered by the police hiding under the couch on the night of November 9, 2000 after the murder had been committed. He was six years old at the time.

[64] Bearing in mind the cautionary rule applicable to the testimony of children, and the tenor of his testimony, I am of the view that his evidence cannot be regarded as reliable and that he was not a helpful witness. His testimony gave the impression that he had been schooled by his father. [Mrs Sylvester, the deceased's mother had testified that although there had been a court order prohibiting Accused 3 from communicating with Shannon, there had on one occasion been contact between them and thereafter the boy had spoken to her about testifying in Court.] Shannon himself in his testimony referred to the deceased's head being put in the bath by the two men who had entered their house but said he had not seen this. His father had told him about this. He initially said that his parents and the men were lying on the kitchen floor. Thereafter he said he had seen his parents lying on the kitchen floor and the men were holding them. He also spoke about the men having guns. However it was simply not possible to establish from his evidence what he had seen and what his father had told him.

The testimony of Accused 3

[65] The version of Accused 3 is that on the night of 9 November 2000 Accused 1

and 2 entered his home to commit a burglary and held him and his wife at gunpoint. He managed to escape and phoned the police. By the time the police arrived at the scene, his wife had been murdered and her body was found in the bath. He denies being part of any conspiracy with Ricardo Little, Accused 1 and 2 to kill his wife. Accused 1 and 2 had come to burgle his house through Ricardo Little who had worked with Accused 3.

[66] Accused 3 is 31 years old and lives in Bridgetown with his parents. He and the deceased had three children currently, aged 10, 7 and 1, who live with the deceased's parents.

He testified that he is currently contracted to 2 organisations in a sales capacity. In his spare time he repairs and upgrades computers.

[67] He and the deceased had been married for one month short of ten years at the time of her death. Contrary to the testimony of the deceased's mother he said that they loved each other although they had the usual ups and downs. During 1998 they had separated for 12 - 18 months as they were both under emotional and financial pressure. He had fully supported his wife's decision to move in with her parents. In contrast to the testimony of the deceased's mother, Accused 3 testified that he had regular contact with his family during the separation and supported them.

[] They reconciled in December 1999 and rented 12 St Kilda Road together on a year's lease. He disputed the testimony of the deceased's mother that her daughter had paid the rental of R2200 per month. He said that he had initially paid the rent but conceded that his wife had taken over the rental during the latter part of the year. He testified that at the end of the lease he and his wife were planning to move in with her parents. He denied that his wife's intention was to divorce him and move in with her parents. He also testified that the landlord had agreed to extend the lease. He moreover denied that his wife was desperately unhappy with him as stated by her mother. He testified also that the diaries of the deceased recording her unhappiness which were mentioned in Mrs Sylvester's testimony, referred to the time before their separation.

[68] Accused 3 testified in chief that in November 2000 he had worked at Dialogue Communications for 10 to 12 working days with Little and Trudy Noemda.. Contrary to the evidence of Noemda, he said they worked non stop having 5 minute toilet or smoke breaks with no time to socialise. He did not get to know Little personally and Little did not interest him. In fact he referred to Little as a person of lesser calibre. It was only in the last hour of the last day that he gave Little his cell phone number, saying Little was welcome to call him to enquire about job possibilities. He also said that virtually everybody at the workplace was younger than him and lived with their parents. It was exciting for them that he had his own comfortable house in Rondebosch.

His testimony about the day of the murder is as follows:

[69] On 9 November 2000 Accused 3 had an appointment with a new client, Sean Oliver in Queens Road Woodstock. He worked on his computer and then forgot his cell phone on the desk at Oliver's house. He decided that he would return to Sean's house the following day to collect his cell phone. He was therefore without his cell phone all day and did not personally receive any calls from Little. At about 21.30 that evening Accused 3 was leaving his house to go to the shop, when Sean Oliver and his girlfriend, Lee Anne Johnson pulled up to return his cell phone. Sean told him that Little had phoned 4 times, the last time being 10 minutes before. Little phoned again in the presence of Sean, and enquired about work. His speech was slurred. Accused 3 became upset with Little, said he was busy with a client and did not have time for him, and asked him to call at a later date. Oliver left after 15 minutes, giving Accused 3 a lift to the Shell Select Store, and dropped him at the corner of Taronga Road and Bridgeway.

[70] Accused 3 was surprised to meet Little outside the Store. Little said he was attending a party in the area. According to Accused 3 he was quite irritated by Little and had told him he had no work for him and asked Little not to make a nuisance of himself. Little "bugged" him for a cigarette. Accused 3 went into the store with Little and bought him a cigarette and purchased a coke for his wife. The till slip records this purchase at 21.47h00. A video camera recording of the Store depicts Little and accused 3 in the shop. According to Accused 3 his irritation with Little is not apparent on the video as he had completed being irritated with Little outside the store.

[71] According to Accused 3 when he returned home from the shop the door was latched. His wife informed him that she had latched the door because two strangers had come to the stoep and asked for Malcolm and then left. He and his wife had watched television, while the children were sleeping in the main bedroom. Just before 10 pm there was a knock on the front door. They looked out through the blinds and saw a man on the stoep. He asked where Alexander Road was. He seemed like a decent person. Accused 3's wife said that he should open the door and give him directions.

[72] Accused 3 opened the door, and he recognised Accused 1 holding a silver or chrome pistol which he stuck into Accused 3's forehead. Accused 1 said, 'hou net jou bek'. A second person then appeared whom he later recognised as Accused 2, wearing a balaclava which did not cover his entire face. Accused 2 had a black pistol. Accused 1 and 2 had black insulation tape on their fingers. They forced Accused 3 and his wife at gun point to the kitchen and made them lie down on the floor, all the time guns pointed at them. The gunmen wanted to know who they were and seemed agitated. Accused 1 ordered the wife to get up, pulled the back of her night clothes, and marched her to the front door. Accused 3 had a gun pointed at him. Accused 2 walked after them, keeping one eye on Accused 3 who was still sitting on the kitchen floor.

Accused 1 heard a scuffle at the door. Accused 2 came in from the front door

followed by Accused 1 and the wife. Accused 1 then smacked the wife and they went into the bathroom. Accused 2 ordered Accused 3 to get up, his left arm around his neck, the gun against the side of his head and marched him to the lounge. The blinds were opened, they signalled to two people in a red car parked opposite. The people in the red car flickered back.

[73] Accused 2 then forced Accused 3 at gun point into the bathroom where Accused 1 was holding his wife by the hair over the bath and fiddling with the taps. At that stage the baby cried. Accused 2 became agitated and said "Ek gaan die kind skiet". Accused 1 said, "los daai gedagtes" at which point Accused 1 and 2 became embroiled in an argument and it seemed as if they were going to come to blows. Accused 3 pushed Accused 2 who stumbled into Accused 1 and they were thrown off balance. Accused 3 then made for the door and escaped.

[74] Accused 3 said he was desperate and had to abandon his family to seek help. When he got outside he observed the red car parked about 40 meters down the road. He ran in the opposite direction towards Camberwell Road, and phoned the police from his cell phone. Mr Royker who was outside his house in Camberwell Road, watering his lawn took Accused 3 to the Landsdowne Police Station where he was told the police had already gone to his house.

[75] Accused 3 stated that when he returned to his house 5 minutes after he had left it, he discovered his wife had been murdered. He also said his baby was outside with a neighbour and that his 6 year old son emerged from behind the couch in the lounge and ran to him. He denied that he had expressed concern that his son should not testify. Instead he had said the child should not be questioned in the house, but taken to friends nearby. He also denied as had been stated by the police that he was cold and expressed no emotion at his wife's death. Inspector Fredericks took a statement from Accused 3 on his return to the house. Accused 3 complained that what he had thought was going to be an informal chat turned out to be a formal statement. He said the statement had not been read out to him. He also said he was in such a state that he would have signed anything. The statement, Exhibit "P" differs from Accused 3's testimony in Court in that it states Accused 3 walked to the shop as opposed to being dropped there by Oliver, and moreover makes no mention of Oliver or of Accused 3's meeting with Little at the shop.

[76] Accused 3 testified that when he had escaped to seek help his wife was clothed, alive and the house was in a tidy state. Five minutes later upon his return she was bruised, drowned and the house was in a shambolic state as appears from the photographs before court, being Exhibit "D". These indicate especially at photographs "D 11 and 12" the bedrooms to have been ransacked with clothes all over the floor and in black bin bags.

[77] Accused 3 testified that he did not have valuables in the house, and said also that Accused 1 and 2 had not asked for money.

[78] Further, he testified that he had no idea why Little would have implicated him in a conspiracy to murder the deceased.

[79] Accused 3 also said that he did not know about the deceased's Insurance policies before her death which he understood to be group life assurance policy which a lot of companies take out to cover employees. He conceded as per the testimony of Burger that he had claimed R10 000 U.I.F. benefits due to the deceased in November 2000 because if it had not been claimed, it would have lapsed. He had spent two thirds of this amount on medical expenses for himself and the rest went towards his board and lodgings. He has been seeing a psychologist since the event. He said he had not contributed any of this amount or any other sum towards the maintenance of his children as his parents in law do not want financial assistance from him. He had found employment only 6 months after his release on bail in April 2001.

ASSESSMENT OF THE EVIDENCE

ASSESSMENT OF TESTIMONY OF THE POLICE

All the policemen who testified impressed the Court as credible, honest and reliable witnesses. With regard to the four policemen who arrived first at the scene of the crime, whilst there were a few discrepancies as between their respective testimonies, and as between oral evidence and statements, these were not material and in fact of a kind to be expected when different people recall the same event after some time, so much so that I have not even dwelt upon this. I am satisfied that they corroborated one another in all material aspects. They basically told the same story.

ASSESSMENT OF THE TESTIMONY OF THE ACCUSED

[80] The onus of proof in a criminal case is proof beyond reasonable doubt. "In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable each being the logical corollary of the other"⁴ In assessing the three versions and the evidence of Little, Accused 1, Accused 2 and 3 in turn, I am required to consider if there is a reasonable possibility that their versions and evidence is substantially true.⁵ I am bound to acquit any accused if there exists a reasonable possibility that his version and evidence may be true.⁶

4 S v Van der Meyen 1999 (2) SA 79 (WLD)

5 R v M 1946 A D 370 at 373

6 S v Kubeka 1982(1) SA 534(w) AT 537 F -G

ASSESSMENT OF THE TESTIMONY OF ACCUSED 1 AND 2

[81] Whilst Accused 1 and 2 give the same version about innocently coming to a party and discovering a dead body in the bath, there are troubling discrepancies in the telling of the version by each of them. They differ on whether 1 or 2 calls was made by Little to Accused 3 from Ackermansfield and whether they returned to Ackermansfield before setting off for St Kilda's Road. More significantly they differ as to whether there were car problems, as to where the car came to be parked outside Accused 3's house and as to why Little did not go into the house. They differ also with regard to details in the bathroom as to whether the tap was running or not, as to where Accused 1 stood in the bath (Acc1 says at area "X", accused 2 Says At "Y") and finally as to how Accused 2 helped Accused 1 out of the bath, Accused 1 testifying Accused 2 gave him his right hand, the latter saying he offered his shoulder.

[82] Perhaps more significant is the absence of an adequate explanation as to why Little, the friend of the host does not go into the house and why Accused 2 leaves his girlfriend with Little whom he knows she does not like, and goes into the party without her. Nor could they explain their strange conduct, save for conceding that their conduct was indeed strange, in remaining in the house when it was abundantly clear that the party they had come to was not happening.

Accused 2 admits to entering a stranger's bedroom with no thought as to its possible occupants and picks up a baby, when he is supposed to be following the music coming from the back of the house. Likewise Accused 1 enters a stranger's bathroom with no regard to whether there is someone taking a bath, or in a state of undress.

[83] Their conduct in the bathroom is completely at odds with Accused 1's testimony that their intention was to help the person in the bath whom they thought might be alive. It could not be explained why the plug was not pulled out, why the head was not lifted so that the person in the bath could breathe, why there was no attempt at resuscitation, especially in the light of Accused 1's "medical training", why both of them did not simply lift the person out of the bath. Nor could it be explained why, given the professed intention to assist they abandoned the body, that too when they were still not sure if the person in the bath was dead! Then there is Accused 1's description (much embellished upon) as to how he fell into the bath and the acrobatic feat by which he extricated himself therefrom, an account which defies reasonable explanation and understanding.

[84] When asked why if they were so eager to contact the police for help, they did not immediately and in great relief on seeing the police tell them precisely what had happened, Accused 1's response was simply, "I don't know, I cannot explain that." Likewise Accused 1 could not explain why, given his eagerness to leave the house

and get help, he did not proceed to the front door on leaving the bathroom, but proceeded to the children's room instead, where he was discovered in the doorway by the police. Nor could he offer any explanation as to why the police would want to fabricate evidence that he was searching amongst the clothes on the floor of the children's room, or that they found a balaklava and bomber jacket on him.

[85] Accused 1 and 2's version consists of a complete denial of any conspiracy with Little and Accused Number 3 to kill. Consistent with this version is their denial of any meeting by them with Accused 3 whatsoever on the evening of 9 November 2000. Their version permits them only to concede that Little met Accused 3 in the shop that night whilst they remained outside. Against this is the testimony of Little, that Accused 1 and 2 met Accused 3 outside the shop that evening and discussed the killing as well as the money. Little's evidence in this regard is corroborated by that of Nasreen Adams both in her testimony before Court and in her statement to the police, Exhibit "R", which I have accepted.

[86] By reason of the aforegoing, regarding had to the general quality of their testimony, the inconsistencies within the context of their own version, the extent to which they contradicted each other, their improbable, bizarre, somewhat surreal relating of the scene in the house upon entering it, and the events which unfolded thereafter, I am unable to pronounce them credible, reliable and indeed honest witnesses. The defects and shortcomings in their testimony prevent me from doing so. In a word the truth has not been told by them.

ASSESSMENT OF THE TESTIMONY AND VERSION OF ACCUSED 3

[87] Accused 3's evidence was unsatisfactory in a number of respects. Firstly and crucially he was not an honest witness and his testimony lacked consistency even within the context of his own version. The tenor of his evidence ranged from lying outright, to self contradiction, to adapting his evidence to suit his version, especially under XCD, to giving vague and elusive answers. He simply was not a credible witness. In addition he was belligerent and excessively defensive under cross examination. His lack of veracity is evident from the following:

[88] In his evidence in chief Accused 3 was adamant that he displayed no interest in Little during the time they both worked at the Dialogue call centre, thus lending support to his version that he would not have approached Little about the killing. When confronted with evidence to the contrary by Noemda Accused 3 contradicted himself under cross examination, and admitted to enquiring about Little from Noemda and even warning her about him. He also admitted to asking Noemda to phone Little's mother to enquire why he was not at work when Little was absent. Under cross examination Accused 3 also conceded that he had got a lift from work with Little's parents. Trudy Noemda's testimony on the interactions between Accused 3 and Little, is in contrast convincing, and reliable and must be accepted. Her

evidence is moreover corroborated by that of Little who also testified that Accused 3 had made enquiries about him from Noemda.

[89] Other aspects concerning Accused 3's testimony about Little were also contradictory and did not stand up well to scrutiny. Whilst in his evidence in chief he was at pains to distance himself from Little whom he perceived as a person of lesser calibre, with whom he did not communicate, he nonetheless said he offered to help Little find a job. Under cross examination he could not explain satisfactorily, why he would offer to assist Little in this way, given his low opinion of him. Nor could he satisfactorily explain how Little knew his address or that his brother had a construction company. Accused 3 was also not able to satisfactorily explain the coincidence of Little being in his area at the Shell Select Store on the evening of 9 November 2000 at precisely the same time as him, in the absence of the conspiracy theory. His retort that Little said he was attending a party in the area was unconvincing and in my view a feeble attempt at trying to get out of a tricky situation.

[90] His denial that he had phoned Mrs Little on the evening of 8 November 2000 and discussed a job for Little is unacceptable in the light of Mrs Little's evidence on this point corroborated both by Little and Exhibit "M", the scrap of paper upon which Mrs Little wrote his phone number. His suggestion instead that Mrs Little was lying about the phone call to protect her son, is in the circumstances ludicrous. The evidence of Mrs Little contrary to that of Accused 3 stands.

[91] His evidence on the burglary version was self contradictory. His version as put to Little, and his co accused was that Accused 1 and 2 had come to burgle his house that night because they had heard from Little that he was a wealthy person with a big house. Under cross examination when pressed on this version, he contradicted himself saying he had no idea why the thugs had come to his house and then, astonishingly, said that he was not in a position to say where his counsel had got the information that they had come to rob him, from. Nor could he explain why, if Accused 1 and 2 had come to burgle, they did not run away immediately. Accused 3, one of their victims made his escape, probably to contact the police, but remained in the house. He further offered no explanation as to why his cell phone would have been called from one of his attacker's cell phone, that of Accused 2 at 22.07 and again at 22.09 after his escape.

[92] Another anomaly in relation to his version about the burglary, is his admission under cross examination to having no valuables in his house and therefore not being able to say why someone would choose to rob his house. His evidence is that the intruders repeatedly enquired what his and the deceased's names were and he could not explain why, if they were there to rob them they did not ask for money. In response to cross examination on this anomaly, he changed his evidence to give credence to the burglary, and for the first time mentioned that the video recorder was stolen. Yet he is unable to explain why this had not been reported to the police.

[93] He lied outright that the owner of the house, at St Kilda Road, rented by the deceased and him had agreed to extend the lease upon its termination in December 2000. This was proved to be an untruth from a note to the contrary signed by the landlord, handed in as an exhibit by the state, another one of many troubling aspects of Accused 3's testimony.

[94] A further unsatisfactory aspect was his vague and evasive testimony about his family life, marriage and work record. He was at pains to present a picture of a happy married life with normal ups and downs and an image of himself as a caring parent. In his anxiety to do so, he portrayed a barely credible and unrealistic picture of domestic harmony during the troubled time when he was separated from the deceased, and deftly suggested that his wife's extreme unhappiness as recorded in her diaries related to the period before this separation. This of course is in contrast to the more realistic and credible testimony of the deceased's mother, about this aspect. He was evasive about the reasons for his separation from his wife, mentioning emotional and financial pressures in vague terms.

[95] Equally evasive was his testimony about his work record, not being able to recall what employment he had prior to 1998, and being unable to explain precisely what was the work he did. His evidence on this aspect ranged between declaring himself self importantly to be some kind of consultant who was at times between contracts, to someone with bouts of unemployment during which he could always work for his brother's construction company, to an unemployed husband whose wife was the main bread winner, accepting financial assistance from his in laws.

[] His carefully crafted image of himself as a man of the world with contacts who gets around, with a happy and stable family life living close to domestic bliss in the up market suburb of Rondebosch East, could not stand up to close scrutiny and I daresay crumbles completely under the credible and qualitatively superior testimony of Mrs Sylvester. His denial that he was in an unhappy marriage from which he and the deceased could not become disengaged, and that his wife planned to leave him once again at the termination of the lease in December 2000, cannot be accepted in the light of Mrs Sylvester's convincing testimony.

[96] Another example of Accused 3 being unable to give satisfactory and convincing explanations to difficulties in his version is his response to the discrepancies between his statement to the police and his testimony in Court. He was unable to explain satisfactorily why in his statement to Inspector Fredericks, Exhibit "P" given on the night of the murder, he omitted to mention crucially his meeting with Little at the shop earlier that evening, or the fact that Sean Oliver gave him a lift to the shop. The statement indicates that he walked there. In argument it was suggested that these discrepancies are reasonable, given the traumatic state Accused 3 was in when the statement was taken that night immediately after the murder. In my view the trauma on its own does not explain away the omission from

the statement of the potentially damaging encounter with Little. He further failed satisfactorily to explain why his meeting with Oliver and Little in particular were not reported to the investigating officer Fredericks, when he was arrested on the day after the murder. Another discrepancy is that the statement refers only to a slight disagreement between Accused 1 and 2 in the bathroom whilst Accused 3's evidence in Court was that Accused 1 and 2 were embroiled in an argument, it seemed they were going to come to blows, and this gave Accused 3 the opportunity to escape. Accused 3 clearly adjusted his evidence in order to overcome these discrepancies, but without success. In the circumstances I accept the veracity of the statement, Exhibit "P" over Accused 3's testimony in Court in so far as the two differ.

[97] Then there is the crucial question of the whereabouts of Accused 3's cell phone on 9 November 2000. It was argued that Accused 3 at some stage became aware that the evidence of cell phone calls received by him from Little on 9 November 2000, would be harmful to his version and give credence to Little's version. Consequently he fabricated the evidence that his cell phone had been in the possession of Sean Oliver for much of the day, to escape implication in Little's conspiracy version. (This would explain why Sean Oliver does not appear in the statement given to Fredericks).

[98] Lee Anne Johnson, (the girlfriend of Sean Oliver who was at Oliver's house when accused 3 allegedly forgot his cell phone there, and with whom together with Oliver the cell phone is alleged to have been all day on 9 November 2000), was called as a witness by Accused 3 to corroborate his evidence that his cell phone had been left at the house of Sean Oliver on 9 November 2000.

[99] The sole purpose of Lee Anne Johnson's evidence was to corroborate Accused 3's evidence that he did not have his cell phone that fateful day. This purpose took on almost the magnitude of a mission as her testimony studiously mimicked with remarkable accuracy that of Accused 3's on the leaving behind and return of the cell phone to him by Lee Anne and her boyfriend Sean.

[100] Lee Anne Johnson also displayed a remarkable almost superhuman memory for detail relating to November 2000, and Accused 3's cell phone, yet her short term memory was found to be lacking. An example of modifying her evidence to support Accused 3's version, is her omission in her eagerness to dispense with the calls received from Little, during evidence in chief, (whilst the phone was in her and her boyfriend's possession,) to explain the longest call received that day, being of 433 seconds duration at 16.51.29. Under cross examination when asked to explain this call, she commits the error of saying that call too was from Little and explains its duration by saying the phone was put on hold. This is an untruth. For from the evidence and cell phone records it is common cause that this particular call did not emanate from the cell phone number Little had access to, namely the phone of Accused 2. On the contrary this call emanated from another cell phone, the same

cell phone number that called Accused 2's cell phone four times on that very day between 12.49 and 14.10.

[101] She also untruthfully states that calls had come through on Accused 3's cell phone prior to 2 pm, when she and Sean Oliver had proceeded initially to Accused 3's house to return the cell phone to him. The cell phone records, Annexure "F" indicates that no calls were made to Accused 3's cell phone between before 2pm that day whilst the cell phone is alleged to have been in the possession of Oliver and Johnson. From the records it is clear that the first call during that time was at 16.51.29. Her testimony was unconvincing in the extreme.

[102] It has been said by Professor Starkie,⁷ a renowned commentator on the law of evidence,

“Where several witnesses bear testimony to the same transaction, and concur in their statement on a series of particular circumstances and the order in which they occurred, **such coincidences** exclude all apprehension of **mere chance and accident**, and can be accounted for by **only one or other of two suppositions, either the testimony is true, or the coincidences are the result of concert and conspiracy**. If therefore the independency of the witnesses be proved and the supposition of previous conspiracy be disproved or rendered highly improbable, to the same extent will the truth of their testimony be established.”

Applying this to the over-rehearsed tenor of the testimony of Lee Anne Johnson, and the arranging thereof to match Accused 3's version, I am of the view that her testimony was as a result of concert and conspiracy with Accused 3, something which was not disproved, is not truthful and must be rejected.

In addition to all of the above there is also the intriguing chance encounter testified to by Accused 3 which lead up to Lee Anne Johnson coming to testify for Accused 3. He said he met her quite by chance at Pick and Pay some 14 Months after the murder and asked her if she would testify on his behalf. Now, on his own admission at that time he did not know that evidence pertaining to cell phone calls received on his phone would be relevant or that the whereabouts of his cell phone on 9 November 2000 would be in issue. He said he only got knowledge of this after the commencement of the trial. Given that the only relevance of Johnson's testimony pertained to cell phone calls why the need to ask her to testify at that time? This account too, must I believe, be fabricated.

[103] A careful assessment of the content and quality of the testimony of Accused 3, and Lee Anne Johnson about the cell phone whereabouts, and the contrasting thereof with the testimony of Little, leads I believe to the conclusion that the evidence about the cell phone being with Sean Oliver from the morning until 21.30 that day, is fabricated and must be rejected. This finding is fatal for Accused 3 for it

⁷ Referred to in an Article by H C Nicholas JA, entitled “CREDIBILITY OF WITNESSES”, SALJ Vol 102 1985 at page 35

places the cell phone very firmly in his possession for all of the day of 9 November 2000, and marks him as the recipient of all calls, including those of Little and the inexplicable call received at 16.51.29.

[105] Then there is the question of the mysterious call at 16.51.29 in relation to the conspiracy theory of Little's. Despite the denial of the conspiracy theory between himself Little and his co accused, Accused no 3 is unable to explain why the same person who called Accused 2's phone four times that day, called him later that afternoon. Accused 2 suggested the caller to have been Jason Claassen, from the evidence of Little the call could have been made by the infamous "Green Eyes " around that time. The identity of the caller is unclear, but what is clear is a link between a third party and both Accused 3 and Little and company that day, which, given the evidence, further corroborates Little's hired killer version.

[106] A final and fatal flaw in Accused 3's testimony is, I believe the 5 minute time frame within which his version asks, one accepts the undressing of the deceased, her sexual assault, the filling of the bath, drowning of the deceased and ransacking of the house (as depicted in the photographic exhibits), occurred. He was, not surprisingly, simply unable to explain how it was reasonably possibly true, during the 5 minute period in which he left the house and phoned the police at 22.05, and his return, Accused 1 and 2 could have undressed his wife, filled the bath sexually assaulted her and ransacked the house.

[107] I am not satisfied that the truth has been told by Accused 3. His testimony indicates that his version was concocted.

Assessment of the Evidence and version of Ricardo Little

[108] Little's evidence is that of an accomplice, to which the cautionary rule requiring one to be astute to the special danger of convicting on the evidence of an accomplice, applies. The rule has been aptly set out in **Sv Hlapezulu⁸ where at 440E-Holmes JA stated "It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First he is a self confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit."**

[109] It has also been said **" the most satisfactory way of meeting the dangers of accomplice evidence, is by corroboration implicating the accused, but it will also be reduced if , for instance the accused proves to be a lying witness or if**

he does not give evidence to contradict or explain that of the accomplice or if he implicates, in addition to the accused, someone near and dear to him and against whom he has no ground for rancour Even in the absence of such features a conviction will still be possible if the merits of the accomplice as a witness and the demerits of the accused are beyond question”⁹. In *S v Francis*¹⁰ it was held that it is not necessarily expected that the accomplice’s evidence should be wholly consistent and wholly reliable or even wholly truthful; the ultimate test, after cautiously considering the accomplice’s evidence, is whether the court is satisfied beyond reasonable doubt that in its essential features the story he tells is a true one.

[110] I set out to assess Little’s evidence in general and to consider how it counters the dangers inherent in the testimony of an accomplice. Regard being had to the general quality of Little’s testimony, his consistency within the context of his own version, his candour, personal interest in the outcome of the matter, his demeanour and crucially the extent to which his testimony is corroborated by others, I find Little to be a credible, reliable and truthful witness.

[111] In addition to his own testimony, there is sufficient corroboration of crucial aspects of Little’s version to lend credence thereto. To begin with his evidence that Accused 3 showed an interest in him and made enquiries about him at work from Trudy Noemda, prior to approaching him about the killing is corroborated by Trudy Noemda and ironically even by Accused 3 in his eventual concession on this point under cross examination. Then Little’s testimony that Accused 3 phoned Little’s mother on the evening of 8 November 2000 purportedly to offer him a job is corroborated by the evidence of Mrs Little herself.

[112] The evidence pertaining to the crucial cell phone call made at 20.01.15 to Accused 3 (setting up arrangements for the killing on Little’s version), is corroborated both in the oral testimony and statement, Exhibit “R”, of Nasreen Adams and Little’s evidence regarding cell phone calls generally, is satisfactorily backed up by the cell phone records. I accept Little’s evidence that he spoke directly to Accused 3 on the occasion he phoned the latter’s cell phone at 20.01.15 from Ackermansfield, on 9 November 2000.

[113] His testimony about Accused 1, 2, 3 and himself meeting on that fateful night to discuss arrangements after he and Accused 3 came out of the shop is corroborated by the testimony of Nasreen Adams on this aspect, as well as in her statement, Exhibit “R”.

[114] His evidence about fetching a balaklava from Accused 2’s house is corroborated by that of the police as well as the photograph of the balaklava being Exhibit “D” As is his evidence that Accused 1 and 2’s fingers were taped with black insulation tape, given the testimony of Fredericks that black insulation tape matching

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the roll in the car was found in the house.

[115] It was suggested that a credibility finding be made against Little because he testified to telling the police when they encountered him at Accused 3's house, that he was fetching a friend there, whilst the testimony of the police was that he was fetching Julian. A discrepancy of this nature is of little consequence when viewed against the backdrop of Little's corroborated evidence. Issue was also taken with the fact that Little could not remember some of the cell phone calls recorded on Exhibit "F". Little, I believe ought to be commended for simply admitting he did not know about these calls instead of adjusting his evidence to explain them. I do not agree with the further cause for credibility findings against Little suggested, namely the fact that Little's version excluded himself from the actual killing, and Little's explanation on why he came clean to the police. Little's evidence regarding this is acceptable, namely, that the plan was that Little, being slighter than Accused 1 and 2 would not engage in the actual killing but would man the getaway car instead. Little's explanation on why he came clean is also acceptable.

[116] Little's Testimony has, I believe satisfactorily met the dangers inherent in accomplice evidence, referred to above. There is corroboration of his evidence which implicates the three accused. Little has also implicated two very close friends in Accused 1 and 2 against whom he had no ground for rancour. The merits of Little as a witness and the demerits of the three accused are simply beyond question. I am satisfied that the account told by Little is in its essentials true.

[117] It was argued by Counsel for Accused 1 that his version whilst strange, was reasonably possibly true. Counsel for accused 2 and 3 also argued that their versions were reasonably possibly true. The respective versions of Accused 1, 2 and 3, in my view may at best only be probable, in the same way that anything may be probable, and therefore cannot be accepted. For, as was so aptly put by Denning J, in the English case of *Miller v Minister of Pensions* [1947] All ER 372 (King's Bench) it was said at 373H by Denning J: "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice". This wisdom is particularly apt to the present case. About the versions of Accused 1, 2 and 3 it can be said, "Of course it is possible but not in the least probable". This is a standard well below that of "reasonably possibly true", the Accused are required to meet.

[118] I was reminded also of the rules which govern the assessment of circumstantial evidence in a criminal case, namely (a) the inference sought to be drawn must be consistent with all the proved facts, and (b), the proved facts should

be such that they exclude every reasonable inference from them save the one to be drawn¹¹. In applying these rules to the totality of the evidence I am satisfied that the only inference to be drawn is that Accused 1, 2 and 3 conspired with a common purpose to murder the deceased as a result whereof her murder was executed.

I am accordingly satisfied that there is proof beyond reasonable doubt that Accused 1, 2 and 3 are guilty of the murder of the deceased as charged.

[119] On the second count of indecent assault, the state submitted that there is not a proper factual basis for a conviction on sexual assault in respect of Accused 3, as from the evidence one does not know if he was present when the sexual assault occurred, and consequently whether there was a common purpose between him and Accused 1 and 2 to commit that particular crime.

In respect of Accused 1 and 2 however, the state argued, that they effected the death of the deceased and the indecent assault in the bathroom in concert and with a common purpose and should accordingly be found guilty on the second count. There is merit in this argument. It is common cause that Accused 1 and 2 were in the bathroom with Tanya Sylvester, their wet clothing also establishes this. There is no evidence that either one of them was not present when she was indecently assaulted before her death. Nor indeed that either one of them did not participate in the indecent assault or attempted to prevent it. Accordingly I am satisfied that the only inference to be drawn is that Accused 1 and 2 indecently assaulted her with a common purpose. I am therefore satisfied that there is proof beyond reasonable doubt that Accused 1 and 2 are guilty of indecent assault as charged.

[120] I am satisfied that Ricardo Little Answered all questions put to him frankly and honestly in terms of Section 204 of the Criminal Procedure Act, No 51 of 1977. He is accordingly in terms of the said section discharged from prosecution with regard to the offences specified in the charge sheet and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offences so specified.

Accused 1, you are found guilty as charged on:

Count 1, Murder

Count 2, Indecent Assault.

Accused 2, you are found guilty as charged on:

Count 1, Murder.

Count 2, Indecent Assault.

Accused 3, you have been found guilty as charged on:

Count 1, Murder

MEER, A.J.