

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

**CASE NO CC 101/2002**

In the matter between:

**THE STATE**

and

**LUYANDA MBONISWA**

**Accused**

**THIS JUDGMENT DELIVERED ON THIS 13<sup>TH</sup> DAY OF MAY 2003**

**HLOPHE, JP:**

1.The accused, a twenty-two year old adult male, was charged with:

- 1)Murder;
- 2)Robbery (with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977); and
- 3)Housebreaking with intent to commit a crime unknown to the State.

2.The State alleged that these crimes were committed on or about 02 December 2001 at Dolphin Beach, Cape Town, upon the deceased, Mrs Marike de Klerk, the former first lady.

3.At the beginning of the trial, the State made an application to add a fourth charge to the indictment, namely **rape**. The defence counsel did not object to the application to amend the charge sheet. However, defence requested an explanation as to why the charge was introduced at such a late stage. In the circumstances the Court allowed the application to

amend the charge sheet.

4.The accused pleaded “**not guilty**” on all four charges. Defence counsel confirmed that the plea was in accordance with instructions. The accused exercised his constitutional right to remain silent. There was no section 115 Plea statement handed up to the court and no indication was given to Court as to the accused’s defence.

5.Ms T **Heunis** SC, together with Ms M **Tsheole**, appeared for the State throughout the proceedings in this case. The accused was represented in Court by Mr P **Gamble** SC, who appeared together with Mr S **Mohammed** and Mr H **Rossouw**.

6.On the first day of the trial, immediately after the accused had pleaded not guilty, the Court was asked to adjourn the proceedings in order to carry out an *Inspection In Loco* at Dolphin Beach Complex, the scene of the crimes in question. On arrival at the scene the Court was shown the Security Guards’ Control Room, which is at the entrance of the complex and opposite the storeroom that is also used by the security guards. The accused was having his meal in the storeroom when the Police came to arrest him.

7.On the way to the deceased’s apartment, the Court was shown a rover point, one of ten where the security guards had to check in when patrolling the complex. In the apartment the master bedroom was pointed out to the Court. The deceased’s body was allegedly discovered in the master bedroom. All the other rooms of the apartment were inspected as well. During evidence reference was constantly made to “Exhibits A and "B" which contained photographs of the apartment and the complex.

8.The exterior of the apartment was also inspected and measurements of the wall, which may have been used in order to gain access to the apartment, were taken. On part of the wall a camera was situated which, it was alleged, was not working on the evening of the commission of the crimes in question. It was noted that on the beach side of the complex, there is no security fence. The basement parking was also observed, and the parking bay of the deceased where her car was found.

9. Thereafter, the Court proceeded to the Total Filling Station where the accused was alleged to have been seen and to have made telephone calls on the night of the murder. The Court was also shown the room in which the video camera recorders were installed for purposes of security. It was pointed out to the Court that one of the cameras in question took photographs of the accused when the latter visited the Total Filling Station on the night of the alleged killing of Mrs de Klerk. The *Inspection In Loco* minutes were handed up to Court by agreement between the parties and marked as “Exhibit R”. The document speaks for itself.

### **The evidence**

10. The State called several witnesses in support of its case. In essence the State’s case was to the following effect. Kelvin Cornelius, a security officer who was a section leader at the Dolphin Beach Hotel complex, testified that at 16h00 on the 4<sup>th</sup> December 2001 the security guard who was patrolling the complex (Vernon Bosch) informed him that the deceased’s beautician had come for the second time to the security office where he was stationed, at the front of the complex and informed him that the deceased had missed her appointment. She then requested that Cornelius accompany her to access apartment D102, being that of the deceased. They were unable to gain access through the front door, which was locked. Ntshuba, a fellow security guard at the complex had advised him to get into the flat via rover point 9. Cornelius attempted to climb the wall at this point but failed. Ntshuba then brought a ladder which Cornelius used to get to the balcony. He then tried to access apartment D102. The third sliding door from the left opened and he entered what he identified was a bedroom after lifting aside a curtain. He entered the bedroom and saw a body lying on the floor, which he was able to identify as that of Mrs de Klerk. He checked but he could not find a pulse and so he took a sheet from the bed and covered the body. The beautician, Yolanda Wright, had also climbed up the ladder and had entered the apartment. Then Myra Roux, a neighbour, heard Wright’s screams and also arrived. The police were called. Kruger, the Dolphin Beach Manager, unlocked the front door that leads to the lift. Cornelius then showed him the body. Cornelius noticed a thin line of blood on the wall, and a blood spot on the carpet. The police then

arrived. They were two constables from Table View.

11. Cornelius also testified that the accused was supposed to be on duty on Monday the 3<sup>rd</sup> December 2001, but did not arrive. Ntshuba told him that the accused had been in the Complex late the previous night. Cornelius said he was upset to hear that because the security guards had instructions that they should not be in the Complex when they were off duty. When the accused telephoned Cornelius, he told him that some of his goods had been stolen when his residence was broken into. Cornelius advised him to report the matter to the Police. Cornelius further testified that when he was patrolling he found a pocket torch, about 10 (ten) centimetres long. He thought it belonged to the accused as he liked gadgets, like cellular telephones. The accused only reported for work on Wednesday the 5<sup>th</sup> December 2001. Cornelius told the accused that the Police would approach him first because he was the last on the premises. Asked what the accused's response was to that, Cornelius said the latter said "I know". Later that afternoon the Police came and arrested the accused.

12. Cornelius told the Court further that he usually asked the cleaners for rubber gloves for the security guards to use when cleaning their toilets. A pair of similar gloves was handed up to Court and marked as "Exhibit 8".

13. Yolanda Sharon Wright, the deceased's beautician, corroborated Cornelius' evidence that she arrived at the Dolphin Beach on the 4<sup>th</sup> December 2001 to look for Mrs de Klerk, as she (the deceased) had an appointment with her the previous day at 13h00. She further testified that, after trying several times to get hold of Mrs de Klerk in vain, she decided to go to the Dolphin Beach. Wright said that she was concerned because Mrs de Klerk had never missed an appointment, and furthermore Mrs de Klerk had not responded to the message that Wright had left on her landline answering machine. The cellular telephone was off and there was no voicemail to allow Wright to leave a message. Wright further corroborated Cornelius' evidence regarding the way they gained access to the deceased's flat, confirming that the third sliding door was unlocked. She

further testified that the body of the deceased was found lying in the positions portrayed in “Exhibit A” Photographs 1 and 2.

14. Myra Dawn Roux testified that she occupied apartment CG04 at the Dolphin Beach Complex. Roux stated that on the afternoon of the 4<sup>th</sup> December 2001 she had heard screaming outside the apartment occupied by the deceased. She exited her apartment and found a security guard standing outside holding a ladder against the balcony of the deceased’s flat. She ascended the ladder and entered the apartment. She found a woman kneeling over a body which had been covered by a sheet. She proceeded to lift the sheet and confirmed that the body was that of Mrs de Klerk. She then asked Cornelius, a security guard who was also present, to fetch sugar water for herself and the distressed woman who was hysterical. She also asked Cornelius to call the police. She went to look for a telephone and found a piece of paper beside the telephone which contained some numbers, including one for the deceased’s daughter, whom Roux proceeded to phone. She could not recall whether she had phoned any of the other numbers on the list. The police were then phoned. When the police arrived she was told to leave the apartment.

15. Another witness was Sipho Kem. He gave evidence to the effect that he was working as a night auditor at the front reception of the Dolphin Beach Hotel, on the night of the 2<sup>nd</sup> December 2001. He told the Court that he received a telephone call from the accused at 23h45 on the 2<sup>nd</sup> December 2001. The accused told him that his friends had left him behind at the beach after they had been drinking. He asked to borrow his car in order to use it to go home at Khayelitsha. Kem declined to lend the accused his car. Kem phoned the security office situated at the entrance of the complex and informed Ntshuba, one of the security officers who was on duty, that he had been phoned by the accused, asking to borrow his car. Ten minutes later the accused came into the reception and again requested use of Kem’s car. Kem again declined. Kem observed that the accused appeared to be “in a great hurry”. Kem stated that the accused was wearing a dirty white T-shirt, dark pants and a green cap. Kem was a credible and reliable witness, remaining consistent after extensive cross-examination.

16. Nicholas Fredsen, who was a security guard with Securicor Gray Services, testified that he was on duty for the night shift on the 2<sup>nd</sup> December 2001 at Dolphin Beach. He arrived on duty at 17h25. He gave evidence to the effect that there were two guards on duty that night, himself and Mkhululi Ntshuba. He testified that the patrol procedure was that one of the guards would conduct a patrol of the complex which lasted 50 minutes and involved criss-crossing the complex and placing a key in all ten of the rover points, while one guard remained in the security office for access control purposes. Fredsen gave evidence in regard to the fact that each fifty-minute patrol would be followed by a twenty-minute rest period, during which time both of the security officers on duty would be together in the Control Room. The times and any relevant details of these patrols would be noted in the occurrence book. Copies of the occurrence book for the night of the 2<sup>nd</sup> December 2001 were handed up to Court as “Exhibit O”. Fredsen also gave evidence in respect of a phone call made by the accused to the security office. He testified that he had answered the phone and then passed it to his colleague, Ntshuba, who had a discussion with the accused. Fredsen stated that the accused had then come to the security office, and he passed and greeted the accused as he was leaving at 00h30 to start his patrol round the complex. Fredsen corroborated the testimony of Kem in respect of the clothes that the accused was wearing. He stated that the accused was wearing a dirty white T-shirt, blue jeans and a cap. He was a credible witness, remaining consistent in the face of lengthy cross-examination. He gave evidence in a straightforward manner. I am quite satisfied that his evidence may be safely relied upon.

17. Mkhululi Ntshuba gave evidence which corroborated a number of other witnesses’ evidence. Ntshuba was a security officer who was on duty on the night of the commission of the crimes in question. He gave evidence to the effect that the accused telephoned him from Blouberg and told him that his friends had left him behind at the beach after they had been partying. The accused further told Ntshuba that he wanted to come and borrow Kem’s car. Later the accused phoned Ntshuba again and told him that Kem had refused to lend him his car. He mentioned that he would be coming to the Dolphin Beach Complex to make further oral representations to Kem. Ntshuba saw the accused when he came to

the complex, wearing the same clothes as described by Kem in his testimony. Ntshuba, like Kem, said that although he looked like someone who had been drinking as his eyes were red, the accused was not drunk. The white T-shirt that he was wearing was dirty, but his speech and walk were normal.

18. In further corroboration with Cornelius, Ntshuba said that on Tuesday the 4<sup>th</sup> December 2001 Vernon Bosch had told him that Yolanda Wright was looking for the deceased. Ntshuba also testified that he last saw Mrs de Klerk on Sunday evening, the 2<sup>nd</sup> December 2001, alone in her car. Ntshuba also testified that he failed to make an entry in the occurrence book detailing the presence of the accused at the complex after hours. Consequently Cornelius asked him to write a report describing the incident. Despite lengthy cross-examination, Ntshuba emerged as an honest witness whose evidence could be safely relied upon.

19. Two further witnesses, Xolile Mbeka and Denver Collins, who worked for Securicor Gray Head Office at Woodstock testified. Mbeka was on night duty on the 2<sup>nd</sup> December 2001. He gave evidence that the accused called at 04h50 on the 3<sup>rd</sup> December 2001 to say that he was not coming to work as he was not feeling well and was going to consult a doctor. Collins, who was working the following shift, said that the accused called at 07h30 on the same day to say he would not be reporting for duty as he was going to consult a doctor. Both these calls were recorded in the Occurrence Book. (“Exhibits P and Q” respectively).

20. An expert witness from MTN (Mobile Telephone Network), Hilda Hester du Plessis, gave evidence as to how to gain information on the use of a cellular telephone. She had worked for MTN in the Forensic Data Department for six years. She was authorised to release information from the computer to the Police if they needed it for investigating purposes. She gave evidence that the information regarding MTN cellular telephones is not created or punched by a human being into the computer, but it is done electronically. Du Plessis also testified that during the period of November to December 2001, the

system was not faulty at all. She explained to the Court that everything done with the cellular telephone, for example making calls, sending messages etc. is stored in the computer. Even if a call has been forwarded to a voicemail, the computer would capture that. All the data in the computer cannot be altered by anyone.

21. Du Plessis said that they received a request by the Cape Town Police for detailed records of a cellular telephone with the number 083 683 7505. She retrieved the information and it showed that several calls were made from that phone between the 3<sup>rd</sup> and the 5<sup>th</sup> December 2001, using different SIM (Subscriber Identification Module) cards, including the deceased's. Evidence showed that the number "083 683 7505" belonged to the accused. This was not disputed by the accused.

22. The State also led evidence from witnesses who testified that the accused had certain items in his possession, which were later identified as belonging to the deceased. His girlfriend, Nokuzola Victoria Dyasi, said that on the evening of the 2<sup>nd</sup> December 2001 the accused had gone to Table View with her brother. When she spoke to the accused in person in the early hours of the 3<sup>rd</sup> December 2001 he informed her that he had gone to his place of work in order to borrow Sipho Kem's car. She testified that when they went to the accused's room to sleep he counted out approximately R300 in fifty and twenty rand notes. That night the accused slept badly. He was restless and at times gasping for breath. Her evidence was that this was unusual as she had known the accused, with whom she had been in love for about ten months, to be a relatively quiet sleeper who did not even snore.

23. She testified that the next morning she observed that the accused had in his possession a black Nokia 5110 cellular telephone, which she identified as "Exhibit 5", and a gold ladies wrist watch which she identified as "Exhibit 1". She also gave evidence in respect of a phone call made by the accused to his employers informing them that he was sick that morning and would be unable to report for duty. She corroborated Ntshuba's evidence regarding a call that the accused had received from Ntshuba asking



the accused where he was because he was supposed to be starting his shift. She also gave evidence in respect of a request by the accused that afternoon to wash his clothes. On Wednesday the 5<sup>th</sup> December 2001 she received an SMS (**Short Message System** that is written on the screen of the cellphone) from the accused in Xhosa, instructing her to take his blue jeans, the black Nokia 5110 cellphone, the watch and the cap and to hide them. She informed the Court that she threw the cap in the rubbish bin and took the rest of the possessions to her home, including two silver watches because she was unsure which watch the accused was referring to. She then wrapped the cellphone and three watches in a T-shirt, placed them in a bag, and hid them under her brother's bed.

24. In her testimony Victoria stated that the police arrived at her home on Thursday the 6<sup>th</sup> December 2001 and informed her that the accused had been arrested. She gave the police the jeans that she had washed and a pair of Nike tackies with white heels. She testified that these were the ones the accused had been wearing on the night the crimes were committed. However, the accused insisted that she bring another pair which he said he had been wearing. She testified that she handed the bag containing the cellphone and watches to her friend Samuel Mehlwana and asked him to keep them for her. When the police returned to question her she denied knowledge of these goods. However, the accused later told her to hand them over to the police. She then asked Samuel Mehlwana to return them and the latter gave the cellphone and the watches to the police.

25. When Victoria was asked how the accused appeared to be emotionally, she testified that he appeared to be "in grief".

26. Samuel Mehlwana gave evidence that Victoria gave him a plastic bag with three watches and a cellular telephone inside, and asked him to hide it. He said that she told him what was in the bag, and he hid it at his residence. Later the police came to collect the items. This witness identified the gold watch and the cellphone, and said that he recognised them as the items which Victoria had asked him to hide.

27. Mzwabantu Dyasi (also known as "Botyo"), the sixteen-year old brother of Victoria,

was also called. He gave evidence that on Sunday the 2<sup>nd</sup> December 2001, at about 21h00, the accused arrived at his home with another man in a white VW Jetta. The three of them then proceeded to Blouberg. The driver was given directions by the accused, and he dropped them off at the Total Service Station, Blouberg, at about 22h00. The accused paid the driver R150. The accused left Botyo at the garage and said that he was going to his workplace borrow a vehicle. Botyo waited for him for about three hours, and the accused only returned between 01h00 and 02h00. While Botyo was waiting there, one man who worked at the garage phoned his sister to tell her that he would keep him there until morning and give him money to go home, as Botyo was cold and stranded.

28. When the accused eventually returned, they took a metred taxi to Khayelitsha. Botyo testified that on the night in question, the accused was wearing blue jeans, a black lumber jacket and a green cap. He was referred to “Exhibit V”, and confirmed that it was himself and the accused at the Blouberg Total Garage. “Exhibit V” was a printout from a video-tape made by a hidden camera at the garage. Botyo’s evidence corroborated that of his sister in material respects, particularly with regard to what the accused was wearing on the night in question.

29. Petrus Wynand Louw from the Fire Department, Table View, gave evidence that on the 4<sup>th</sup> December 2001 he was called to the Dolphin Beach Complex. On arrival he found two policemen, and saw a body lying on the floor in the master bedroom. The body was covered with a sheet. The two policemen asked him to establish if the person lying on the floor was still alive or dead. Louw removed the sheet and saw a white lady. He used a stethoscope and a machine to establish whether there was life. The machine showed that the deceased was no longer breathing. Louw also told the Court that he noticed that the pyjama pants that the deceased was wearing were pulled down slightly. He then pulled them up, but did not move the body at all.

30. Lansley Freddie Joumar, an employee of Unicab, a taxi company, told the Court that he was alone on duty in the Control Room on the night of the 2<sup>nd</sup> until the morning of

the 3<sup>rd</sup> December 2001. After 01h00 he received a telephone call from someone who needed a taxi from Blouberg to Khayelitsha. Joumar contacted a driver by the name of Lucky and told him that a customer needed to be transported from Blouberg to Khayelitsha. Lucky quoted R300 for the trip. Joumar informed the caller, who was still on the line what the fare would be, and the latter agreed. The caller said he was with a friend at the Total Garage next to the Tempest Car Hire. The caller identified himself as Mboniswa, and gave his telephone number as 083 683 7507. Joumar recorded the information in his occurrence book. The entry page of Unicab occurrence book was handed up to Court as “Exhibit EE”.

31. Joumar said that about thirty minutes later Mboniswa called to enquire how long the taxi would take to arrive at the garage. Joumar called Lucky, who said that he was already at Blouberg and was trying to locate the Total Garage. Joumar conveyed that to the caller, one Mboniswa.

32. Vuyani Lucky Masoka, who was a driver at Unicab, corroborated Joumar’s evidence that he was called on the two-way radio and asked to transport two gentlemen from Blouberg Total Garage to Khayelitsha. The fare of R300 was paid up front by the older of the two, who looked sober and calm.

33. Inspector Andries Gous Visser Delport from the South African Police Services in Table View gave evidence that on the 4<sup>th</sup> December 2001 at about 16h00, he was called to Apartment D102 at the Dolphin Beach Complex. On arrival at the scene he found Cornelius and two white ladies in the flat. He saw a body lying on the floor. It was a white lady wearing pink clothes. The body lay on its back, the arms widespread, the head leaning to the left shoulder, and the legs crossed beneath the body. Delport testified that the position in which he found the body was not the same as that in the photographs in “Exhibit A”. Delport further told the Court that he was surprised, after seeing the condition of the body, that there was no blood on the carpet where the body lay. At this stage the prosecution sought to lead evidence of statements made by the accused to the investigating officer and the magistrate. Both these statements were ruled admissible. I

shall deal with this later.

34. Subsequent to the rulings referred to above, the State called Magistrate Hendrik Johannes Le Roux who gave evidence relating to the contents of the statement made by the accused before him. He confirmed that the contents were recorded verbatim. Le Roux was adamant that he had recorded the statement correctly. He told the Court that he understands Xhosa, and if the interpreter had not properly interpreted he would have picked that up. He testified further that the statement was read back to the accused who was satisfied with it.

35. Mxolisi Edman Maboyana, who interpreted when the statement was made, was also called to testify. He was also of the opinion that the accused understood English well because he (the accused) would respond to questions before he could interpret. He explained to Court that he interpreted Le Roux's questions from English to Xhosa and accused's answers from Xhosa to English.

36. Inspector Marius Malan from Table View gave evidence that he was called to the Dolphin Beach complex on the 10<sup>th</sup> December 2001. Upon his arrival Barkhuizen asked him to search for plastic gloves. He testified that Barkhuizen did not state the colour of the gloves. He told the Court that he found a yellow glove and called Barkhuizen who came to the scene immediately. The glove was then put in an exhibit bag which was properly sealed. He identified the spot where he found the glove as marked by the letter "K" on "Exhibit B". Malan testified that Inspector Arries found the other glove.

37. Inspector Arries corroborated Malan's evidence that Barkhuizen had asked them to look for gloves. He was also not told the colour of the gloves. He confirmed that he found a yellow glove. He identified the spot where he found the glove as marked by the letter "L" on "Exhibit B".

38. John Richard Thebus, who had been implicated by the accused in the statement, told the Court that he knew Mrs de Klerk and that he had met her in September 2000 at a

mutual friend's wedding. Thebus said that his relationship with Mrs de Klerk concerned dancing lessons, although at times they dined together at her apartment. He gave her dancing lessons on Monday evenings, and the deceased would pay him R80, 00 per lesson. Occasionally he would take her to dancing lessons by another instructor in Bellville. He told the Court that he had last seen Mrs de Klerk alive on Saturday the 1<sup>st</sup> December 2001, when they had gone dancing. He was supposed to meet her on Monday the 3<sup>rd</sup> December 2001 for a dancing lesson at her flat. When he arrived at the Dolphin Beach complex on that Monday to see Mrs de Klerk she did not reply on the security intercom. He thereafter went to check if her car was in the basement parking area, and he did not see it. He returned home and telephoned her from his landline. There was no reply.

39. Thebus testified further that on Sunday the 2<sup>nd</sup> December 2001 while at his home he received a telephone call at about 23h30 from a friend, Doris Ricketts which lasted for about forty minutes. He telephoned Doris later before he went to sleep. The Telkom Record of both telephone calls was handed in and marked as "Exhibit HH" and "Exhibit JJ" respectively.

40. Thebus gave evidence that on Friday the 7<sup>th</sup> December 2001 he was detained by the police. He told the Court that when the police arrived at his house they said he had been implicated in the murder of Mrs de Klerk. He was questioned by the police and later taken to a District Surgeon who took some blood samples from him. He also agreed to be subjected to a lie-detector test. On Saturday the 8<sup>th</sup> December 2001 he was released. When the police came to search his house on Tuesday the 11<sup>th</sup> December 2001, they asked for a pair of black shoes and said that the accused had told them that on the night of the commission of the crimes he had been wearing it. Thebus testified that on the night in question he had been wearing tan, and not black shoes. However he gave the police black shoes because they had asked for them. The police also took a pair of trousers and a waistcoat. When he was asked whether he told the police that he was wearing tan and not black shoes on the night in question, Thebus answered in the negative. On the 11<sup>th</sup>

December 2001 Thebus then made a statement to Sergeant van der Merwe at the Bishop Lavis Police Station.

41. Thebus adamantly denied all allegations made by the accused against him. He told the Court that the conversations between himself and the accused only went as far as greeting him and thanking him at the gate. He told the Court that he knew nothing about the killing of Mrs de Klerk and that he was not at all involved in planning to rob or steal the deceased's valuables and that he was at home on the night of the alleged crimes.

42. Inspector Craig Shane Hale testified that on the 4<sup>th</sup> December 2001 between 14h00 and 15h00, he was called to the crime scene to take photographs of certain exhibits. He confirmed having taken photographs of the gloves shown in "Exhibit GG". After he had done so, Captain Bartholomew put the gloves in separate exhibit bags and sealed them in his presence. Hale told the Court that he took the photographs of two red Mercedes Benz's. One car belonged to the deceased and the other belonged to one Vos who also resided at the Dolphin Beach complex.

43. Detective Constable Speed testified that on the 12<sup>th</sup> December 2001 he had been instructed by Barkhuizen to take the accused to Karl Bremer Hospital for medical examination. Speed told the Court that he and Barnard took the accused to hospital, where the latter was examined by Dr Jentel. Speed testified that Dr Jentel drew blood and hair samples from the accused and placed them in a crime kit.

44. Speed gave evidence of the integrity of crime kits. He told the Court that a crime kit was handed to the doctor who broke the seal in his and accused's presence. In the crime kit were two glass containers for samples and two small envelopes for hair samples. Once these samples had been taken they were returned to the crime kit sealed properly.

45. Speed told the Court that this seal was stamped with a number and the usual procedure would be for the Doctor to note the seal number, in a place provided on the J88 form ("Exhibit DD") but in this instance Dr Jentel had not done that.

46. Speed testified that he had noted the number down in his pocketbook, along with other notes relating to the examination. This particular page of the pocketbook was handed up to Court as “Exhibit KK”. Speed testified that he had then been handed the sealed crime kit by Dr Jentel. He told the Court that he had returned to Bishop Lavis and the crime kit, along with the J88 (Dr Jentel’s report) and the SAP 308 (giving the doctor permission to examine the accused), were secured in his office. Speed testified that the kit and the forms were placed in a padlocked cupboard, for which there were only two keys, both of which were kept by him. The kit was retrieved later that day and handed to Barkhuizen.

47. Speed testified further that he had been instructed to return to Dolphin Beach on the 11<sup>th</sup> December 2001, in order to assist Superintendent Dreyer and members of Technical Support as record keeper during the search of the deceased’s apartment. He had accompanied Barkhuizen to the main bedroom of the apartment. They opened an ottoman inside which was a blue blanket. Underneath the blanket they found a black plastic knife handle that was handed in as “Exhibit 7”. They had also removed samples of the blue blanket, which was marked by visible stains that required analysis. They had also removed a note made on a memo pad beside the deceased’s bed, as well as her computer hard-drive and an MTN SIM card from the deceased’s study. They entered the spare bedroom and removed a letter addressed to the Dolphin Beach Complex, a purchase certificate for a ladies watch, as well as an item from the fax machine which indicated that a fax had been sent late on the evening of the 2<sup>nd</sup> December 2001. A copy of the fax was handed in as “Exhibit NN”.

48. Speed also testified that on the 11<sup>th</sup> December 2001 he had gone to the home of Thebus to assist Van der Merwe to collect clothing allegedly worn by Thebus on the 2<sup>nd</sup> December 2001. He told the Court that Thebus brought out certain items, namely a cream pair of trousers, a blue jacket and a pair of black shoes. He informed Thebus that he also wanted a blue jacket with a zip. Thebus gave him permission to search in his room but

the only blue jacket he could find was without a zip. He took same, along with the other items of clothing given to him by Thebus.

49. Captain Bruce Stuart Bartholomew from the Criminal Record Centre in Cape Town told the Court that on the 5<sup>th</sup> December 2001 he was called to Dolphin Beach. On arrival he saw two yellow gloves that had been found near the spots marked “K” and “L” on “Exhibit B”. One of the gloves was damp and had red spots which looked like blood. He put the gloves in separate exhibit bags and sealed them. When he was in his specially equipped vehicle, he carefully opened the exhibit bag with the damp glove slightly. The reason was to let air in so that the damp glove could be dry, in order to avoid contamination before tests were conducted.

50. Captain Sietze Sibbo Albertse, who worked at the Criminal Records Centre in Pretoria, gave evidence that Bartholomew brought exhibits to the Pretoria centre on the 11<sup>th</sup> December 2001. The exhibits were two gloves which had to be tested for finger prints. However, the finger prints taken could not be positively matched to anyone.

51. Senior Superintendent Helena Johanna Ras from the Forensic Science Laboratory in Pretoria told the Court that she received two gloves from Captain Albertse. She said the gloves were in separate sealed bags, which were in a bigger bag that was sealed as well. In one of the gloves a hair was found, and it matched Mrs de Klerk after being tested. Ras then sent the exhibits to the administration department in the Biology Unit so that they would be returned to Cape Town.

52. Senior Superintendent Petra Johanna Hennop from the Forensic Science Laboratory in Kuilsriver, Cape Town, told the Court that on the 24<sup>th</sup> December 2001 she handed over an envelope to Captain Salie, who works in the same laboratory. She had no idea what was in the envelope. She testified further that when she visited the scene of the crime she saw stains on the bathroom mat, which she thought were semen stains. Tests were conducted and there were no positive results to show that it was semen.



53. Professor Gideon Jacobus Knobel is a well-known Registered Specialist Pathologist employed by the Western Cape Department of Health as a Chief Specialist. He is also employed by the University of Cape Town as Head of the Department of Forensic Medicine and Toxicology. Furthermore he is a Consultant at Groote Schuur Hospital.

54. Professor Knobel gave evidence that on the 4th December 2001, he was called to the Dolphin Beach, the apartment of the deceased. From his first impression, it was clear that the deceased was assaulted and had possibly been strangled as she had bruises all over her face and arm. On examination of the genitals, he was of the opinion that the deceased had possibly also been sexually assaulted. He testified that he had mentioned this at the scene. He then took an extensive range of specimens using swabs, which were handed to the police. He also took some rough notes which he later transcribed into a report.

55. The following morning, at 08h30, he commenced with the post-mortem examination of the body. He concluded in his chief findings in his report that the deceased had died of manual strangulation and the consequences thereof. This conclusion was a result of the following observations:

- The body had a number of contusions and scratches
- The fractures of both horns of the hyoid bone
- The fractures of both upper horns of the thyroid cartilage
- Haemorrhages and contusions in the deep muscles of the neck on the right, in the right submandibular gland, and in the posterior wall of the hypopharynx
- A subconjunctival haemorrhage in the right eye, with petechial haemorrhages in the inner aspect of the lower lid of the right eye
- Other findings included a stab wound below the left shoulder
- Early changes of decomposition and autolysis of internal organs
- Both lungs were heavy and congested

56. Professor Knobel maintained that, when he examined the body in the flat he observed

a slimy mucus-like substance in the genitals. Later, after conducting some tests on that mucus, he found "phosphotase acid". This, Prof. Knobel testified, may be secreted either by the testes or the vagina. For this reason, he could neither include nor exclude the possibility that the deceased had been sexually assaulted/abused. He testified further that he was still of the opinion that the deceased may have been sexually assaulted, and that he could still neither confirm nor exclude that possibility.

57. Doctor Lorna Jean Martin, a pathologist at the University of Cape Town, was also called as a witness. She gave evidence that on the 1<sup>st</sup> August 2002 she was asked by Professor Knobel for an opinion on the report that he had compiled after conducting an *in loco* examination as well as the autopsy of Mrs de Klerk. She had not been involved in the autopsy as she had been on leave between the 1<sup>st</sup> and the 10<sup>th</sup> December 2001. Her examination was therefore based on the photographs in "Exhibit G". She told the Court that in her career she had conducted ninety-five (95) autopsies on sexually assaulted females, ranging from eight month to eighty-eight year olds. She gave evidence that she noticed erythema (redness) on the genitals of the deceased, which highly suggested that she had had non-consensual sexual intercourse. She testified further that signs showed that there had been penetration of a blunt object, such as a male penis. Dr Martin said the reason why she came to that conclusion was because the injuries were at the entrance and went about ten (10) centimetres deep into the deceased's genitals, as it could be seen on the photographs in "Exhibit G".

58. Dr Martin testified that when Prof Knobel asked her to have a look at his report she had no idea that the deceased might have been raped. She concurred with Prof Knobel with regard to the fact that the possibility that the deceased had been sexually abused could not be excluded. Dr Martin's further evidence was that the deceased might probably have been sexually abused about an hour to two hours before her death. However, she conceded in re-examination that it could have been longer than two hours, but not longer than four hours. She also told the Court that the State had provided her with Prof Knobel's report and that she had perused it out of interest and also in preparation for her testimony.

59. Dr Martin testified that she had never discussed the merits of the case with Prof Knobel. She conceded in cross-examination that her report was based purely on the photographs and Prof Knobel's report that she had read. She said that she had not physically examined the deceased at the scene as Prof Knobel had done.

60. Prof Knobel was recalled to the witness stand for purposes of further cross-examination. In cross-examination he stuck to his previous evidence that when he performed an autopsy on the deceased, he did not immediately conclude that she had been raped. However, he could not exclude the possibility of sexual assault. When asked why he had sought Dr Martin's opinion as late as around August 2002, when he was already preparing for the trial, Prof Knobel answered that there was a rumour that he had changed his report, and therefore he wanted her opinion for transparency.

61. Superintendent Sharlene Otto, a DNA expert from the Forensic Unit in Cape Town, told the Court that she has seventeen (17) years' experience as a DNA expert. She explained to the Court the procedure of DNA testing in detail.

62. She said that the DNA found on the sweat specimen which was found in the yellow gloves matched the accused. However, she conceded that the DNA did not match the accused only, but also traces of other DNA. The DNA from inside the glove was of poor quality and insufficient to give to the defence for testing. Accordingly there is no definite reliance that can be placed on DNA evidence *in casu*.

63. Mr Hermanus Jacobus Visagie, an operational specialist at Telkom, testified in respect of the calls that were made between the 2<sup>nd</sup> and the 3<sup>rd</sup> December 2001. He corroborated Du Plessis's evidence in material respects. He confirmed telephone calls that were made at the Total Garage in Blouberg. He further assured the Court that the details of all calls were recorded electronically by the computer, no human being can tamper therewith. Visagie also testified that the telephone systems at Telkom were in order during the period when those calls were made.

64. Mr Grant Devenish Carnell, who was Head of Radio Network at MTN, explained to the Court how data is recorded at MTN. He said that various stringent tests are done, for example parity checks, which are designed to eliminate/minimise any possibility of errors in the data records. Carnell stressed that a call is recorded once it is answered and sent electronically to what is called “Input-Output Group” (IOG), and therefore if a call did not take place it can never be recorded. He further explained that the records can even show how a call has been terminated, for instance, whether the signal went dead or it was terminated manually by the caller or the receiver of the call.

65. Mr John Richard Collier worked for ISIS Wholesale Billing, which is a sub-contractor to MTN. He was a computer expert and had worked as a computer software developer from 1974, i.e. he has more than twenty (20) years’ experience with the computers. He joined MTN in 1995. Collier corroborated the other experts’ evidence that there can be no human interference with the processing of telephone call data. He explained to the Court that a record of a call cannot be fabricated, and all information is stored electronically by the computer. He also stated that about twenty (20) million calls are made a day, and the system is always accurate.

66. The last witness called by the State was Detective Superintendent Michael Anthony Barkhuizen. Barkhuizen who has twenty-nine (29) years’ experience as a policeman. He told the Court that on the 4<sup>th</sup> December 2001 at about 17h20, he received an instruction from Director Booysen, who was the Provincial Director of the Serious and Violent Crimes Unit, to go to Apartment No D102 Dolphin Beach Complex in Blouberg, the flat being that of the former first lady Mrs Marike de Klerk. He was informed that there had been a sudden death and he had to investigate the matter. When he arrived at the scene he found Detective Superintendent Tobias Johaan Roelofse who was based at the Table View Police Station at the time. Inspector Leggett, who was on stand-by at the Table View Police Station, as well as Captain Basson were also present.

67. Upon arrival at the scene Barkhuizen enquired about the circumstances of death. He

told the Court that at the time it had not been established whether the deceased had died naturally or unnaturally. However, he immediately formed the impression that the deceased had been murdered as she had bruises on her face and under her jaw, and there was blood oozing from the mouth down her left cheek. Captain Carstens also arrived, as well as Superintendent Hennop who was from the Forensic Unit. A doctor was then called to come and certify the deceased dead. Barkhuizen then instructed Carstens to take photographs at the scene. At this stage of his testimony, Barkhuizen was shown “Exhibit A”, which contained the photographs of the body of the deceased. He confirmed that its position was as he found it when he arrived at the scene. Prof. Knobel was called to examine the body, and Superintendent Hennop assisted him. When Prof. Knobel arrived he enquired if the deceased’s body was as it had been found, and it transpired that one of the paramedics had pulled up the pyjama pants that the deceased was wearing, since they had been pulled down. Prof. Knobel then summoned the gentleman to the scene in order to explain how they had found the deceased’s clothing, which he did. Prof. Knobel then told the gentleman that he should never disturb the position of anything at a crime scene.

68. Prof. Knobel shared Barkhuizen’s view that the deceased had not died naturally. Prof. Knobel suggested that the deceased had possibly been sodomised. Prof. Knobel and Superintendent Hennop turned the body over and a broken knife blade was found protruding from the left shoulder blade. One other thing that Barkhuizen also noticed when he was at the scene was that the sliding door leading to the balcony was closed but not locked. However, it appeared that there had been no forced entry into the apartment. In the handbag that was found in the main bedroom there was a cheque-book, but there was no cash. There was no cash found elsewhere in the apartment. The deceased’s business card was found in the handbag as well, which indicated that she had a cellular telephone; but no cellular telephone was found in the apartment. For that reason, Barkhuizen believed that the cellular telephone had possibly been stolen and requested his informant in the cellular telephone industry to investigate if the deceased phone had been used at anytime from the 2<sup>nd</sup> December 2001 and afterwards. Among some documents found in the apartment on the day the body was found, there was a facsimile that had apparently been sent around 22h00 on the 2<sup>nd</sup> December 2001 by the deceased

to a lady in Holland (“Exhibit MM”).

69. The following morning around 08h00, Barkhuizen went to the offices of Securicor Gray in Woodstock (the accused’s employer) and discovered that an entry had been made in the occurrence book that the accused had reported off-sick. Barkhuizen was accompanied by Detective Constable Speed. They then asked for the personal file of the accused and made copies thereof, as well as copies of the occurrence book (“Exhibits P and Q”). When he returned to the apartment later that morning, he found that it had been locked and cordoned. He also found out that it had been handed over to the Forensic Unit whose services had been requested from Pretoria.

70. On that same day Barkhuizen received information from his informant, which information led to the decision to arrest the accused. Barkhuizen then went to Dolphin Beach. At the gate he found Cornelius who was the Security Guards’ Supervisor. He then asked Cornelius to call the accused. Barkhuizen was with Speed at that time, and he informed the accused that he was arresting him, informed him why he was arresting him and also informed him about his constitutional rights. Thereafter they both left with the accused to Bishop Lavis Police Station. On the way the accused indicated that his cellular telephone had been left where he was eating when Cornelius called him. Barkhuizen then called Cornelius and Ontong, who had been left at Dolphin Beach, to look for the phone and keep it safely. Upon arrival at Bishop Lavis, the accused was shown the SAP14A form, which contains constitutional rights of an accused person. The accused, although he was speaking English, was asked to read the Xhosa version of the form and sign it.

71. The accused was interviewed, and during the interview handcuffs were removed and leg irons were put on. When the accused was interviewed he made reports which prompted Barkhuizen to follow them up. The accused was then taken to Speed’s office, and Barkhuizen arranged for the tracing of two witnesses. The two witnesses were found and statements were duly taken from them. The accused was informed that his statement would be recorded on audio/video, which was done on the seventh floor in the presence of Barkhuizen, Chauke and Speed.

72. After taking the statement Barkhuizen asked the accused for his consent to search his residence in Khayelitsha. The accused agreed and they proceeded thereto. During the search they found a black jacket hanging behind the door. In the inner pocket of the jacket a small torch with an LTA logo was found. The accused claimed that the torch was his and he was using it at work. They then proceeded to the accused's girlfriend's (Victoria Dyasi) residence, where her younger brother "Botyo" was arrested. Botyo's mother was asked to come to the Bellville Police Station the following day so that she would be present when a statement was taken from her son as he was a juvenile. The accused was detained at the Parow Police Station. It was in the early hours of the 6<sup>th</sup> December 2001.

73. Later that day, at about 17h00, Barkhuizen received a call from Parow Police Station and was informed that the accused wanted to see him. He went there, had a discussion with the accused after which he decided to make arrangements that the accused be taken to a magistrate. As Barkhuizen was leaving the cells, he met an attorney by the name of Gordon and had a discussion with him. Gordon also had a discussion with the accused and later told Barkhuizen that he could continue with the arrangements for the accused to see a magistrate. Arrangements were then made for Sergeant Barnard from Wynberg to accompany the accused to a magistrate in Cape Town. Later that evening Barnard gave Barkhuizen a confession that had been made by the accused before magistrate Le Roux. The accused was thereafter taken to a district surgeon to be examined for injuries and for DNA purposes. After the examination by the district surgeon, the samples together with the examination form were kept in a safe in Barkhuizen's office, until he personally took them to the Forensic Laboratory on the 10<sup>th</sup> December 2001. Samples had also been taken from Botyo and Thebus (the deceased's dance instructor whom the accused had implicated in his confession). Barkhuizen explained to Court how the samples are safely kept in a crime kit and how the kit is sealed before the doctor who performs the test(s) breaks the seal.

74. On the 7<sup>th</sup> December 2001 Barkhuizen questioned Dyasi (accused's girlfriend). There was a discrepancy between what she told him and what the accused had actually told him. Dyasi was then taken to meet with the accused at Parow Police Station. Dyasi thereafter volunteered to accompany Barkhuizen to Khayelitsha. Upon arrival at Khayelitsha Dyasi showed him Mehlwana's residence. Mehlwana was one of the witnesses who had been previously called by the State. After being asked for the items he had received from Dyasi, Mehlwana brought a plastic bag which contained two watches, one of which was a ladies' gold wristwatch, and a Nokia 5110 cellular telephone. Barkhuizen identified the gold watch as "Exhibit 1".

75. On the 9<sup>th</sup> December 2001, Barkhuizen asked Inspector Hendricks to trace Thebus. Thebus was found the following day and was questioned. He volunteered to undergo a lie detector test. Two further witnesses were traced and affidavits were obtained from them confirming Thebus' alibi on the 2<sup>nd</sup> December 2001. Records of telephone calls made to and from Thebus' landline at his residence were also obtained. Thebus also volunteered to supply the investigating team with his DNA samples as well as fingerprints. After extensive investigation, Thebus was released.

76. The following morning members of the Public Protection Unit were deployed to Dolphin Beach to look for yellow rubber gardening gloves. Inspector Malan found the first glove, and within a distance of approximately eight (8) metres a second glove was found by Inspector Arries. Both gloves were photographed by Inspector Bartholomew and put in exhibit bags, and sealed. Barkhuizen told the Court that he never touched the gloves. The two sealed bags were then taken to the Forensic Laboratory. After the Forensic Team had concluded the investigation, the deceased's apartment was handed back to Barkhuizen.

77. On the 11<sup>th</sup> December 2001 Barkhuizen returned to the apartment for further investigation and possible clues. During the search he saw a blue ottoman next to where the body had been lying. When he shifted it he heard something falling inside. When he



checked what it was he found a black knife handle. He went to the kitchen to try and establish if it belonged to some set of knives that might have belonged to the deceased. He did not find any similar knife. He identified the handle as “Exhibit 7”. In one of the bedrooms he found an invoice of the purchase of a ladies’ wristwatch which had been bought in Zurich. This invoice had earlier been in as “Exhibit C”, and Barkhuizen identified it.

78. Barkhuizen was shown the torch which had been handed in as “Exhibit 2”. Cornelius had testified that he had found the torch next to the deceased’s apartment. Barkhuizen identified the torch as that which had been shown to him on the day of the accused’s arrest. On the 7<sup>th</sup> January 2002 Barkhuizen met the former State President, Mr FW de Klerk, at the deceased’s apartment. He asked Mr de Klerk to view some of the items that had been found during the investigation. Mr de Klerk identified the gold wristwatch as one he had bought for the deceased in Zurich in 1990. Mr de Klerk also identified the two torches which he said the deceased had used when they were still married. In his testimony, Barkhuizen told the Court that he had measured the distance between the Dolphin Beach Complex and the Total Garage in Table View using a car’s speedometre, and he found that it was 1,2 kilometres. When he investigated the route allegedly used by the accused on the night of the murder, he said that it took him about twenty-two (22) minutes to cover the distance between the Total Garage and the deceased’s flat.

79. Barkhuizen also identified the notice of rights in terms of the Constitution dated the 5<sup>th</sup> December 2001, which had been handed up to Court as “Exhibit X”, and testified that it had been signed by the accused and himself.

80. Under cross-examination the witness did make a few minor concessions. He conceded that the sliding door leading out on to the balcony from the main bedroom, as well as the sliding door in the dining room were closed but not locked and that this was unusual, given that the deceased had appeared to be very meticulous and security conscious.

81. Additionally, he conceded that the accused had not been advised that he was entitled to have a lawyer present during the search of his residence nor was he advised that he did not have to consent to the search. He maintained, however, that the accused had been advised of such rights earlier when he had signed the warning statement at Bishop Lavis Police Station. He also told the Court in cross-examination that he had read the accused's confession with circumspection because within twenty-four (24) hours the accused had given him two contradictory versions.

82. Barkhuizen admitted that his failure to ensure that a fingerprint report regarding the accused included in the docket before it was submitted to the prosecuting authorities was an oversight on his part. Furthermore, he acknowledged that the fact that he updated his investigation diary on his computer made a contemporaneous recording of the day's events difficult. Often he was only able to summarise the day's events when he had returned to his office and had an opportunity to do so. In certain instances this meant he would record the previous day's events only the following morning. He also said that because his diary was stored in his computer from notes made contemporaneously, it was possible for him to add supplementary information to earlier entries.

83. Barkhuizen was also questioned with regard to a statement made by Prof. Knobel, and which appeared in a newspaper, indicating that he (Prof. Knobel) was denying the fact that the deceased had been sexually assaulted. In his response thereto, he told the Court that he got an impression that Prof. Knobel had no conclusive evidence that the deceased had been raped. He further told the Court that Prof. Knobel appeared annoyed when he asked him about the deceased's alleged rape.

84. Where necessary, Barkhuizen made concessions. He conceded, for example, that out of fifty-eight (58) people whose fingerprints were taken, only eight people were positively linked. He also told the Court that when Willem de Klerk Junior arrived at the scene he was emotional, and occasionally he would cry. This was corroborated by Detective Superintendent Roelofse, who was also at the scene when De Klerk Junior arrived.

85. The Court has carefully considered the evidence placed before it by the State. In evaluating the evidence of each witness we have had regard to the fact that most of them were subjected to lengthy and intensive cross-examination. Without exception they gave their evidence satisfactorily, answering questions clearly and directly.

86. Much of cross-examination related to matters which were never otherwise contested or contradicted by defence evidence. Many submissions were made to witnesses suggesting that the defence would be leading contradictory evidence, for example that the deceased was alive and driving her car on the afternoon of Monday the 3<sup>rd</sup> December 2001; newspaper articles and an e-mail with red herrings intended to raise all sorts of possibilities and mud-dying the water unnecessarily.

87. It cannot be said that any of the State witnesses were evasive or palpably dishonest or untruthful. Such discrepancies and/or contradictions as there were, were of a minor nature and in no way caused the Court to doubt the veracity or reliability of the State's witnesses.

88. The one and only witness called by the Defence, Dr Marx, actually supported the State's DNA expert and said that he could not find fault with her tests and conclusions.

89. At no stage during the course of this trial was a defence of any sort disclosed or suggested. The Defence is of course not obliged to do so but in the absence of any Defence evidence the Court has no way to evaluate the State's case against anything else. The State's evidence stands on its own, uncontested and uncontradicted. The Court therefore comes to the conclusion that it can be accepted and that it is sufficient in all material aspects to prove the following facts:

### **Factual Findings**

- During December 2001 the deceased, Mrs Marike de Klerk, lived in an apartment of the Dolphin Beach Complex at Table View in the district of Cape Town.

- Vehicular access to this complex is controlled at its entrance by security personnel of the firm Securicor Gray Security. Access to the complex was not controlled on its Western, Eastern or Southern sides. In fact, footpaths from the beach, west of the complex allowing free pedestrian access thereto are clearly seen on photograph 8 of “Exhibit B”. Accused worked for the firm Securicor Gray Security as a Security Guard Grade C and was a colleague of Kem, Ntshuba and other State witnesses who work for the same firm. This is common cause.
- During the evening of the 2<sup>nd</sup> December 2001 the accused, accompanied by Mzwabantu Dyasi (also known as “Botyo”) travelled from Khayelitsha to Blouberg by taxi, after having withdrawn R300 from his bank account at an ATM (leaving a balance of R289). The accused told Botyo that he was going to borrow a car from a friend to go to Port Elizabeth. The driver of the taxi, a white VW Jetta, was paid R150 by the accused and they were dropped off at a Total Garage in Blouberg at about 21h00, and went into the garage’s shop. The accused was wearing a green cap. At the garage the accused told Botyo to wait for him while he went to his work to find the car. This is clear from the evidence of Botyo and “Exhibit VVV” reflecting the R300 withdrawal.
- Before leaving the garage the accused telephoned Fredson, one of his colleagues at the Dolphin Beach Security Guard Room and asked to speak to another colleague, Ntshuba. Fredson could not hear one side of the conversation but gleaned therefrom that the accused was looking for another colleague, Kem. This was confirmed by Ntshuba who said that the accused wanted to borrow Kem’s car because friends with whom he had been partying had left him stranded.
- The accused contacted Kem who was on duty as the Night Auditor at the Dolphin Beach Hotel, which is part of the complex, at 23h50 on the 2<sup>nd</sup> December 2001. He told Kem the same story and asked to borrow his car. Kem refused. A short while later the accused made an appearance at the guard house where he was seen by Fredson and Ntshuba. He was wearing a dirty white T-shirt; a green cap and trousers. He was not drunk, but had been drinking. The accused approached Kem at the Reception Desk where he was working and again asked to borrow the car. Kem again refused to lend the accused his car, whereupon the accused left. Kem also described

the accused's clothing as a white T-shirt; green cap and trousers. The accused was last seen leaving the complex and walking towards Blouberg.

- At about 01h00 on the 3<sup>rd</sup> December 2001 the accused returned to the garage from where he telephoned a taxi company, Unicab, to hire a taxi to take him and Botyo back to Khayelitsha. Joumar, the dispatcher for Unicab taxis said that he received a call from someone who identified himself as Mboniswa and gave a cellular telephone number 083 683 7507 (the accused's cellphone number) just after 01h00 on the 3<sup>rd</sup> December 2001. He arranged for a taxi driver, Lucky Masoka, to take the accused to Khayelitsha for R300. Masoka duly picked up the fare, two people, demanded and got the R300 before moving off and took the two men to Khayelitsha. There can be no doubt that the two were the accused and Botyo. Botyo said in evidence that they were taken back to Khayelitsha by taxi, and Mr Mohamed in cross-examining Masoka to establish the accused's condition referred to "the accused" leaving no doubt that he and Botyo were the men he took to Khayelitsha.
- When Botyo got home, between 02h00 and 03h00 on the 3<sup>rd</sup> December 2001, he told his sister, Victoria (the accused's girlfriend), that the accused wanted to see her. She went to his residence.
- In her presence the accused took money out of a wallet. She saw him counting out R20 and R50 notes, totalling about R300. They went to bed and she found it strange that the accused was very restless and gasping for breath. When they woke up later that morning the accused telephoned one of his supervisors to say that he was not feeling well and was not going to report for duty.
- At 04h50 on the 3<sup>rd</sup> December 2001 the accused telephoned the Securicor Gray Security Control Room at Woodstock and told Mbeka that he was not feeling well and that he was going to see a doctor. This is the call to which Victoria had referred and was made on Mrs de Klerk's cellular telephone, using her SIM card. This was made very clear by Hilda du Plessis who works for MTN and picked up the record of the call – see "Exhibit HHH".
- Later that morning the accused received a call from Ntshuba asking him when he was going to relieve him. The accused told Ntshuba that he had already advised the

Control Room that he was going to see a doctor. At 07h30 the accused again contacted the Control Room and told Collins that he would not be going to work. These calls were received and made on Mrs de Klerk's cellular telephone according to the MTN record of calls made and received. At this stage the accused was using his own SIM card.

- At about 08h00 on the 3<sup>rd</sup> December 2001 Victoria got out of bed and it was then that she saw a black Nokia5110 cellular telephone and a gold ladies' wristwatch on a table in the accused's room. When she asked him about the telephone he said that he had got it at work. Questioned about the watch, his reply was that "she must not try to know everything". The watch was later identified as having belonged to Mrs de Klerk. During the course of the same day the accused sent a money order to his mother in Port Elizabeth for an amount of R650. This came out during the cross-examination of Barkhuizen – see "Exhibit WWW".
- On Monday the 3<sup>rd</sup> December 2001 between 08h30 and 09h00 while still on patrol, Cornelius, who was a Section Leader at Securicor Gray Security at Dolphin Beach picked up a torch on a path close to "Block D" of the complex. He kept the torch in the file in the Guard Room and later gave it to the investigating police officers. The torch with the logo "W.O.F." was later identified as being similar to one owned by Mrs de Klerk.
- Two appointments Mrs de Klerk had on Monday the 3<sup>rd</sup> December 2001 were not kept. One was for 08h30 to have the car serviced. The other was with her beautician for 13h00.
- Mrs de Klerk was to have had a dancing lesson from her instructor John Thebus at 19h00 on the evening of the 3<sup>rd</sup> December 2001. There was no reply when her apartment was called from the Security Guard Room. Thebus looked for her car in the parking area but did not see it there. When he tried to telephone her from his house, there was no reply.
- Mrs de Klerk's body was discovered in the bedroom of her apartment at about 16h30 on Tuesday the 4<sup>th</sup> December 2001. The circumstances leading to the discovery are well documented in the evidence of Cornelius; Ntshuba; Yolanda Wright, the

beautician whose appointment had not been kept; and Dawn Roux, a neighbour.

- Superintendent Barkhuizen, the investigating officer in this case, arrived at the scene and immediately formed the opinion that Mrs de Klerk had been murdered because of the injuries to her face and neck. Prof. Knobel, the Senior Government Pathologist, also visited the scene. He examined the body and made notes for a preliminary report. He came to the conclusion that the probable cause of death was throttling and that she had been dead for twenty-four (24) to thirty-six (36) hours or longer. Swabs were taken for analysis. The deceased had also been stabbed in the left shoulder blade area.
- Barkhuizen conducted an investigation of the apartment. He found that a sliding door leading to the balcony was closed but not locked. Another door in the lounge was also closed but not locked. In a handbag found in the bedroom he discovered a purse and a cheque book. The purse was empty and after a search through the apartment he could find no cash. He also found a business card in the handbag on which was a cellular telephone number. This led him to believe that the deceased owned a cellular telephone, but he could not find any cellular telephone in the apartment. He suspected that it may have been stolen
- The following day Barkhuizen contacted an informant and as a result of the information he received he went to the Control room of Securicor Gray Security in Woodstock, where he found that at 04h50 on the 3<sup>rd</sup> December 2001 the accused had booked off sick. Later the records of MTN revealed that this call had been made from the deceased's cellular telephone. The accused was arrested just after 16h00 on the 5<sup>th</sup> December 2001 and taken to Bishop Lavis Police Station where he later that evening made a formal statement to Barkhuizen. Certain information furnished by the accused to Barkhuizen before the formal statement was recorded caused Barkhuizen to have two witnesses, Kem and Ntshuba, to be brought to him to have statements taken from them.
- With the accused's consent Barkhuizen searched his residence and in the pocket of a coat hanging behind the door he found a black torch ("Exhibit 3"), with letters "LTA" embossed on it. This torch was also later identified as being similar to one owned by the deceased. The accused was then taken to Parow Police Station in the early hours

of the 6<sup>th</sup> December 2001.

- The accused returned to work on Wednesday the 5<sup>th</sup> December 2001 where he was told by Cornelius that he was the last person to be seen at the Dolphin Beach Complex on the night in question and that the Police would be coming to speak to him first. His reaction was to say “I know”. Some time during that day the accused sent an SMS message to Victoria in Xhosa telling her to hide the cellular telephone and the watch she had seen on Monday morning. She hid the items, with two other silver watches in her brother’s room. After his initial investigation on the night of the 4<sup>th</sup> to 5<sup>th</sup> December 2001 Barkhuizen locked the apartment, secured it and handed the key to the Forensic Team who over the next few days conducted a thorough search and took various samples for DNA analysis.
- At about 03h00 on the 6<sup>th</sup> December 2001 the accused was taken to Victoria’s house where a search was carried out by the Police. Victoria then learned that the accused was a suspect in the murder of Mrs de Klerk and that her cellular telephone was missing. She denied knowing anything about the cellular telephone when asked by the Police. Later that morning she gave the cellular telephone and the watches to Samuel Mehlwana to look after because she did not want the Police to find them in her possession.
- At about 17h00 on the 6<sup>th</sup> December 2001 the accused called for Barkhuizen to come to him and said he wanted to make a statement. Barkhuizen explained his constitutional rights to him but the accused chose to make a statement to a magistrate, which he did later that night.
- On the 7<sup>th</sup> December 2001 Victoria was again questioned by the Police. Victoria accompanied Barkhuizen to Mehlwana’s home where the two watches and the cellular telephone were hidden.
- Because he had been implicated by the accused in his statement to the magistrate, John Thebus was detained and questioned by Barkhuizen. Thebus gave an account of his movements on the night of the 2<sup>nd</sup> December 2001, handed his clothes to the Police for DNA testing, underwent a lie-detector test and gave him the names of witnesses who could support his statement. Thebus was released the following day.



- On the 10<sup>th</sup> December 2001 a search was conducted of the grounds of the Dolphin Beach Complex. Two plastic yellow gloves were found as indicated in “Exhibit B”, photograph no. 5. One of these gloves had traces of blood on it. The gloves were tested for DNA; the blood proved to be that of the deceased. Mixed DNA was lifted off the inside of the same glove and proved to be that of the accused and another unidentified person(s).
- Barkhuizen and Speed returned to the scene of the crime on the 11<sup>th</sup> December 2001 and found the handle of the knife with which the deceased had been stabbed inside an ottoman in the passage.
- On the 7<sup>th</sup> January 2002 Mr FW de Klerk identified the gold watch (“Exhibit 1”) as the one he had bought for Mrs de Klerk in Zurich. He also identified the two torches as having been given to Mrs de Klerk on social occasions during the time they were married. The chances of anyone else having two similar torches are so remote as to be discounted.

A great deal of evidence relating to DNA specimens collected and tested was led in respect of which the Court can make its definite findings. In particular the yellow glove on which the deceased’s blood was found also had traces of the accused’s DNA which was mixed with DNA belonging to other unidentified persons. This took the case no further as the evidence clearly showed that the glove in question could have been used by other members of the Securicor Gray Security personnel.

### **Trial-within-a-trial**

90. The State had information that the accused had made a statement to the Police and a statement to a magistrate in Cape Town. To that end the State wished to hand up to Court the statements allegedly made by the accused. Defence counsel objected, inter alia, on the basis that same were not made freely and voluntarily, and that certain of accused’s constitutional rights (such as the right to legal representation) were not explained to him. In the circumstances this led to a trial-within-a-trial. Several witnesses were called by the State to testify in the trial-within-a-trial.

91. Detective Superintendent Michael Anthony Barkhuizen gave evidence that he and Detective Constable Speed had arrested the accused shortly after 16h00 on the 5<sup>th</sup> December 2001 at the Dolphin Beach Complex. Barkhuizen introduced himself and told the accused that he was investigating the murder of Mrs de Klerk, and that they had information to the effect that the accused was linked thereto. His rights, such as the right to legal representation and the right to remain silent etc. were explained to the accused at the time of his arrest. He gave evidence that this occurred in the Security Guard Room in the presence of Speed, Cornelius, Ontong and two security officers. This was corroborated by Speed and Ontong. Barkhuizen and Speed thereafter took the accused to Bishop Lavis Police Station for questioning. On the way to the police station the accused indicated to him (Barkhuizen) that he had left his cellphone at Dolphin Beach in the room where he was eating before his arrest. Barkhuizen then telephoned Cornelius and asked him and Inspector Ontong to keep it safely. After his constitutional rights were explained to him and accused indicated he understood them, he was asked whether he knew anything about Mrs de Klerk's murder. Whereupon the accused made an exculpatory statement to Barkhuizen.

92. On arrival at the Bishop Lavis Police Station the accused was taken to the charge office. The handcuffs were removed and leg irons were put on. This was standard procedure as handcuffs were too uncomfortable. The accused was shown the notice (SAP 14 A) which contained the constitutional rights of an accused person. The notice is written in all official languages, and although the accused spoke good English, he was provided with the Xhosa version as he had indicated that he was Xhosa speaking. He read the Xhosa version but signed the English version which was handed up to Court as "Exhibit AA". Barkhuizen said that it was explained to the accused that the two documents contained exactly the same information, though in two different languages.

93. Barkhuizen had a short interview with the accused in relation to comments that the latter had made on the way to the police station. Barkhuizen testified that the accused's comments in his opinion constituted an alibi. Barkhuizen asked Speed to keep an eye on the accused while he made some further investigation. Barkhuizen went to his office to

interview two witnesses and finished at about 22h00. Thereafter he returned to Speed's office and had a further short interview with the accused. Barkhuizen asked the accused if he would agree that his earlier comments be written down. The accused was also informed that his statement would be recorded on audio/video. The accused agreed.

94. Barkhuizen and Speed had to prepare the recording facility and so had to leave the accused in Brian Swart's office, who is also a policeman stationed at Bishop Lavis Police Station. The audio/video recording was done in the presence of Barkhuizen, Speed, the accused and Detective Sergeant Chauke who interpreted for the accused. During the recording the accused was asked to take off the top that he was wearing, and Barkhuizen noticed some scratch marks on the accused's body. The accused said that they were old marks. Barkhuizen's interview with the accused was duly recorded on video and audio tape while Barkhuizen kept his own notes ("Exhibits Y and Z"). The audio/video recording machine, Barkhuizen said, records in triplicate. One copy is sealed in an exhibit bag and the accused had to sign that he witnessed the sealing. The second copy is used by the detective for investigation purposes and the third is supplied to the defence counsel.

95. The accused was taken to Khayelitsha after he had agreed that his residence be searched. He travelled in the same vehicle with Barkhuizen, Speed and Booysen. The investigating team first went to the girlfriend's home and then to the accused's residence. After the search the accused was taken to Parow Police Station for detention. The accused checked in at Parow Police Station at about 04h40 on the morning of the 6<sup>th</sup> December 2001, as per "Exhibit AA", being the occurrence book. On the 6<sup>th</sup> December 2001 at about 17h00, Barkhuizen received a telephone call from Inspector De Jager of Parow Police Station informing him that the accused wanted to see him urgently. On his arrival at the police station Barkhuizen had a discussion with the accused, whereupon the accused made a report to Barkhuizen which was tantamount to a confession. Barkhuizen explained to the accused that such information could not be used as evidence in court unless the accused agreed that it be taken down in the presence of a magistrate. Barkhuizen further warned the accused that once the statement had been recorded in the presence of a magistrate it could be used as evidence against him. The accused agreed to

go to a magistrate with a view to making a confession.

96. Barkhuizen left the accused to make the necessary arrangements and met Mr Gordon, an attorney who had just arrived at the police station, who said that he was instructed by Securicor Gray (accused's employer) to visit the accused. Barkhuizen told him of the accused's decision to make a statement to a magistrate. Gordon then consulted with the accused privately in the cells. Barkhuizen spoke to Gordon after the latter's interview with the accused and again mentioned the accused's decision to make a statement to a magistrate, asking him if he could go ahead. Mr Gordon declined to comment. Afterwards Barkhuizen asked the accused if he still wished to make a confession. The accused agreed. Barkhuizen then telephoned the Directorate of Public Prosecutions and asked for the arrangement that a magistrate be available after hours in Cape Town for purposes of making a confession. Arrangements were also made for the availability of a policeman who was not involved in the investigation to take the accused to a magistrate. Sergeant Barnard from Wynberg Police Station took the accused to Magistrate Le Roux in Cape Town. Thereafter the accused was taken to a District Surgeon for examination. The doctor, according to Barkhuizen's knowledge, found nothing wrong with the accused. The accused did not complain about any ill-treatment from the Police. Barkhuizen, despite lengthy cross-examination, remained calm and consistent in his testimony. There were no material contradictions in his evidence. He did not exaggerate in any way, as the record clearly shows.

97. Detective Constable Kenneth David Speed also gave evidence with respect to the accused's arrest. Speed said that he was present when the accused was arrested. He was asked by Barkhuizen to handcuff the accused at the Dolphin Beach Complex. The arrest was effected in the Security Control Room at the entrance to the complex. According to Speed's testimony, also present where and when the accused was arrested were Inspector Ontong, Cornelius and two other Security Officers.

98. Speed corroborated Barkhuizen's evidence that the latter introduced himself by name and rank, and told the accused that he was investigating the murder of Mrs de Klerk.

Speed said that Barkhuizen informed the accused that he was arresting him because the investigating team had received information that the accused might be linked to the murder in question. Speed further corroborated Barkhuizen's evidence that the latter warned the accused about his constitutional rights, i.e. the right to remain silent and the right to legal representation. At this stage Cornelius showed Speed a torch that had been found in the complex, which Speed handed to Barkhuizen. Speed also testified that in the car, on the way to Bishop Lavis Police Station, the accused initiated a conversation in which he told them that his cellular telephone had been left in the complex, in the room where he was having his meal immediately prior to his arrest. He said it was a Nokia 3310 and asked for its safekeeping. Barkhuizen then telephoned Cornelius and Ontong and asked them to keep the cellular telephone safely. Speed said that the accused also told them that he was not involved in the murder of Mrs de Klerk. Speed observed that the accused was relaxed, bordering on arrogance, and was confident of what he was saying.

99. Speed testified further that on arrival at Bishop Lavis Police Station, the accused was shown the SAP 14 A, a document containing constitutional rights of an accused person. Speed said that the accused was given a chance to read the Xhosa version and asked to sign the English version as the latter was detachable from the book. Both versions were handed up to Court as "Exhibits X and X1" respectively. Speed also told the Court that the accused understood the document as he was Security Guard Grade "C". Constitutional rights of arrested persons are taught to Grade C security trainees as they are also required to arrest people from time to time. Speed was informed by the Training Officer that the accused had received this training. The accused himself confirmed to Speed that he underwent such training. The accused, according to Speed, had neither complaints nor questions at that stage. Handcuffs were removed and the accused was then footcuffed. Later at about 22h42 the accused's statement was recorded on an audio/video machine. Until that time, the accused was in Speed's office. At no stage did four detectives interrogate the accused simultaneously as had been alleged by defence counsel during cross-examination. When Speed testified he described the recording procedure in the same manner as Barkhuizen did.

100. Afterwards, they proceeded to Khayelitsha to search the accused's residence. Speed testified that the accused was with him, Barkhuizen and Booysen in the Police vehicle. Speed said on the way to Khayelitsha they stopped at a garage and Booysen gave him some money to buy cold drinks for all of them, including the accused. After the search the accused was taken to Parow Police Station. Speed saw the accused again later at about 21h00 on the 6<sup>th</sup> December 2001. Barkhuizen told Speed that the accused wanted to make a statement before a magistrate. Speed, as requested by Barkhuizen and Booysen, asked Sergeant Barnard from Wynberg to take the accused to a magistrate in Cape Town. While Speed was waiting for Barnard, Gordon arrived and said that he came to consult with the accused. Gordon went inside and emerged after about fifteen minutes. Gordon informed Barkhuizen that he had talked with the accused, and that he could not disclose what the contents of the discussion were as same was privileged communication between attorney and client.

101. Barnard subsequently arrived and booked the accused out of the cells. Speed met the accused later at night. Speed and Barnard then took the accused to the District Surgeon for examination, as instructed by Barkhuizen. When they arrived at Karl Bremer Hospital, Speed advised the surgeon that the accused had made a statement before a magistrate and that the surgeon should take samples of hair and blood for DNA testing purposes. The District Surgeon did not find any fresh wounds on the accused's body, but noted down some old scars. Speed corroborated Barkhuizen's evidence in material respects, and he remained consistent throughout the cross-examination. Speed was undoubtedly a good witness.

102. Sergeant Barnard from Wynberg Police Station, who took the accused to the magistrate for purposes of a confession, also testified. He gave evidence that he received a telephone call from Speed on the 6<sup>th</sup> December 2001 at about 20h00. Barnard said Speed asked him if he could take a suspect who had to make a statement before a magistrate in Cape Town. Mr Hendriks took Barnard to Parow Police Station. On arrival Barnard booked the accused out of the police cells and took the latter to the Magistrate's Office in Cape Town. As soon as they arrived there the accused was taken inside after

having his handcuffs and footcuffs removed. Barnard was left outside. At about 23h00 Magistrate le Roux told him that he had finished. Barnard and the accused thereafter returned to Parow Police Station.

103. Barnard corroborated Speed's evidence that they both took the accused to a District Surgeon for examination. Barnard further testified that he was not involved in the investigation in question. Barnard said that the accused seemed relaxed. When he asked the accused if he was well or had any complaint, the latter did not complain about anything.

104. Detective Inspector Clive Joseph Ontong, who was present when the accused was arrested at the Dolphin Beach Complex, was also called to testify. He corroborated Barkhuizen's and Speed's evidence on the whole incident surrounding the arrest. He testified that when Barkhuizen and Speed took the accused to Bishop Lavis, he remained at the complex because the Forensic Team had arrived and he wanted to join them. While Ontong was still in the complex, Barkhuizen telephoned him and asked him to look for the accused's cellphone in the storeroom, which he did.

105. When Ontong arrived at the police station, he found the accused in Speed's office, with leg irons and no handcuffs. He had a casual talk with the accused. They communicated in English. He asked him what his name was; where he stayed; how long he had been in Cape Town and what his mother's telephone number was. Ontong testified that when he asked the accused his mother's telephone number, the latter pleaded with him not to call his mother to tell her that he (the accused) had been arrested in connection with the murder of Mrs de Klerk. Ontong said that he spent about twenty to thirty minutes in Speed's office, and while he was there Chauke and Swart came in and out but did not question the accused. Ontong corroborated the other witnesses' evidence that the accused was warned of his constitutional rights at the time of his arrest at the Dolphin Beach Complex.

106. Detective Inspector Brian Johannes Swart from Bishop Lavis Police Station also

took the witness stand. He gave evidence that on the 5<sup>th</sup> December 2001 in the evening, he was asked by Barkhuizen to fetch a witness, Sipho Kem, from the Dolphin Beach Complex. After the witness had been interviewed he took him back to the complex, and thereafter went home. He returned from home at about 22h00 to the police station and he was asked to look after the accused while Barkhuizen and Speed went to prepare the recording facility. Swart corroborated the other witnesses' evidence that Barkhuizen, Speed, Ontong and himself were never in Speed's office at the same time interrogating the accused.

107. Detective Sergeant David Chauke, who also worked at Bishop Lavis Police Station, was also called to give evidence. Chauke told the Court that on the 5<sup>th</sup> December 2001 he left his office at about 13h00 in order to investigate some other cases. He returned to the station later in the afternoon. At about 17h00 he was asked by Barkhuizen to fetch a witness at Makana Square in Langa Township, which he did. Barkhuizen interviewed the witness and took down a statement in his office, and Chauke interpreted. Barkhuizen indicated that he would need his assistance later, therefore he did not leave the building. In the mean time he went to Speed's office, where he saw the accused, together with Speed. He introduced himself to the accused. He had no further discussion with the accused as the latter had a conversation with Speed.

108. At about 22h00, Barkhuizen asked Chauke to be available when the accused's statement was recorded, so that he could interpret. During the recording of the statement, Chauke had an impression that the accused spoke very good English. He interpreted at the beginning, and thereafter stopped when he noticed that the accused would respond before he could interpret (as the accused did in Court when he gave evidence – as the record clearly shows). However, he remained in the room as a standby, i.e. in case there were aspects in which the accused needed interpretation. Chauke observed that the accused was relaxed and extremely calm during the recording.

109. After the recording was completed they went to Khayelitsha, the accused's place of residence. On the way one vehicle that was used by the "Operation Crackdown Unit"



needed refuelling. For that reason they had to stop at a filling station. While they were waiting for the other vehicle to refuel, Director Booysen, who was travelling with them, bought all of them (including the accused) some cold drinks. They proceeded to Khayelitsha, and the accused got out of the car when they were at his residence. The search was conducted and thereafter Chauke took the accused in his car to Parow Police Station, where the latter was subsequently detained in the early hours of the 6<sup>th</sup> December 2001.

110. On arrival at Parow Police Station Chauke brought the “SAP 14 A” form. The form was actually a notice of rights of a detainee in terms of the constitution. The accused had to complete the form. When Chauke tried to explain it to the accused, the latter said that he understood what it was because he had already read and completed the same form at Bishop Lavis Police Station. He tried to show the accused the Xhosa version of the form, and again the accused said he knew what it contained. The accused then signed the form. Chauke made an entry for the detention of the accused. Chauke remained consistent in his testimony despite extensive cross-examination. I am quite satisfied that he was a reliable witness.

111. Dr Bedwill Jentel, a District Surgeon at Karl Bremer Hospital, Bellville gave evidence that he was on duty on the 6<sup>th</sup> December 2001 and had examined the accused, in order to determine if there was any evidence of police brutality. He examined the accused for approximately one hour and completed the requisite medical report. This medical report was handed up to Court as “Exhibit DD.” In his testimony Dr. Jentel stated that the accused had informed him that he had no medical problems or complaints. Dr. Jentel testified that the accused appeared fine emotionally and that he did not find any physical injuries on the accused, only old marks which Dr. Jentel estimated were more than three months old. Under cross-examination Dr. Jentel stated that a blood specimen was taken from the accused, with his consent and that the specimen containers were sealed in the presence of the accused and the investigating officer.

112. Inspector Anton Groenewald, stationed at Parow Police Station, testified that he had

received and booked the accused into the Parow police cells at 04h40 on the morning of the 6<sup>th</sup> December 2001. In his evidence Groenewald stated that he had spoken to the accused who indicated that he had no complaints or requests. The accused appeared relaxed and did not look tired. Groenewald testified that he had visited the cells and found the accused sleeping and then later at 06h16 he had personally given the accused food and coffee. Groenewald told the Court that he remembered the accused well because he was being detained in connection with an unusual case involving the murder of Mrs de Klerk, the former wife of ex-President FW de Klerk.

113. Another witness was Hendrik Johannes le Roux, the magistrate before whom the accused allegedly made the statement. Le Roux gave evidence that on the 6<sup>th</sup> December 2001 he received a telephone call and was told that someone wanted to make a statement. He had no idea what the statement in question was about, or who wanted to make it. The accused arrived at the magistrate's office around 21h00 with a policeman.

114. From Le Roux's observation, the accused was well and relaxed. He did not look tired. The accused even wanted to make a demonstration, but he was stopped by the magistrate from doing so. Le Roux then brought a form that had to be completed when a confession was being made from the Control Magistrate's office. The form was written in English. The interpreter, who introduced himself as Mxolisi Edman Maboyana, had arrived at that time. Le Roux explained the contents of the form, as well as the constitutional rights of a detainee to the accused. The latter confirmed that he understood. Le Roux also explained to the accused that he was not obliged to respond to all the questions, and that once the confession was recorded it could be used as evidence against him in court. Initially the accused spoke in English, but he was advised to take advantage of the interpreter as he was available. Le Roux also told the Court that he understood the Xhosa language well, and therefore he would have been able to see if the interpreter did not properly interpret to the accused.

115. Le Roux testified further that he noticed that the rights of the accused relating to legal representation did not appear on the form. He therefore decided to add them with

his own handwriting, which he did. The accused understood and signed the amendment, as appears on the first page of the form, which was handed up to Court and marked as “Exhibit BB”. All the questions on the form were answered by the accused “**verbatim**”. There was no suggestion at all in cross-examination that magistrate Le Roux was not telling the truth. No reasons were advanced in Court during argument as to why Le Roux’s evidence should be rejected.

116. Mxolisi Edman Maboyana, an official interpreter employed at the Goodwood Magistrates’ Court since 1993, testified that he had been contacted at 20h40 on the 6<sup>th</sup> December 2001 and asked if he would be available to interpret for the accused, who was going to make a confession before a magistrate. Maboyana made himself available. He testified that he was escorted to the office of the magistrate in Cape Town, whereupon the magistrate, Le Roux, proceeded with the official formalities required in the taking of a confession. Maboyana testified that he interpreted Le Roux’s words into Xhosa and the accused’s responses into English, for the benefit of Le Roux. In his evidence Maboyana stated that he found the accused to be “*very brilliant*” and that the accused would respond to questions before he (Maboyana) had interpreted what was being read out to the accused by Le Roux. In addition Maboyana testified that the accused “*appeared calm and collected*” and “*eager to make a statement*”. In his evidence Maboyana stated that it was his signature that appeared on various pages of “Exhibit BB”, the prescribed form relating to a confession.

117. Athol Abraham Gordon, an attorney from a law firm **Findlay Tait** in Cape Town, gave evidence that Securicor Gray (the accused’s employer company) was their client. The company had instructed him to visit the accused in the cells of Parow Police Station. The aim of the visit was to ascertain whether the accused experienced any problems, and to provide legal advice if necessary. Gordon arrived at the police station at about 19h00 on the 6<sup>th</sup> December 2001. He was referred to Barkhuizen, who informed him that the accused had made a verbal statement and that the latter further wished to make a confession. Gordon thereafter met the accused and had a consultation with him. They

conversed in English and there was no interpreter. Gordon formed a view that the accused understood everything that they discussed. The accused was relatively calm and relaxed, although not necessarily happy. After consultation Gordon decided that he would not represent the accused as there was a conflict of interest. When he was leaving, Gordon met Barkhuizen outside. He did not disclose what he had discussed with the accused as it was protected by the law relating to attorney/client privilege. Gordon was a confident and calm witness throughout his testimony.

118. Inspector Cornelius Gideon de Jager was also called to testify. De Jager worked at Parow Police Station but spent most of the day outside the station. He normally arrived for duty at 06h30. He gave evidence that on the 6<sup>th</sup> December 2001 he returned from his duties outside the station in the afternoon. While he was walking past the cells, the accused asked him to find Barkhuizen for him. What he noticed about the accused at that time was that the latter looked depressed and had tears in his eyes. He went to look for Barkhuizen and told him that the accused wanted to see him. He left the station at about 18h00 that day, and he did not see the accused again.

119. Salomo Adams, who worked at the Parow Police Station, was also one of the State witnesses. He told the Court that his duty was to visit the cells to establish if there was anything that the detainees needed. On the morning of the 6<sup>th</sup> December 2001 he visited the cells as usual, accompanied by Superintendent Philander. The procedure was to check each cell individually and note down each detainee's complaint(s). Thereafter he would enter the complaints in the occurrence book in the charge office. That morning the accused never indicated that he had any problem or complaint.

120. Marius George Carstens, an inspector at Parow Police Station, also gave evidence. Carstens told the Court that on the 7<sup>th</sup> December 2001 he visited the cells at about 20h00. He saw the accused, and the latter neither made a request nor had any complaints.

121. Sergeant Owenita Cornelia Beukes from Parow Police Station also testified. She

gave evidence that she was in charge of the police station. She further told the Court that on the 6<sup>th</sup> December 2001 she arrived on duty at 06h30. She stated that part of her duty was to visit the cells, check whether all the detainees were there and if they had any complaints or problems. No detainee, including the accused, had a complaint that morning. Beukes told the Court that when she visited the cells the detainees had already had their breakfast. Beukes further stated that she made cell visits on an hourly basis, and at no time did the accused complain of, or request anything. She made records in the occurrence book to that effect. Beukes was a reliable and credible witness. The State then closed its case in the trial-within-a-trial.

122. Thereafter the accused, Luyanda Mboniswa, ascended to the witness box and testified that he was born and schooled in Port Elizabeth and that Xhosa was his mother tongue. He testified further that it was 16h03 on Wednesday the 5<sup>th</sup> December 2001 when the police arrived at his place of work, the Dolphin Beach complex, and arrested him in connection with the murder of the deceased. Mboniswa stated that he was eating in the storeroom when he was called by his colleague, Bosch. He exited the storeroom and saw three detectives. Two of the detectives called him into the Security Control Room and Superintendent Barkhuizen introduced himself as the police officer investigating the murder of Marike de Klerk and introduced his colleague, Sergeant Speed. Mboniswa testified that Barkhuizen had informed him that he was under arrest for the murder of Mrs de Klerk. He responded by stating that he did not know what Barkhuizen was talking about. According to Mboniswa's evidence Barkhuizen then told him that they would discuss the matter further in his office. He was then handcuffed by Speed and put in a police vehicle. Mboniswa testified that at the time he was 21 years old and it was the first time that he had been arrested.

123. Mboniswa further testified that they drove to Bishop Lavis Police Station and that he was asked by Barkhuizen, in the presence of Speed whether he liked "*speedy money*", and whether the deceased had "*practised apartheid*" to him. Mboniswa told the Court that his answer to both questions was "*no*". According to Mboniswa, Barkhuizen also asked him about his cellphone and Mboniswa informed him that he had left it in the

storeroom at the Dolphin Beach complex.

124. Mboniswa's evidence was that his constitutional rights had not been explained to him at the time of his arrest nor in the car as he was being transported to Bishop Lavis Police Station. Mboniswa testified that when they arrived at Bishop Lavis he was given a form ("Exhibit X 1") to sign. This form, which was handed up to Court, is in English and it outlines constitutional rights of a detained person. He was instructed to sign the document and he did so. He stated that he was not given any instructions to read the document before signing it nor was he given a Xhosa version by Speed. Mboniswa told the Court that he was then taken to Barkhuizen's office and thereafter to Speed's office. At that stage his hands remained cuffed behind his back. He was footcuffed as well and told to sit on a chair. While Speed was busy at his computer, Swart entered, followed shortly by Chauke and Ontong, whereupon all four asked him a series of questions.

125. Mboniswa said the four policemen interrogated him. He estimated that this went on for about two to three hours. Mboniswa also said that at that stage he was tired and did not have any strength, that he was handcuffed, footcuffed and hungry. One of the policemen, whom Mboniswa could now identify as Swart, told him that they would arrest Botyo and if he did not tell the truth they would lock him (Mboniswa) up as well. Mboniswa testified that he was concerned and hurt and explained to them that Botyo did not go any further than the Total Garage.

126. Mboniswa also testified that he had never wanted to make a statement and furthermore that he was never properly advised of his right to remain silent or of his right to a lawyer, either before, during or immediately after the interrogation in Speed's office. He testified further that the purpose of being taken to the seventh floor was never explained to him. He told the Court that had he been advised of his rights he would have sought legal advice.

127. Mboniswa told the Court that when he was taken to the seventh floor in order for his statement to be recorded Barkhuizen, Speed and Chauke were all present and no one

asked his permission to record him on video. He stated that although Chauke did interpret there were occasions when he would sleep. Mboniswa stated further that Barkhuizen had informed him that he was going to be interviewed first and that later he could have access to a lawyer. He testified that he understood this to be a promise that he would have access to a legal representative. Mboniswa told the Court that Barkhuizen had told him that the purpose of the interview was to give him a chance to prove his innocence. Mboniswa stated that he felt compelled to make the statement and having done so believed he would be released. He testified that at that time he had not had anything to eat or drink and although he was thirsty, did not ask for water. However, he later changed that version.

128. Mboniswa was then escorted by the police to Khayelitsha where he was taken to his girlfriend's house and then to his own residence. He testified that he saw the police arrest Botyo and was hurt by this because he had furnished them with reasons not to arrest him.

129. Mboniswa testified that when he was taken to Parow Police Station at 04h40, he was very tired and drowsy. He was also worried about Botyo's arrest. He testified that although he had signed "Exhibit CC", which set out his constitutional rights, the document had not been explained to him by Chauke who claimed to be too tired and had simply told him to sign the document because it would take him too long to explain it. He told the Court that the document was then placed in his pocket.

130. He also testified that although breakfast was served on the morning of the 6<sup>th</sup> December 2001 he did not eat it. He told the Court that he had requested the use of a telephone because he wished to telephone his mother in Port Elizabeth, but De Jager had just stared at him as if he had not heard him. Mboniswa told the Court that he had banged on the door, and when De Jager reappeared and asked him what the problem was, Mboniswa asked to see Barkhuizen.

131. Mboniswa told the Court that when Barkhuizen arrived he told him that he should go and speak to a magistrate. When Mboniswa requested access to a telephone, Barkhuizen told him that he should first go to a magistrate and thereafter he would allow

him to use the telephone. Mboniswa testified that Barkhuizen had not informed him of any constitutional rights such as the right to remain silent. Mboniswa gave evidence in respect of being brought before Le Roux and admitted that Le Roux had informed him of his right to legal representation but had not told him specifically that it was possible to access a lawyer at 22h00. When asked why he had responded in the negative when asked by Le Roux whether any promises had been made to him, he stated that he thought that as a result of making a statement Botyo would be released.

132. Mboniswa was cross-examined at length and several material contradictions were revealed during the cross-examination. These became evident in his testimony regarding the alleged interrogation that occurred in Speed's office. Initially he stated that the police stopped when he heard Kem in the corridor complaining that he had to leave because he had to go to work. He later stated that they stopped because Barkhuizen instructed them to take him to the seventh floor for the recording of the statement, and then at a later stage he stated that the questioning never stopped. He also stated under cross-examination that he had in fact asked for, and had been permitted to drink water when Swart had taken him to the fingerprint room at Bishop Lavis Police Station. It was put to him that if he had asked for water why he had not asked for food, if he was as hungry as he claimed to be.

133. There were further contradictions in Mboniswa's evidence. For instance, he was evasive and did not respond when asked if "Exhibit CC", which set out his constitutional rights and which he had signed at Parow was the same document he had previously signed at Bishop Lavis Police Station. He could not tell the Court what it was that he was supposed to have missed when signing "Exhibit CC" and why it was never put to Chauke that he, as Mboniswa was suddenly alleging, had been too tired to read the form to him.

134. It was also clear that at times Mboniswa was being economical with the truth. It was pointed out to him that Groenewald had testified that when he spoke to Mboniswa at Parow Police Station he had indicated that he was fine. When he was told that Groenewald's evidence had not been disputed, Mboniswa testified that he did not know



why that had not been disputed by his counsel. He confirmed that when he had woken up at 10h00 he saw his breakfast by the grill. He testified further that he had been given his lunch by De Jager. He could not explain why in the testimony given by Beukes the occurrence book showed that fourteen visits had been made to his cell and yet he claimed to have remembered none of them.

135. When asked about his educational qualifications Mboniswa testified that he had passed Matric and a Computer Literacy course at Technikon, as well as reaching “C” Grade as a security guard. He confirmed that in order to reach this grade he had to pass a number of courses which were taught in English. He also stated that when he worked at Dolphin Beach he had received instructions from Cornelius in English. It was also clear from the cross-examination that the accused had a good understanding of English because often he would respond to a question before it had been interpreted to him.

136. When asked why he had asked Barkhuizen to come to his cell at Parow Police Station, he told the Court that it was because De Jager had refused to give him access to a telephone and because of an express wish to make a statement. He conceded that nobody had said to him that if he made a statement he would be released. Mboniswa stated that Barkhuizen had never explained any of his rights to him but had simply asked him to go to a magistrate to make a statement. He said that he did not know why it had not been put to Barkhuizen that he was lying when he testified that he had fully explained his (Mboniswa’s) rights.

137. Mboniswa stated that when he was taken to Le Roux he still had in his pocket the document that he had signed at Parow, which contained his rights. He admitted that they were written in English and that he had read them while eating a meal brought by De Jager. He confirmed that he had read the form because he saw the words “constitutional rights” written on it. He told the Court that he had understood the rights and in fact had decided to exercise one of them by asking for the telephone. He also confirmed that some of the rights were the same as the ones explained to him before he made the audio/video-recorded statement.

138. The accused appeared to be a stranger to the truth with his evidence that he had not been allowed to use the telephone to contact his mother. When it was put to him that he had the opportunity to ask Speed for the telephone because Speed had taken him to the doctor after he had made his statement to Le Roux, he told the Court that there was no time for him to do so. He later contradicted himself by stating suddenly that it was too late to use the telephone. When it was put to him that Ontong had told the Court that on the 5<sup>th</sup> December 2001 Mboniswa did not want to telephone his mother, he denied this but could not tell the Court why it had not been put to Ontong by his defence counsel that he was lying.

139. The second defence witness was Mr Martin Yodeiken, a clinical psychologist who had been in continuous private practice for some twenty-five years. He prepared a report which was subsequently handed up to Court and marked as “Exhibit FF”. He confirmed the contents of the report. His evidence was that he had consultation with the accused for a total of three-and-a-half hours. Thereafter he was able to compile a report on the profile of the accused. He testified that the accused spoke reasonable, though not good English.

140. His evidence was that the accused was twenty-one years old at the time of the commission of the offence in question in December 2001. The accused was suddenly being interrogated over a long period of time by four policemen whilst he was handcuffed. The interrogation lasted for a long time and he had nothing to eat nor drink except tap-water later on the day of his arrest. This, coupled with the fact that he had woken up much more earlier in the morning in order to prepare for work and had been working the whole day up until the time of his arrest, at about 16h00 on the 5<sup>th</sup> December 2001, possibly had an effect on the accused.

141. Mr Yodeiken’s evidence was that the arrest of Botyo on the 6<sup>th</sup> December 2001 in the presence of the accused possibly had an effect on him. His evidence was that culminating with the arrest of the accused’s girlfriend, the Court can reasonably “infer

*that the accused was brought to a confessing state of mind as a result of the sequence of events which had increased his level of exhaustion, anxiety, stress and experience of being intimidated”.*

142. Mr Yodeiken testified that the “*possibility cannot be excluded that he [the accused] was thus brought to a confessing state of mind when he made his statement to the magistrate*”. Mr Yodeiken also added that an arrest itself is stressful by its very nature. Furthermore the interrogation that was prolonged against the background of an accused, and the fact that he had not had something to eat on that particular day contributed to a situation whereby he was brought to a confessing state of mind when he made the statements. The high watermark of Mr Yodeiken’s report was that the possibility could not be excluded that the accused was brought to a confessing state of mind.

143. Mr Yodeiken was cross-examined by the State quite effectively. He conceded in cross-examination that his conclusions were based on what the accused had told him. He also conceded that three-and-a-half hours were not good enough to do a full and proper assessment of the accused. When it was put to him in cross-examination that if the accused had not told the truth to him, particularly in the light of the accused’s allegation that he was bombarded by a series of questions when he was being interrogated by the Police detectives on the day in question, he conceded that some stress would therefore fall away in those circumstances.

144. In my view Mr Yodeiken’s evidence cannot be safely relied upon. It is no more than self-corroboration of the version given to him by the accused. There were no collateral and/ or objective sources to corroborate what Mr Yodeiken said. Mr Yodeiken was not even present in Court when the accused gave evidence-in-chief. Furthermore, some of the things that were told to him by the accused were in conflict with the evidence that was led by the accused before this Court. One example is on page 6 of the report, the last paragraph, where it says “*he began to feel afraid that the police may now beat him*”. In Court the accused said in no uncertain terms that he was not afraid of being beaten by the police.

145. This Court has had the benefit of observing the accused who was in the witness box for at least two full days. The Court is in a far better position to make credibility findings in relation to the accused than Mr Yodeiken, who merely consulted with the accused for some three-and-a-half hours and was not even present in Court when the accused gave evidence-in-chief. Even Mr Yodeiken conceded that. It is abundantly clear from Mr Yodeiken's report that it was based almost entirely on what the accused had told him. It is clear from the report that the accused did not tell him the truth in certain respects as indicated above.

146. Thereafter the defence closed its case in the trial-within-a-trial.

147. On the 9<sup>th</sup> September 2002 I ruled the statement made by the accused to Detective Superintendent Barkhuizen on the night of his arrest to be admissible. Similarly the confession that was made by the accused to magistrate Le Roux on the following evening was ruled admissible. What follows in the judgment are reasons for the ruling in respect of each of these statements. We shall first deal with the admission that was made to Detective Superintendent Barkhuizen on the 5<sup>th</sup> December 2001.

148. The evidence clearly established that at the time of the arrest Superintendent Barkhuizen introduced himself to the accused, informed him that he was investigating the murder of Mrs de Klerk, that he had information implicating him in the murder and that he was arresting him as a suspect in connection with the murder. The evidence also reveals that Barkhuizen warned the accused of his rights in terms of the Constitution. Thereafter Barkhuizen asked the accused whether he had understood what he had been told, to which the accused replied in the affirmative. This was corroborated by Detective Sergeant Speed and Detective Inspector Ontong.

149. Upon arrival at Bishop Lavis Police Station the accused was taken into the charge office, where his handcuffs were removed. He was also officially informed of his constitutional rights as contained on Form SAP 14 A ("Exhibit X1"). Prior to signing the

English version, the accused was given the Xhosa translation (“Exhibit X”) printed at the front of the book to read. A copy of the signed English version was torn out and placed in the accused’s jacket pocket. Superintendent Barkhuizen’s evidence was clearly to the effect that he enquired from the accused whether he was willing to make a formal statement which would be recorded in writing and on video. The accused agreed and thereafter arrangements were made to get the facility on the seventh floor of the same building.

150. At the start of the interview the accused was warned of his rights in terms of the Constitution. “Exhibit Y” before Court clearly reflects that the accused was warned of his rights. The Court also had the benefit of seeing a video which was played. The accused who testified also admitted that he was warned of his rights at that stage by Superintendent Barkhuizen. Furthermore he conceded that he was still in possession of the signed copy of his constitutional rights which had been placed in his pocket at Bishop Lavis earlier that afternoon. “Exhibit Y” makes it abundantly clear that the accused was warned about his right to remain silent throughout the interview, the fact that he was not compelled to make a statement or to answer any questions put to him, and the fact that if he made a statement it would be reduced to writing and that it could be used as evidence in a court of law against him. Furthermore it is clear from “Exhibit Y” that the accused was warned about his right to legal representation before making a statement. The accused elected to make a statement before being consulted by a lawyer.

151. The evidence, in my view, clearly reveals that the accused was left in no doubt about his rights before he made a statement to Superintendent Barkhuizen on the night of his arrest. It is not the accused’s case that he was assaulted or threatened by anyone to make a statement. His rights had been fully explained to him at the time of his arrest, at Bishop Lavis Police Station when he signed what was referred to in Court as his Bishop Lavis constitutional rights, and thirdly before he made a statement that was recorded on the seventh floor. There can be no doubt that he was fully informed of his rights before making the statement.

152. The statement that was made by the accused during the interview is exculpatory in nature. It contains substantially the same information as at all times previously had been given by the accused to Superintendent Barkhuizen. It is inconceivable that anyone could be forced to make an essentially exculpatory statement regarding the crimes for which one has been arrested. Mr Mahomed's contention was that even though the accused's rights may have been explained to him, given the fact that he was shocked, he was relatively young (he was twenty-one years old at the time of the commission of the offence) and it was late at night, the accused did not have enough time to assimilate or to understand that which was explained to him. In my view that argument cannot hold water in the circumstances of this particular case, for the reasons given above.

153. Accordingly for these reasons I ruled that the statement made to Superintendent Barkhuizen on the night of the accused's arrest was admissible in terms of section 219 of the Criminal Procedure Act 51 of 1977.

154. We now turn to the statement that was made to the magistrate on the 6<sup>th</sup> December 2001. The evidence clearly reveals that the accused checked in at the Parow police cells at 04h40 on the 6<sup>th</sup> December 2001. He was served breakfast and enquiries were made as to whether he had any complaints, to which he indicated that he had none. The record clearly reveals that there were several visits during the course of the day and on each occasion the accused indicated that he had no complaints.

155. The evidence was also that at about 17h30 Inspector de Jager came in from outside and brought a prisoner to the cells. Thereafter the accused shouted and called him, indicating that he wanted to speak to Barkhuizen. De Jager obliged and telephoned Barkhuizen, who arrived approximately an hour later. This was the first contact that the accused had with any member of the investigating team since leaving Khayelitsha early that morning. When Barkhuizen arrived at the accused's cell, the latter made a report to him that he wished to make a confession. Barkhuizen explained the legal position regarding the making of a confession before a magistrate, including the accused's rights in terms of the Constitution in this regard.

156. Prior to Superintendent Barkhuizen's arrival at Parow the accused had read through the SAP 14 A notice of rights in terms of the Constitution. He testified that he had completed reading the notice and had understood it. Furthermore at about 19h00 on that day Mr Athol Gordon, an attorney representing the accused's then employers, arrived at Parow Police Station to attend upon the accused. Barkhuizen informed Gordon that the accused had indicated to him that he wished to make a confession before a magistrate, whereupon Gordon visited the accused in the cell and consulted with him alone for just under an hour. Before leaving the police station Gordon again spoke to Barkhuizen, after which discussion he was aware of the possibility that the accused would be taken to make a statement before a magistrate.

157. Barkhuizen testified that after Gordon left he (Barkhuizen) went to the cell and enquired from the accused whether or not he still wished to make a statement. The accused answered in the affirmative. It is common cause that thereafter the accused was taken to magistrate Le Roux in Cape Town who immediately ordered that the handcuffs and footcuffs be removed from the accused. Magistrate Le Roux testified that he explained the accused's rights to him before he made a statement, and that this took place in the privacy of the magistrate's locked office. Before making the statement the accused was warned of his rights by magistrate Le Roux. Furthermore the entire proceedings in the office were interpreted from English to Xhosa by an official court interpreter, who testified and confirmed same. The magistrate testified that he could also speak and understand Xhosa.

158. In my view the evidence clearly indicates that the accused had had a decent sleep the day before he made a statement. Furthermore he had had food, he had rested and there can be no doubt that he made the statement freely and voluntarily. It is important that the accused had had the benefit of being consulted by an attorney before he went to make a statement before the magistrate. Undoubtedly Gordon (the attorney) would have been doubly vigilant in warning the accused of his rights. In the view of this Court it is unthinkable that an attorney would not have advised the accused of his constitutional

rights before he made a statement to the magistrate. Even if I am wrong in this regard, the accused made a statement to the magistrate on the day in question with full knowledge of his constitutional rights which were explained to him the previous day, and which were explained to him by Barkhuizen before he made the statement.

159. The accused was not forced or threatened to make a confession before the magistrate. Le Roux himself testified that the accused made the statement freely and voluntarily. Furthermore, upon being asked, *“Why do you wish to repeat this statement?”*, the accused answered *“I want to tell the truth now: what I said previously was not the truth”*. The accused also added, *“something which comes from my heart”*. This was in response to the question *“Did any person tell you what to say in your statement, or will your statement comprise the things which you have personally experienced and observed and which are within your knowledge?”* This appears in “Exhibit BB”.

160. In my judgment, this is a classic case where the requirements prescribed by section 217 of the Criminal Procedure Act 51 of 1977 relating to the admissibility of a confession by the accused were met. There can be no doubt on the evidence before me that the statement was made by the accused freely and voluntarily, that the accused was in the sound and sober senses and without having been unduly influenced in relation thereto.

161. Furthermore the proceedings relating to the making of a confession were fully interpreted or translated to the accused, as per the evidence of the interpreter and magistrate Le Roux before whom the confession was made. The accused’s evidence that he was brought to a confessing state of mind as a result of not having a decent sleep, and the fact that the Police had arrested Botyo in his presence, cannot reasonably be true in the light of overwhelming evidence by State witnesses against the accused, particularly relating to the accused’s emotional state at the time.

162. Almost all State witnesses testified that the accused looked calm and comfortable. Magistrate Le Roux, before whom the statement was made noted on “Exhibit BB” that the accused “looked comfortable”.



163. Equally the defence argument that the accused's knowledge of English was limited and therefore the possibility exists that there was misunderstanding between him and the magistrate cannot hold water.

#### **Defence's case**

164. Mr **Gamble** SC, leader of the defence team, indicated to Court that the accused wished to exercise his constitutional right to remain silent. Accordingly the accused did not give evidence in Court. Defence counsel then proceeded to call Dr Munro Peter Marx, a DNA expert in private employment. Dr Marx is a Managing Director of Unistel Medical Laboratories (Pty) Ltd, which is attached to the University of Stellenbosch.

165. He gave evidence-in-chief with reference to "Exhibit YYY" and indicated that he would have liked to have lowered the minimum threshold, and that this would have provided trouble waters. However, he told the Court that this could have been a helpful academic exercise as well. "Exhibit YYY" contained Dr Marx's DNA report as well as a recent article on the interpretation of complex forensic DNA mixtures, which appeared in a Croatian Medical Journal. Dr Marx explained to the Court that an "Analytical Threshold" is a safety mechanism which is contained in the international guidelines for forensic DNA testing. He further conceded that the threshold was dropped *in casu*.

166. In cross-examination, Dr Marx praised the methodology of the State's Laboratories, given that they deal largely with mixed DNA profiles. He also admitted in Court that he accepted Otto's conclusion as being correct.

167. In the considered view of this Court, Dr Marx's evidence did not take the case any further. He was the only witness whose evidence was led by the defence, hence this was the end of defence's case.

### **Evaluation of evidence**

168. On evaluating the facts found to have been proved, the Court comes to the following conclusion:

- ◆ The deceased was killed some time between 21h00 on the 2<sup>nd</sup> December 2001 and 08h30 on the 3<sup>rd</sup> December 2001. One of the Security Guards, Ntshuba, saw her driving her car between 18h00 and 19h00 on Sunday the 2<sup>nd</sup> December 2001 and she did not meet her appointment on Monday the 3<sup>rd</sup> December 2001 at 08h30 to have her car serviced. Prof. Knobel could not with any accuracy determine the time of her death other than to say it must have been thirty-six (36) hours or more prior to his initial examination at about 20h00 on the 3<sup>rd</sup> December 2001. Rigor mortis had disappeared completely, there was marbling of the skin and there were early changes of decomposition and autolysis of the internal organs.
- ◆ The cause of death was manual strangulation and the consequences thereof where considerable force had been used. Prof. Knobel said the classic signs of manual strangulation were fractures of the hyoid bone; haemorrhages and contusions in the deep muscles of the neck; subconjunctival haemorrhage of the eye with petechial haemorrhages in the eye. The fact that both horns of the hyoid bone and that both upper horns of the thyroid cartilage had also been fractured was unusual and indicated the use of considerable force.
- ◆ The deceased was robbed of her cellular telephone; two torches; a wristwatch and cash. As far as the cash is concerned no specific amount can be determined. The accused had R300 in his possession from which he paid the taxi to Blouberg R150; the taxi to Khayelitsha R300; gave Botyo R50 and sent his mother R650, all without drawing more cash from his own account.
- ◆ Access to Mrs de Klerk's apartment must have been obtained through the door on the balcony. No signs of breaking in were found and the front door of the apartment was locked. Mrs de Klerk was known to be very security conscious and while a door to the balcony may have been unlocked, it is inconceivable that it would have been open.
- ◆ The Court cannot find without reasonable doubt that the deceased was raped.

## **Conclusion**

169. The accused went to the Dolphin Beach Complex after 21h00 on the 2<sup>nd</sup> December 2001 when he left Botyo at the Total Garage. He left the complex at approximately 00h30 when he was seen walking away in the direction of Blouberg. He should in any event not have been at the complex as he was not on duty.

170. At 23h50 on the 2<sup>nd</sup> December 2001 the accused was in Mrs de Klerk's apartment from where he made the first telephone call to Kem asking for the loan of his car. At 00h16 on the 3<sup>rd</sup> December 2001 another call was made to Kem at the reception desk (see the evidence of Visagie, the Telkom expert).

171. On the Monday morning (03<sup>rd</sup> December 2001) he returned home at about 02h30 and was in possession of cash which he counted out after having paid the two taxis a total amount of R450. He had drawn an amount of R300 earlier and had sufficient cash in his possession to send R650 to his mother later that Monday and to give Botyo R50.

172. He also had in his possession Mrs de Klerk's cellular telephone; her wristwatch and a torch. These items were satisfactorily identified as being the property of Mrs de Klerk. The cellular telephone and watch were hidden by Victoria at his request. When on Wednesday the 5<sup>th</sup> December 2001 it became apparent that the accused was a suspect in connection with the murder Victoria gave the items to Sam Mehlwana who later gave them to the Police. The torch was found in a jacket in his room.

173. The only conclusion that can be drawn from the evidence before this Court is that the accused was the perpetrator of the crimes that were committed. Defence counsel attempted throughout the trial to show that another person or other persons may have been involved in the commission of the crimes, but from the evidence before the Court, no such finding can be made.

174. In addition to this evidence linking the accused to the crimes there was a detailed statement made by the accused to the magistrate in which he admitted his participation in the commission of the alleged crimes, except that of rape. This statement contains details which could only be known to someone who was at the scene at the time of the commission of the crimes in question. Many of such details were corroborated by evidence of various State witnesses. Although the so-called confession by the accused certainly confirms his involvement in the commission of the crimes, the Court did **not** find it to be the deciding factor in reaching its conclusion that the accused is guilty of the following crimes:

Count 1 – Murder

Count 3 – Robbery (with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977)

Count 4 – Housebreaking with intent to commit a crime unknown to the State

The accused is acquitted on count 2, that of Rape.

175. This is a unanimous finding of the Court.

**Hlophe, JP**