Reportable (in part)

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

CASE NO: SS88/2002

In the matter between:

THE STATE

and

SHAHEEM ISMAIL

FARIED DAVIDS

ALIVIA DAVIDS

ROY VLOTMAN

IKRAM NORTON

ASHRAF LEE

ABDULLAH BRENNER

JUDGMENT DELIVERED ON 6th DECEMBER 2004

HJ ERASMUS, J

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INTRODUCTION

In this matter the question arises in what language the judgment is to be given. The accused are all members of the Muslim community of Cape Town. The first accused, Dr Shaheem Ismail, is a well educated man, a qualified dentist. In the evidence, he was referred to as "Doc" Ismail or simply as "Doc". At the beginning of the trial, I was given the assurance that although he prefers to use English, he understands Afrikaans and that he would have no difficulty in following the evidence given in Afrikaans. His fellow-accused are less well educated and have a limited command of English. During the trial, evidence given in English was translated into Afrikaans by an interpreter who sat with them in the dock.

I shall give my judgment mainly in English because most of the evidence adduced at the trial concerns the position of the first accused. I shall use Afrikaans when I deal specifically with the evidence relating to some of the other accused individually.

THE EVENTS OF 10th AUGUST 2000

On 10th August 2000 at about 18h45 a BMW came to a stop in Booi de Goede Crescent, Table View, at the entrance to the drive-way leading to Regional Magistrate Wilma van der Merwe's ("Van der Merwe") residence at 3 Villa De Angelo. A figure emerged from the car and walked up the drive-way towards Van der Merwe's residence which is situated at the end of the drive-way. The man had something in his hand which was wrapped in, or covered by, what appeared to a patterned scarf. He pressed the bell at Van

der Merwe's front door. After a brief lapse of time, the front door was flung open, two heavily armed policemen rushed out, overwhelmed the man at the door and pinned him to the ground. In the process, the scarf and a 9mm pistol were sent flying. The man was arrested. He is Mr Abdullah Brenner who is now before Court as accused seven.

One of the policemen ran towards the BMW along with two other policemen who had emerged from the house next door to Van der Merwe's residence. The BMW pulled away but was forced to stop by police vehicles which were in the vicinity. The driver of the BMW and his passenger were arrested. The driver was one Allistair Kerridge ("Kerridge") who was to become one of the principal witnesses for the prosecution. The passenger was Mr Ashraf Lee who is now before Court as accused six.

The Court was told that the police had been expecting an attack on Van der Merwe's house. A video camera was installed outside the front door and the approach of the man was observed on a screen in the house. The events were video-taped and the video was subsequently shown in Court during the course of the trial.

A number of people were arrested, including the accused now before the Court, and they were in due course indicted on charges arising from the events.

THE INDICTMENT

The accused are charged on three counts

Count 1:

It is alleged that the accused are guilty of a contravention of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956 in that the accused during the period from November 1999 to 10th August 2000 and at or near Pollsmoor Prison and/or several other places in the Cape Peninsula, within the districts of Cape Town, Wynberg, Bellville and Goodwood, wrongfully and intentionally conspired with one another and other persons to commit the offence of murder and/or to assist in committing the offence of murder in that the accused, together with others, agreed to obtain a firearm and/or a knife and thereafter wrongfully and intentionally to kill Regional Magistrate Wilma van der Merwe by shooting her with a firearm and/or stabbing her with a knife.

In the first alternative to count 1:

It is alleged that the accused are guilty of the crime of attempted murder in that the accused on or about the 10th August 2000 and at or near 3 Villa De Angelo, Booi de Goede Crescent, Table View, in the district of the Cape, wrongfully and intentionally attempted to kill Regional Magistrate Wilma van der Merwe by approaching her with a loaded firearm with the intention of shooting her therewith.

In the second alternative to count 1 (this count is only applicable to accused number one)

It is alleged that the accused is guilty of a contravention of section 18(2)(b) of the Riotous Assemblies Act 17 of 1956 in that the accused during the period from November 1999 to 10th August 2000 and at or near Pollsmoor Prison and/or several other places in the Cape Peninsula, within the districts of Cape Town, Wynberg, Bellville and Goodwood, wrongfully and intentionally incited, instigated, or procured other persons to wit Kelvin Keith Daniels, Ikram Norton, Roy Vlotman, Faried Davids, Alivia Davids en Abdullah Brenner to commit the offence of murder and/or to assist in committing the offence of murder in that the said Kelvin Keith Daniels, Ikram Norton, Roy Vlotman, Faried Davids, Alivia Davids en Abdullah Brenner agreed to obtain a firearm and/or a knife and thereafter wrongfully and intentionally to kill Regional Magistrate Wilma van der Merwe by shooting her with a firearm and/or stabbing her with a knife.

Count 2

It is alleged that the accused are guilty of a contravention of section 2 of the Arms and Ammunition Act 75 van 1969 in that the accused on or about the 10th August 2000 and at or near 3 Villa De Angelo, Booi de Goede Crescent, Table View, in the district of the Cape, were wrongfully in possession of a firearm to wit a 9mm Parabellum calibre Astra semi-automatic pistol 0786E without being the holder of a valid licence to posses such a firearm.

Count 3

It is alleged that the accused are guilty of a contravention of section 36 of the Arms and Ammunition Act 75 van 1969 in that the accused on or about the 10th August 2000 and at or near 3 Villa De Angelo, Booi de Goede Crescent, Table View, in the district of the Cape, were wrongfully in possession of ammunition to wit nine 9mm bullets, without being in lawful possession of a firearm capable of firing that ammunition.

[During the course of the trial, it became apparent that person named Kelvin Keith Daniels in the second alternative count to count one, is in fact known by several other names. When he testified on behalf of accused one under the name Alex Petersen, he indicated that he is also known as Kelvin Keith Daniels, as Dillon Williams and as Dawood. During the course of the trial, he was mostly referred to as Dawood, and sometimes as Dillon. In the judgment, we will refer to him as Dawood.]

CONSPIRACY AND INCITEMENT

The principal charge against the accused is that they conspired with one another and other persons to commit the offence of murder or to assist in committing the offence of murder. The second alternative to the principal count, and one which applies only to the first accused, is that he incited, instigated, or procured other named persons to commit the offence of murder or to assist in committing the offence of murder.

The degree of proof required to establish that a conspiracy to commit a crime had taken place between two or more people was set out as follows in *R v Ruper and Jane Lewis* (unreported) and cited with approval in *R v S* 1959 (1) SA 680 (C) at 683C—D:

> "Conspiracy to commit a crime requires an agreement on the part of two or more accused to commit a criminal act (see *R v Solomon* 15 SC 107, and *R v Dhlamini* 1941 OPD 154). Mere intention is insufficient: there must be an actual concurrence of minds in an agreement to do the act in question. Such concurrence need not necessarily be by way of explicit, spoken words, for the agreement to commit a crime, as any other agreement, can be arrived at tacitly and by conduct (see eg *R v B* 1956 (3) SA 363 (E) at 365). Where, however, the agreement is sought to be inferred solely from the conduct of the alleged conspirators such inference must be on the cardinal rules of logic enumerated in *R v Blom* 1939 AD 188 at 202 and 203, be consistent with all the proved facts, and the proved facts in turn must be such that they exclude every reasonable inference from them save the one to be drawn."

In *S v Moumbaris and Others* 1974 (1) SA 681 (T) at 687A it is accordingly said –

> "A conspiracy is thus not merely a concurrence of wills but a concurrence resulting from agreement."

There is no conspiracy if one of the parties only pretends to agree but in fact secretly intends to inform the police of the other party's plans (*Harris v R* (1927) 48 NLR 330 at 347—48; Snyman *Criminal Law* 4th ed 293).

The legislative purpose of making incitement to commit a crime a punishable offence is to discourage people from seeking to influence others to commit crimes (*R v Zeelie* 1952 (1) SA 400 (A) at 405C—D; *S v Nkosiyana and Another* 1966 (4) SA 655 (A) at 659A). In the latter case, an inciter is described (at 658H) as "one who reaches and seeks to influence the mind of another to the commission of a crime". The means used to influence the other person are immaterial (*S v Nkosiyana and Another*, *supra,* 659H). The incitement may be express or tacit (*R v Zeelie*, *supra*, 410A).

It is the conduct and intention of the inciter which is vitally in issue. Hence incitement may be committed even in respect of a police trap, who has no intention of committing the real crime (*S v Nkosiyana and Another*, *supra*, 659A—B; Snyman *Criminal Law* 4th ed 296).

THE COURSE OF THE TRIAL

The trial started before me on 4th February 2003. It is necessary that I deal with the reasons why the trial is only now, after twenty-two months, nearing completion.

Initially there were twenty-one accused. The case was scheduled to be heard by a Judge of this Division in the magistrate's court at Atlantis. The charges against fourteen of the accused were in due course withdrawn. On 3rd February 2003 the trial was transferred for hearing in the High Court in Cape Town.

On 4th February 2003 the accused all pleaded not guilty to the charges. On that day, the State presented the evidence of several members of the South African Police Service who were all duly cross-examined by the legal representatives of the accused.

The next day, Mr Kawalsky, who appeared on behalf of accused one, informed me that the accused had terminated his mandate. The trial was postponed to 10th February and thereafter to 13th February to enable accused one to apply to the Legal Aid Board for the appointment of other counsel to represent him. Ms Lötter was in due course appointed and the accused informed me that that he was satisfied with her appointment. On 13th February the trial was postponed to 3rd March to afford Ms Lötter the opportunity to consult with her client and to prepare for the trial. On 3rd March a witness was indisposed and unable to attend Court, Ms Lötter needed more time to consult and I was informed that accused four, Mr Roy Vlotman, had to attend a clinic on Wednesday 5th March.

Prior to the resumption of the trial on the morning of Thursday 6th March, Ms Lötter informed me that she had been instructed by the first accused to apply for my recusal. She asked for the matter to stand down to Monday, 10th March at 10h00. On that day, the preparation of the typing of the record of the proceedings on which the accused wished to rely had not been completed and the matter was further postponed to 12th March. The application for my recusal was heard on 12th March and on 13th March I dismissed the application. My judgment dismissing the application is reported *sub nom S v Ismail and Others* 2003 (2) SACR 479 (C).

On 17th, 18th and 19th March the case could not proceed due to the absence of accused four by reason of illness. On 19th March a direction was made in terms of section 159(3) of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act") for the separation of the proceedings against him from the proceedings in respect of the other accused. His counsel, Mr Philander, continued to represent his interests in Court. It subsequently appeared that he had suffered a massive stroke and he died on 5th May 2003. Accused one was also indisposed on the 19th March. On 20th March, Ms Lötter was indisposed and the matter eventually continued on 24th March.

The loss of twenty-seven court days during the six week-period from 5th February to 24th March 2003 had a devastating effect on the further course of the case: it worked havoc with counsels' diaries and with the scheduling of witnesses by the State. I may interpose, at this stage, and point out that on the day that Mr Kawalsky withdrew, Mr Robertson on behalf of the second accused, Mr Johnson on behalf of the third accused, and Mr Philander on behalf of the fourth accused, strongly objected to the delay brought about by the termination of Mr Kawalsky's mandate. As Mr Johnson put it at the time:

> "It is correct as my learned colleague, Mr Kawalsky has stated before this Court that this matter has been postponed on numerous occasions. And it is because of the length of the trial, M'Lord, we have to set down eight weeks, two months at a time, and that makes not only a delay of justice for the client, it also makes inroads into counsel's time and how we can regulate our day to day business."

There were further complicating factors which impinged upon the smooth running of the case. There were many, frustrating delays. Thus, for example, due to an oversight on the part of the Police, accused one was not brought to Court on 23rd October 2003. On another occasion, the police vehicle bringing accused one to Court was involved in an accident. On yet another occasion, a new police unit detailed to transport accused one lost their way and could not find the High Court. Counsel also had their problems at times, with cars that did not start or trains that did not run on time. I need not dwell on the causes of all the delays.

A further complicating factor had its origin in the period 13th February to 3rd March 2003 when the matter was stood down to enable Ms Lötter to prepare for the trial. I was allocated a civil trial which was set down for 20th February and estimated (by counsel) to last five days. On that estimate, the civil trial would have run its course before this matter was due to resume. The estimated duration of the civil trial can only be described as a gross miscalculation. Attempts to deal with the two matters then pending before me by “leapfrogging” them, for obvious reasons proved to be unsatisfactory. In the end, it was resolved, in consultation with all counsel involved, to complete the civil trial during the first term of 2004, thus leaving the coast clear for this matter to run its course to completion, however long it may take, without any further interruption.

Throughout most of the trial, accused one was held in the prison at Malmesbury. In order to consult with him, his legal representative either had to proceed to Malmesbury, or accused one had to be brought to Cape Town. I was informed that the Police do not have the manpower to bring accused

one to Cape Town for purposes of consultation on days when the trial was not proceeding. They nevertheless gave their co-operation by bringing accused one to Cape Town for purposes of consultation on 8th, 9th and 10th July 2003. Ms Lötter had occasion to complain that, when the head of the prison was absent, she was denied access to her client by officials on duty. This refusal resulted in the trial being stood down on 18th and 19th November 2003 to afford Ms Lötter the opportunity to consult at Court with her client in preparation of the cross-examination of (former) Captain Johan Van Dyk. (Several persons with the surname Van Dyk feature in this case. In what follows, a reference to "Van Dyk" without qualification is a reference to Captain Johan Van Dyk). Mr Mihalik subsequently had similar complaints about difficulties in gaining access to accused one at the prison, despite the fact the arrangements had been made beforehand. On 7th June 2004 the head of the prison at Malmesbury attended at my chambers at my request and undertook to take matters in hand.

The Court did not sit on 25th November 2003 -- all the accused are Muslims and 25th November marked the end of Ramadan and the festival of Eid.

On 26th November 2003 Ms Lötter informed me that by reason of information that had come to her knowledge, she was obliged for ethical reasons to withdraw as counsel for accused one. It was not a decision she made lightly. She discussed the matter with and elicited the advice of a senior member of the Bar.

The matter in respect of accused one was postponed to 3rd December 2003 in order to receive a report on the progress of his application to the Legal Aid

Board for the appointment of counsel to take the place of Ms Lötter. On that day, I was informed that his application had been submitted to the Legal Aid Board and that Mr J Mihalik had expressed willingness to accept the brief to appear on behalf of the first accused.

It was then resolved, in consultation with all counsel involved, to postpone the matter to 5th April 2004. It was hoped that this arrangement would leave the Legal Aid Board adequate time to finalise the appointment of counsel to take the place of Ms Lötter, and to afford such counsel time to consult with his client and to prepare for trial. The idea was further to enable me to complete the part-heard civil trial adverted to above, and to enable counsel representing the other accused to arrange their commitments in such a way as to leave the coast clear for trial to resume on 5th April 2004 and to run its course to completion, however long it may take, without any further interruption.

I requested to be kept informed about the progress being made with the appointment of counsel to take the place of Ms Lötter. When in February 2004 I had heard nothing further about the matter, I started making enquiries. I was concerned that undue delay in finalising the appointment of Mr Mihalik (or other counsel if he were to decide not to accept the brief) would result in counsel not having sufficient time to prepare for the resumption of the trial on 5th April 2004. After a long and tortuous process, which I need not detail here, Mr J Mihalik was in mid-April 2004 appointed to act on behalf of the first accused.

The delay in coming to finality about the appointment of Mr Mihalik had a further devastating effect upon a matter already bedevilled by lengthy delays. It worked havoc with the diaries and work-schedules of counsel who represent the other accused, and had a material, negative effect on their income. It disrupted the planning of Mr Cilliers, who appears for the State, who had to orchestrate the calling of witnesses, including an expert witness who had to be specially brought to Cape Town. And it disrupted the lives of the other accused who have to wait so much longer for the completion of their trial.

On 21st October 2004 Mr Robertson informed me that irreconcilable differences about the conduct of the defence had arisen between him and his client, the second accused. He accordingly requested, and was granted, leave to withdraw as counsel for accused two. Mr Craig Philander, who had represented accused four prior to his passing away, was available to step into the shoes of Mr Robertson. The Legal Aid Board confirmed the appointment of Mr Philander as counsel for accused two with commendable expedition. The matter stood down for a number of days to enable Mr Philander to prepare and to consult with his client.

While I am dealing with the course of the trial, I should refer to the flow of complaints from accused one about his treatment by officials of the Department of Correctional Service and the Police. On 10th February 2003 he complained about the manner in which he was being transported from prison to Court; on 18th March 2003 he complained that he was not feeling well and I requested the district surgeon of Malmesbury to examine him (his report is Exhibit “L”); on 25th March 2003 he complained about rough

treatment by officials of the Department of Correctional Services and the Police. I again requested the district surgeon to examine him (his report is Exhibit “S”).

On 10th September 2003 accused one complained that his cell had been searched and that some of his documents had been taken. I ruled that his complaint be put on oath. This was not done. On 29th September 2003 he complained that his cell had again been searched. He also complained that his privileges regarding a special diet had been withdrawn and that he was not taken for an appointment with a psychiatrist. Ms Lötter undertook to take up the matter of his diet with the prison authorities. I ruled that all his other complaints had to be pursued by way of substantive application in which the Department of Correctional Services and any other interested parties are joined as respondents. These complaints were repeated when Mr Mihalik took over the defence of accused one. I re-iterated that the complaints should be pursued by way of substantive application in which the Department of Correctional Services and any other interested parties are joined as respondents. Again this was not done.

The fact that the complaints were never put on oath, thus enabling the other parties involved (the Police and the Department of Correctional Services) to respond to the allegations, meant that the complaints could never be properly adjudicated by either myself or another judge. (I indicated that it might be more appropriate if the matter be heard by another Judge if the affidavits showed disputes of fact which might necessitate findings of credibility).

In the cross-examination of Captain C van Dyk, who had taken over as the investigating officer upon the resignation of Captain Johan van Dyk, counsel for accused one dealt with two occasions, before the start of the trial, on which the cell of the first accused had been raided. On one occasion Captain C van Dyk was present (according to him in the background) and of the other he had no knowledge. On this latter occasion, Mr Mihalik said, documents were taken from the accused's cell which later found their way into the hands of the handwriting expert. It was not put to Captain van Dyk that any other (privileged) documents were taken during these two raids.

Finally, in a trial of this duration, it is inevitable that occasions would arise when an accused by reason of illness, or by reason of commitments arising from the death or illness of a family member, would be unable to attend the proceedings in Court. I dealt with a number of such occasions under the provisions of section 159(2) of the Criminal Procedure Act and allowed an accused, with the consent of counsel involved, to absent him or herself from the proceedings for a given time. Thus, for example, I allowed accused three, with the agreement and consent of Mr Johnson, to be absent at a time when she was heavily pregnant and sitting for long periods in Court caused her great discomfort. After the birth of her baby, I allowed her to absent herself when her baby was seriously ill. I also allowed accused five to attend a clinic for treatment of complications arising from suspected tuberculosis. On two occasions, I allowed an accused to absent himself for the funeral of a family member – the accused are Muslims and the funeral of a Muslim has to take place on the day of death.

Counsel also on occasion craved the indulgence of the Court. Thus the matter was stood down during the period 4th to 17th September 2004 in order to enable Mr Mihalik to attend to a long-standing personal commitment.

Over a week-end, Mr Delbrooke-Jones got stuck in Johannesburg with a broken down vehicle. With the consent of both Mr Delbrooke-Jones and his client, accused five, the case proceeded with Mr Pietersen, who appeared for accused six, looking after the interests of accused five in the temporary absence of Mr Delbrooke-Jones.

THE PAGAD FACTOR

There is in the evidence frequent reference to PAGAD, an acronym for the organisation People Against Gangsterism and Drugs. It appears from the evidence that numerous members of PAGAD were in Pollsmoor prison, most of them awaiting trial, during 1999 and 2000. The years 1999 and 2000 were characterised by considerable violence in the streets of Cape Town. Much of this violence was attributed, rightly or wrongly, to the activities of PAGAD. There is in the evidence, reference to the conviction in December 1999 of Dawood Osman, a member of PAGAD, on charges relating to a shooting incident at the Waterfront in which several people died. He was sentenced to a lengthy term of imprisonment and we were told that in Pollsmoor there was talk of murdering the Judge who had convicted and sentenced him. There was also reference in the evidence to the so-called "Oudtshoorn Five", five alleged members of PAGAD who were arrested near Oudtshoorn with a large cache of arms and who were to be tried by Van der Merwe. In the evidence of and pertaining to Dawood, mention is made

of the bomb blast at the Bronx Bar in Seapoint in which several people were killed. In his evidence in mitigation of sentence in the Regional Court in Malmesbury, Dawood refers to the assassination by an unknown assassin of regional magistrate P Theron in Cape Town on 7th September 2000.

While PAGAD lurked in the background during the trial, it is common cause that not one of the accused is a member of PAGAD. Kerridge is also not a member though it would seem that in prison he tried to ingratiate himself with the organisation.

THE CASE FOR THE PROSECUTION

Though the prosecution called a total of twenty-two witnesses, the case for the prosecution is essentially built upon the testimony of Kerridge and Van Dyk. However, to set the scene, it will be convenient to start with the evidence of Van der Merwe.

Wilma van der Merwe

Van der Merwe testified that on 12th November 1998 the trial of accused one on a charge of murder started before her. The trial proceeded without incident. On 23rd June 1999 she found the accused guilty. After she had convicted him, and before sentence, she was informed that an application for her recusal would be brought. The application was brought on 22 September 1999.

Van der Merwe said, and I quote her words, that –

> "… van die dag van skuldigbevinding af het daar verskeie vreemde dinge gebeur".

Thus, for example, letters were written in her name with her signature forged at the bottom. I need mention only two examples of such letters. The first is a letter to the Cape Law Society in which accused one's attorney, Mr Kahn, is charged with corruption. The second is a letter to the Minister of Justice in which it is said that accused one had called her a whore, and in which the Minister is informed that her "adultress" affair with another magistrate "has nothing to do with him or you". The letters came to Van der Merwe's notice when the Law Society and the Minister of Justice acknowledged receipt of "her" letters. I shall in due course return to the letter to the Minister of Justice which is before the Court as Exhibit 12A.

Friends brought to her attention the following advertisement which appeared in the classified advertisements of "The Argus" of 16th March 2000:

> **"I, W. VAN DER MERWE** of 3 Villa de Angelo, Boy de Goede Cres. Tableview, tel 5560112, my son Alex Badenhorst, my friend A. Bouwer and friend C Steyn hereby inform S. Ismail (doc) ref 32/57/98 of Tokai, we will be filing a deformation *(sic)* suite *(sic)* against him for liable *(sic)* and crimen injuria."

Shortly thereafter (on 19th March 2000) the following advertisement appeared:

> **"I, Advocate Wilma** of suite 31 2nd floor, Justicia building, Parade St, Cape Town, hereby notify Shaheem Koelie DOB: 22/2/1958, that I have taken both legal and criminal action against him."

After the appearance of the first advertisement, anonymous telephone calls were made to her home. The content of the calls was always the same: there was a reference to accused one and allegations of racism on her part. She caused Telkom to link a so-called Indenticall device to her phone. This enabled her to identify the origin of incoming calls. When she noted that the calls came from Pollsmoor prison, she did not pick up her phone.

A letter of demand dated 20 April 2000 purporting to emanate from accused one was delivered to Van der Merwe in which payment of R100 000.00 is demanded for defamation arising from the two advertisements

At the same time a summons was delivered to Van der Merwe in which accused one claims damages from Van der Merwe in the sum of R100 000.00. The Particulars of Claim are handwritten by accused one and in part state as follows:

> On the 1st March 2000 I told her she was the mother of a **bastard child** *[emphasis and underlining in the original]* and the father was a married Gauteng magistrate by the name of Herman Badenhorst.
>
> The defendant then published two articles under the personal column of the Argus classified column 245.

> The first advert on the 10-3-00 the defendant threatens to take criminal and civil action against me leaving her telephone no. and address (in) the advert. I called her on the 12-3-00 ??? the advert. She called me a **CRIMINAL COOLIE** and I called her a **slut**.
>
> On the 15/3/00 I received a letter from her dated the 12/3/00 where she again calls me a **CRIMINAL COOLIE.**
>
> On the 15/3/00 she published the 2nd advert calling me a **COOLIE.**
>
> Her **racist prejudice** towards me has exacerbated my serious post traumatic stress disorder to dangerous levels that I had to seek urgent psycho-therapy from my clinical psychologist. Not only has the defendant impaired my dignity caused me severe emotional hurt and mental trauma but she has **defamed** me publicly with her racist slurs."

The matter was handled on behalf of Van der Merwe by the State Attorney. An exception to the summons was upheld and amended Particulars of Claim were apparently delivered on 13th July 2000. In the amended Particulars of Claim it is *inter alia* alleged:

> The defendant wrongfully, intentionally, unlawfully and without justification defamed the plaintiff in that she:
>
> a. …
> b. Published two articles, in the personal column of the Argus classifieds of the 10th and 15th of March 2000 which defamed the plaintiff.
> c. …
> d. …

Nothing further seems to have become of the matter.

Van der Merwe testified that while the recusal application was being heard, accused one on occasion walked behind her in the corridor and said “corrupt magistrate, corrupt magistrate”. On another occasion, also in the corridor, he called her an “adulterous slut”.

In the cross-examination of Van der Merwe by Mr Mihalik the following occurred (I quote from the record):

> “Mr. Mihalik: Kyk, Doc Ismael stem saam. Hy sê hy was uittartend, persoonlik, beledigend tydens die rekuseringsaansoek en veral is hy baie jammer dat hy persoonlike aanvalle op u gemaak het.
>
> Beskuldigde 1: (In agtergrond). I confirm that that was indeed my instructions to my advocate that I’m sorry for the hurt that I caused the magistrate.”

The recusal application was heard on 1st December 1999 and on 4th August 2000 Van der Merwe dismissed the application. However, on 30th August 2000 she recused herself after it came to light that accused one had been arrested on a charge of conspiracy to murder her.

Van der Merwe confirmed that she was at home on the evening of 10th August 2000 when accused seven rang the front door bell. She told him over the intercom that she was busy on the phone and that he had to wait a while. This was to enable the Police to take up position before they rushed out and pinned him down.

Kerridge

Kerridge was during 1999 arrested on numerous counts of fraud. He manipulated matters so as to be accommodated in the hospital section of Pollsmoor prison though he was, in fact, in perfect health. He met accused one while they were being transported to and from the magistrates' court. As is customary in prison, they talked about their respective cases and accused one told him about his grievances arising from his conviction by Van der Merwe. In due course, Kerridge agreed to testify on behalf of the first accused at the recusal application.

Kerridge's sojourn in the hospital section of the prison did not last very long. He was placed with other prisoners who were awaiting trial. In the process, he came into contact with the large number of members of PAGAD who were then awaiting trial.

On 14th March 2000 Kerridge was transferred to the Drakenstein prison where he remained until he was released on bail. While he was in Drakenstein, there seems to have been no direct contact between Kerridge and the first accused.

Upon his release on bail, Kerridge visited friends of his who were at the time being held at Pollsmoor. Accused one came to know of Kerridge's visit to Pollsmoor. On 27th July 2000 he wrote a letter to Kerridge's friends which they passed on to him when he visited them again. The letter reads, in part, as follows (it is common cause that Kerridge at times used the Muslim name Ali Kahn):

> "I believe Ali Kahn is out and came to visit. Could you please tell him that I can get contact visits from Mon – Fr from anyone. Tell him I would be in C.T. court 31 on the 4/8/2000. Shahiem – if possible can you give me Ali's contact no. or ask him to phone as my lawyer on 7001177."

Kerridge on 28th July 2000 visited accused one. He says that accused one told him of the plan to murder Van der Merwe and requested him to attend to matters to which he (accused one) could not attend in prison. Thus he had to arrange for the acquisition of a firearm and the engagement of the services of an assassin. Accused one also wrote a note in red ink on the reverse side of his letter of 27th July 2000 which Kerridge had with him. In his evidence, accused one admitted that he wrote the note. I shall in due course return to the note.

According to Kerridge, the idea was that he should make copies of the note and distribute it in the Cape Town magistrates' court building.

Van Dyk

Van Dyk, at the time a Captain in the South African Police Service, testified that during the course of the morning of 1st August 2000 he received a phone call from inspector Eilward ("Eilward") of the fraud unit. Eilward asked Van Dyk whether his unit was at the time investigating matters involving the first accused. Van Dyk replied in the affirmative. Eilward then informed Van Dyk that he had somebody with him in his office that had information about a murder being planned by accused one who was at the time in Pollsmoor

Prison. The upshot of their conversation was that Eilward brought Kerridge to Van Dyk's office at 14h30 on the same afternoon. Eilward left immediately because he had another appointment.

Kerridge informed Van Dyk that accused one had approached him to assist him in his plan to murder Van der Merwe. He (Kerridge), who was out on bail, was to see to the acquisition of a firearm, recruiting an assassin and providing transport for the assassin. Kerridge also handed Van Dyk a number of documents which he had received from accused one. Kerridge informed Van Dyk that he (Kerridge) was to be accused one's outside contact and that accused one would give him instructions as to what he had to do.

Van Dyk set the wheels in motion to get authority to undertake undercover operations under section 252A of the Criminal Procedure Act. He also applied under the Interception and Monitoring Prohibition Act 127 of 1992 to make recordings of conversations between Kerridge and accused one, three, four and five, and Dillon Williams.

Conversations between Kerridge and accused one were recorded. In this way, Van Dyk was kept informed of the details of the unfolding plans to attack Van der Merwe. The police were, therefore, prepared for the attack when it came on the evening of 10th August 2000.

The conversations, according to the recordings submitted in evidence, were mainly concerned with the acquisition of a firearm and the identification of a person to do the "hit". During the course of the conversations, the names of

accused two and three came up as possible sources for the supply of a firearm, and the names of accused four (now deceased), five and seven as possible assassins. Finding the cash to pay for the firearm presented a problem. A suggestion by accused one that he might get the necessary funds from one Keith came to nothing. In the end, an amount of R450.00 in cash (in marked notes) was made available to Kerridge by the Directorate of Public Prosecutions. This money was used to acquire a gun from one Clinton Mostert.

Kerridge testified to two visits to accused three. On the first he was accompanied by Dawood and on the second by accused seven. Dawood, accused two and accused seven confirm that these visits had taken place. According to Kerridge, they picked up one Igsaan Moses at the house of accused two, and he directed them to the residence of Clinton Mostert where the firearm was handed over. Accused two denied any involvement in the supply of the firearm, and accused seven says that they ran into Igsaan Moses after they had left accused two.

When Clinton Mostert handed the firearm to Kerridge, he instructed accused six to get into the car in order to ensure that the firearm was returned – it was apparently needed for an armed robbery planned for later that evening.

Accused seven, the alleged assassin, was then driven to Van der Merwe's house by Kerridge in his BMW. Accused six, the alleged *custos* of the firearm, was in the car when it was stopped by the police after the assassination attempt.

The firearm that had been in the possession of accused seven and which was sent flying when the Police rushed him, was retrieved by the Police. It was a 9mm Parabellum Astra semi-automatice pistol 0786E. The pistol, magazine and nine rounds of ammunitions were handed in as Exhibits 1, 1B and 1C. It later appeared that the firearm had been stolen in Mitchells Plain on the morning of 10th August 2000.

Thus it came about that the seven accused were charged with the offences set out in the indictment, and Kerridge came to be the principal witness for the prosecution. Kerridge was placed in witness protection in terms of the Witness Protection Act 112 of 1998 because there were fears for his safety.

Slabbert

Mr Nico Slabbert is serving a lengthy sentence of imprisonment for fraud. He testified that he met accused one in Pollsmoor in 1997. He testified that during March or April 2000 accused one told him that he was upset with the magistrate and the prosecutor in his case and that "they" planned to kill Van der Merwe, Edwin Grobler and Kathy Steyn.

THE CROSS-EXAMINATION OF KERRIDGE

Before I proceed to the case for the defence, I should deal briefly with the manner in which the cross-examination of Kerridge was conducted. He was cross-examined by the legal representatives of accused one over a period of eleven days from 6th to 28th August 2003 and again for seven days on 15th and 17th June, and 11, 12, 16, 19 and 26th August 2004.

In 1964 in the report of the Van Winsen Committee (Committee of Inquiry into Uniform Court Rules and Costs) reference is made (at 30—31) in regard to civil proceedings to "[r]epetitious and unnecessary cross-examination" and it is said that "[n]ot rules, but the firm intervention of the presiding judges is the remedy in such cases." These sentiments were echoed twenty years later in the report of the Hoexter Commission (Commission of Inquiry into the Structure and Functioning of the Courts RP78/1983, vol II 148-149 para 6.3.5.5):

> "A number of witnesses have drawn attention to the abuse of cross-examination during trials. Through broad-ranging, purposeless and repetitive cross-examination, not only is the duration of the trial considerably lengthened but, where appeal is made in a higher court against the finding of the trial court, the records of the proceedings become voluminous and extraordinarily expensive. The Commission is convinced that unbridled and improper cross-examination is increasingly occurring, while trial courts are far too tolerant of the practice."

While the court has the authority to stop protracted, irrelevant cross-examination, it is a discretion –

> "that should ... be exercised with caution and with full awareness of the vital role that cross-examination plays in our system of evidence."

(*S v Cele,* 1965 (1) SA 82 (A) at 91B. See also the remarks in *Dongwe v Assistant Magistrate Durban* (unreported judgment of the NPD 10/12/1951, quoted by Pretorius *Cross-examination in SA Law* (1997) 254, and those of an anonymous author in (1967) 2 *Die Landdros* at 226).

The constitutional right of an accused person to a fair trial does not include the "right" to misuse or abuse the process of the court. In *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE) it is said at 410A:

> "Vital as the right to cross-examine may be, it is not an absolute right, for the trial court retains a discretion to disallow questioning which is irrelevant, unduly repetitive, oppressive or otherwise improper."

One should not lose sight of the fact that in a trial such as this, the other accused also have a right to an expeditious trial.

In the first period of cross-examination, Kerridge was cross-examined by the legal representative of accused one over a period of eleven days from 6th August to 28th August. The cross-examination was suspended on 11th, 25th and 27th August to enable counsel to consult with accused one. The cross-examination was mainly concerned with collateral issues on the basis that the questions posed were relevant to the credit of Kerridge. I allowed the cross-examination to proceed in the light of the guidelines set out in *S v Cele, supra,* at 91H:

> "Latitude in testing by cross-examination the credibility of a witness where credibility is clearly the issue, should be allowed until the court is satisfied, either that the right to cross-examine is being abused or misused, or that the particular line of cross-examination could never be productive of anything which could assist the court in its eventual decision on credibility."

I endeavoured to give counsel, within limits, free range in her cross-examination of Kerridge. I say within limits, because limits there are, and it is the duty of the presiding Judge, as it is put in *S v Green* 1962 (3) SA 886 (A) at 888B, "to exclude irrelevancies and discourage repetition".

The cross-examination in time degenerated into what Van Dijkhorst J has on occasion called "a treadmill of repetition and a quagmire of irrelevancies" (in *S v Baleka* unreported, TPD, case number CC 482/85, 15 November 1988).

I found it necessary, on more than one occasion, to point out that the cross-examination amounted to endless and purposeless repetition. Mr Cilliers queried the relevance of some of the questions put in cross-examination, and I on more than one occasion asked counsel to explain the relevance of a particular line of cross-examination. On at least one occasion, Kerridge was requested to leave the Court while the explanation was given.

On about the sixth day of the cross-examination, I pointed out to counsel that at that stage the Court had not yet been given the slightest indication of the nature of accused one's defence and his response to the evidence given by Kerridge on the principal issues in the indictment.

The cross-examination continued, in seeming endless repetition, to focus on collateral issues and peripheral matter of dubious relevance. I ultimately, on more than one occasion, drew counsel's attention to the provisions of section 166(3) of the Criminal Procedure Act and informed her that if the cross-examination continued in the same vein, I would be constrained to take some

form of action to curb her cross-examination of Kerridge. (The constitutionallty of the section is considered by SE van der Merwe 1997 *Stellenbosch Law Review* 348—359).

On the 10th day I informed counsel that I had come to the conclusion that, in the words of Williamson JA in *S v Cele, supra,* at 91H, "the right to cross-examine is being abused or misused". I accordingly set a limit to the cross-examination, namely, the end of court proceedings on the next day. In doing so, I had in mind also what is said in Hiemstra *SA Strafproses* 6th ed by Kriegler and Kruger (2002) at 435:

> "Ook as die hof, nà regterlike oordenking en vergunning op die reg op inspraak aan die ondervraer, oortuig is van die aanwesigheid van een of meer van die faktore wat in *Cele* genoem word, mag 'n absolute toepaslike perk gestel word."

Even on the last day of cross-examination, when the limit had already been set, Mr Cilliers had reason to object to some of the questioning as being irrelevant both to the issues and to credibility.

After Kerridge had been cross-examined by counsel who represent the other accused, and before re-examination, I acceded to counsel's request for an opportunity to put further questions in cross-examination. She said that she needed the opportunity to put aspects of accused one's defence to Kerridge which she had omitted to do during her cross-examination.

The second period of cross-examination came about as a result of the application by Mr Mihalik for the recall of Kerridge for further cross-

examination on a defence which had not been dealt with by Ms Lötter in her cross-examination of Kerridge. The defence to be debated in the further cross-examination was that the whole case against accused one was a conspiracy by the police and the office of the Directorate of Public Prosecutions.

Kerridge obviously resented his recall and he responded in an aggressive manner to the further cross-examination. Mr Mihalik, in turn, adopted a vigorous and confrontational style of cross-examination. At the outset, he said to Kerridge:

> "Now I want to make it clear from the beginning, I've read this record. I've read your record in the magistrate's court where you testified and throughout your evidence you were pedantic, arrogant, rude, argumentative, challenging and I don't mind if you do that.

Counsel is, of course, entitled to cross-examine a witness as vigorously as the circumstances of the case require. However, as Marais J (as he then was) reminds us in *S v Tswai* 1988 (1) SA 851 (C) at 858H, belligerent cross-examination is no substitute for pertinent, properly focussed and accurate cross-examination.

In the hostile atmosphere that prevailed, the cross-examination was interspersed (despite objection from the Court) with remarks by counsel such as –

> "That's a lie".
>
> "I am going to call you in the course of my cross-examination repeatedly a lair, compulsive liar".
>
> "Now I want to know from you is that your usual lying style you are now doing to fight, be argumentative, pedantic, is that while you are busy lying, is that your style?"

In regard to statements of this nature in cross-examination, Marais J (as he then was) said in *S v Tswai, supra,* at 858I—859A:

> "Another tendency which appears to be growing is for prosecutors and cross-examiners to personalise the cross-examination and inflict their own opinions upon the witness and the court. Remarks such as 'I find that answer unacceptable' or cruder variations such as 'nou lieg jy' are not permissible. … If it is necessary to make it clear to a witness that his answer will be submitted to be untruthful or improbable or wrong it should be couched in the form of a submission, not in the form of an assertion of personal belief."

See also the remarks of Rose-Innes J in *S v Gidi and Another* 1984 (4) SA 537 (C) at 540H—I on the personalisation of cross-examination.

During cross-examination, Kerridge was confronted with statements he had made under cross-examination by Ms Lötter, and in the evidence he had given in support of a bail application by accused one in the magistrate's court. Mr Mihalik did not comply with the normal and proper practice of putting the witness's exact words to him as they appear in the record of the

previous proceedings (both records were available). In this regard, Marais J (as he then was) said in *S v Tswai, supra,* at 858F:

> "If he [cross-examining counsel] thinks, but cannot be sure, that the witness said something different earlier, he should either verify it before asserting that he did or ask the witness if his [the questioner's] recollection of what the witness allegedly said is accurate. All too often one sees examples of poorly remembered evidence giving rise to dogmatic assertions by a cross-examiner to a witness that the witness said something contradictory or different earlier in his evidence."

In regard to the bail proceedings, it should be borne in mind that the record of the previous proceedings is not in itself proof of what the witness said in that case. In *Potgieter and Another v Minty and Sons and Additional Magistrate Barberton* 1929 TPD 745 at 752 it is pointed out that the evidence as recorded must be put to the witness, and should he admit it, such evidence may be noted.

The style of cross-examination adopted by counsel is not only unfair to the witness, but defeats whatever purpose counsel is trying to achieve. It also makes things very difficult for the Court when, as in this case, the efficacy of the cross-examination has to be evaluated for purposes of judgment, months after the cross-examination had taken place.

EVALUATION OF THE EVIDENCE OF KERRIDGE

When Kerridge gave his evidence in chief, the alarm bells were set ringing and the red lights flashing. The reasons are threefold: (i) Kerridge has been found guilty of fraud and he has admitted to committing perjury; (ii) he is in

many respects a single witness, and (iii) he is an informer and a participant in a covert operation.

(i) As indicated earlier in this judgment, Kerridge was cross-examined at length on issues said to be relevant to credibility. In the ultimate result, the cross-examination did not alter the fundamental approach which it was from the outset clear should be adopted; namely, that his evidence was acceptable only in so far as it was corroborated by other credible evidence.

(ii) In regard to Kerridge as a single witness, it is of course trite that in terms of section 208 of the Criminal Procedure Act, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits being weighed against factors which militate against his or her credibility (see Zeffert *et al The South African Law of Evidence* (2003) 799—801 and Schmidt and Rademeyer *Law of Evidence* (2003, with looseleaf updates) para 4.3.1). In *Koos Stevens v The State* (unreported, case number 417/2003; 2 September 2004) the Supreme Court of Appeal approved of the approach to the application of this so-called "cautionary rule" as set out by Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E—G:

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings

> or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean
>
> "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded"
>
> (per Schreiner JA in *R v Nhlapo* (AD November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

(iii) In regard to the position Kerridge as an informer and a participant in a covert operation, the following cautionary words in *S v Ramroop* 1991 (1) SACR 555 (N) at 559g—i must be kept in mind:

> The proposition is that where trapping is resorted to, it behoves the court to be doubly cautious because the motive to secure a conviction may override honesty. Hence disparities between the one witness and the other assume a greater significance than ordinarily would be the case. While such a submission may not be faulted as a general proposition, it is subject, as in this case, to another consideration. Where in cases the trap is shown as little more than an *agent provocateur* hoping to share in any fine levied or moneys received, the need for far greater caution is intensified, but it is correspondingly diminished when police officers are simply carrying out their duties. That is not to say that their evidence must be accorded a greater acceptability because they are policemen, but, at the same time, differences in their testimony must not be allowed to take on a far more sinister complexion simply because they are traps.

(See also Zeffertt *et al The South African Law of Evidence* (2003) 808—810).

THE APPLICATION FOR DISCHARGE AT THE END OF THE STATE CASE

At the end of the State case, counsel for accused one and five applied in terms of section 174 of the Criminal Procedure Act for the discharge of their respective clients. No such application was brought on behalf of accused two, three, six and seven.

I refused the applications and indicated that I shall give the reasons for my decision in my judgment at the end of the case.

The refusal to discharge an accused at the close of the prosecution's case entails the exercise of a discretion (*S v Lubaxa* 2001 (2) SACR 703 (SCA) at 705g).

Mr Mihalik, on behalf of accused one, relied on two principal arguments; one, the unreliability of the evidence of Kerridge; and, two, the unreliability of the testimony based on the tape recordings of the conversations between accused one and Kerridge.

Mr Mihalik submitted that Kerridge's evidence was wholly unreliable and worthy of no credence whatsoever. Mr Celliers relied on the following, well-known *dictum* of Williamson J in *S v Mpetha and Others* 1983 (4) SA 262 (C) at 265E—F:

> However, it must be remembered that it is only a very limited role that can be played by credibility at this stage of the proceedings. If a witness gives evidence

> which is relevant to the charges being considered by the Court then that evidence can only be ignored if it is of such poor quality that no reasonable person could possible accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed.

(See also *S v Swartz and Another* 2001 (1) SACR 334 (W))

It was apparent from the outset that the evidence of Kerridge was such that it could only be accepted in so far as it was corroborated by other acceptable evidence. At the end of the prosecution's case, there was a considerable body of evidence around the evidence of Kerridge; such as, for example, the evidence of Van Dyk, the evidence of Slabbert and the testimony afforded by the recordings of the conversations.

Mr Cilliers rightly submitted that it would have been premature at that stage to come to conclusions about the reliability and credibility of such corroborative evidence.

Moreover, the Court was also entitled to have regard to the fact that the prosecution's case against one accused might be supplement by the evidence of a co-accused (*S v Lubaxa, supra,* at 708b).

THE DEFENCE CASE

Accused two, three, five and six deny complicity in any conspiracy to murder Van der Merwe. Accused seven says that he was told by Kerridge

that he was to commit a staged robbery at Kerridge's house in order to enable Kerridge to claim from the insurance.

The defences raised by accused two, three, five, and six will be separately dealt with in the final part of the judgment.

The defence of accused one, as it emerged half-way through the trial, was that the entire case against him is a conspiracy hatched by Van Dyk and other officials. Thus, when leading the evidence in chief of accused one, Mr Mihalik told the Court that –

> "… it is central to my client's defence that there was a conspiracy because they were angry with Doc because of certain actions."

When he took over the defence of accused one, Mr Mihalik applied (on 26th May 2004) for the recall of Kerridge for further cross-examination on the ground that accused one's defence that he is the victim of a conspiracy had not been canvassed with Kerridge. In other words, on the 65th day of the trial (sixteen months after the trial had begun), the Court was told that the gist of the accused's defence had not been canvassed in the cross-examination of the principal State witness, Kerridge, who had been subjected to lengthy cross-examination.

It was clear throughout the trial that accused one took an active part in the conduct of his defence; he knows the documentation backwards and in Court was in constant communication with his counsel. The Court was lenient in allowing Ms Lötter the opportunity to consult with her client during Court

hours, and, as has been noted above when I dealt with the course of the trial, on several days special arrangements were made to have accused one available for consultation with Ms Lötter. In the circumstances, we find it difficult to understand how it came about that the gist of his defence was not canvassed in the cross-examination of the state witness who was principally involved in the alleged conspiracy against him.

The defence of accused one will be considered under the following (interrelated) heads:

(i) The nature of the conspiracy against accused one.
(ii) The covert action under section 252A of the Criminal Procedure Act.
(iii) The taping of the conversations.
(iv) The evidence of Dawood.
(v) The evidence of accused one.

THE NATURE OF THE CONSPIRACY AGAINST ACCUSED ONE

Accused one said in evidence that after his arrest in 1997 on numerous counts of fraud, he encountered massive corruption in the ranks of the Police. He created an organisation named PACJAP (People Against Corrupt Justice and Policemen). He says that because of his efforts to expose the corruption, certain police officers were obliged to take early retirement and at least one was sentenced to a lengthy term of imprisonment. This, he says, is the background to and the underlying reason for the conspiracy on the part of officialdom to pin an attempt to murder a judicial officer on him.

The nature of the alleged conspiracy can best be described in the words of Mr Mihalik when he applied for the recall of Kerridge for further cross-examination:

> "Net baie kortliks is die verweer dat Kerridge is waarskynlik as 'n geplante agent op sy eie of in samewerking met ander agente en informante vir die Staat, onder andere, Nasionale Intelligensie agent het hom sedert sy eerste ontmoeting met my kliënt alles in sy vermoë gedoen om geweldpraatjies aan te wakker, selfs waar my kliënt al verduidelik het dat hy is besig met verskeie regsprossese, het Kerridge hom kort-kort weer op die spoor van geweld probeer plaas.
>
> Kerridge het dit gedoen in die gevangenis reeds en ek gaan argumenteer dat met samewerking met die gevangenisowerhede, die hoof van die gevangenis, waarnemende hoof van die gevangenis, hoof van opnames en ek sal argumenteer dat die enigste redelike afleiding wat die Hof kan maak is dat hulle met Kerridge en met ander informante of agente betrokke was om my kliënt en ander senior PAGAD-lede of PAGAD-ondersteuners te betrek by allerlei geweldadige optredes. Ook met die hulp van die Suid-Afrikaanse polisie het Kerridge voortgegaan met hierdie optrede …"

In his cross-examination of Van Dyk, Mr Mihalik put it to him:

> "So die twee van julle *[Kerridge and Van Dyk]* het gaan saamsit, heel waarskynlik ander beamptes ook, en met hierdie plan na vore gekom, dat Doc die brein is om landdros Van der Merwe te vermoor …"

It is contended that the covert action under section 252A of the Criminal Procedure Act was part of the conspiracy and went beyond providing an

opportunity to commit an offence, and that it is apparent from the taped conversations that it was Kerridge who instigated the attack on Van der Merwe.

THE COVERT ACTION UNDER SECTION 252A OF THE CRIMINAL PROCEDURE ACT

In 1996 the legislature regulated traps and undercover operations by the insertion of section 252A into the Criminal Procedure Act. The section does not create a substantive defence of entrapment. Following the recommendations made by the South African Law Commission (Working Paper 52, Project 84, October 1994), the legislature opted for a qualified rule of exclusion. The gist of the rule is contained in section 252A(3)(a) which provides as follows:

> If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

The difficulties arising from the use of the phrase "the conduct goes beyond providing an opportunity to commit an offence", which occurs in subsections (1), (2) and (3) of section 252A, have been considered in *S v Odugo* 2001 (1) SA 560 (W), *S v Mkonto* 2001 (1) SACR 585 (C) and *S v Makhanyana and Another* 2002 (3) SA 201 (N) (and see Zeffertt *et al The*

South African Law of Evidence (2003) 644). In *S v Odugo, supra,* at 566f — g it is stated:

> "The ordinary meaning of the phrase 'the conduct goes beyond providing an opportunity to commit an offence' suggests that the court should consider the role that the law enforcement officer played in the committing of the offence. If the law enforcement officer played an active role in inducing or persuading the accused to commit the offence, it seems that a finding that the conduct went beyond providing an opportunity to commit an offence is inevitable. On the other hand, if the perpetrators of the offence were using the law enforcement officer as their instrument in the crime which they planning to commit, it clearly does not constitute conduct that goes beyond providing an opportunity to commit an offence."

The above passage is cited with approval in *S v Makhanyana and Another*, *supra*, at 206I—207A. At 207D—E it is stressed that the finding that the conduct in question went beyond providing an opportunity to commit an offence is not the end of the matter, and that in terms of section 252A(3)(a) the Court may exclude the evidence if it was obtained in an improper or unfair manner and the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. In this regard, the following factors must, *inter alia*, be considered: (a) the nature and the seriousness of the offence; (b) the extent of the effect of the trap on the accused; (c) the nature and seriousness of any infringement of a fundamental right, and (d) whether in the setting of the trap the means used were in proportion to the seriousness of the offence (*S v Makhanyana and Another*, *supra*, at 207F—208G; Zeffertt *et al The South African Law of Evidence* (2003) 644). In the ultimate result, the discretionary power of

exclusion created by section 252A(3)(a) remains subject to the provisions of section 35(5) of the Constitution which entrenches the fundamental right to a fair trial (*S v Spies and Another* 2000 (1) SACR 312 (SCA)).

The question as to whether an accused's right to a fair trial has been breached will depend upon the facts of each case. In this regard, reference may be made to the statement of Kriegler J in *Key v Attorney General, Cape Provincial Division and Another* 1996 (2) SACR 113 (CC); 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) at par [13], in the context of the admissibility of unconstitutionally obtained evidence. The statement is as follows:

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, one the other hand, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which puts them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation and prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."

The crime which the Police were investigating was an extremely serious one. It was a crime which threatened the very fabric of our society -- by the assassination of a judicial officer, the very being of the judicial system, one of the pillars of a free and democratic society, is assailed. In my view, the means used in setting up the covert operation were in proportion to the seriousness of the offence. Moreover, when they set the covert operation in motion, the Police had reason to believe that the offence was already being planned. The conduct of the Police and Kerridge falls under what could best be described as a covert operation rather than a trap. The perpetrators of the offence were using Kerridge, the Police informant, as their instrument in the crime which they were planning to commit *(S v Odugo, supra,* at 566g).

Van Dyk further stressed that by means of the covert operation, the Police kept control of the threat. If they lost control, an unknown assassin could have surfaced without warning at any time. This was also the reason why it was decided to make funds available to Kerridge for the “rental” of the firearm.

Reference was made in argument to *S v Nortje* 1997 (1) SA 90 (C) and *S v Hayes en ‘n Ander* 1998 (1) SACR (O). The facts in those cases differ *toto caelo* from those in this case. In both those cases, persons who would not otherwise have participated in the purchase of uncut diamonds did so after improper pressure had been brought upon them (*S v Nortje, supra,* at 102B; *S v Hayes en ‘n Ander, supra,* 632c—g).

Accused one relies on the tapes to show that Kerridge was the instigator of the plot and that he did his best to draw a reluctant accused one into the plot. The time has come to deal with the recording of the conversations.

THE TAPING OF THE CONVERSATIONS

During the period 4th to 11th August 2000 conversations between Kerridge and accused one were recorded on tape. Details of the conversations that were recorded are as follows:

1. A conversation on 4th August 2000 in the cells at the Magistrate's Court, Cape Town. The tape is Exhibit 4A. The quality of the recording is bad and no transcript was handed in to Court.
2. A conversation at Pollsmoor prison, Cape Town. The tape is Exhibit 5A. The quality of the recording is bad and no transcript was handed in to Court.
3. A telephone conversation on 7th August 2000 at 9h06. The tape is Exhibit 6 and the transcript is Exhibit T.
4. A telephone conversation on the afternoon of 7th August 2000. The tape is Exhibit 7 and the transcript is Exhibit U.
5. Telephone conversations on the afternoon of 9th August 2000. The tape is Exhibit 8 and the transcript is Exhibit V.
6. A telephone conversation on 10th August 2000 at 8h06. The tape is Exhibit 9 and the transcript is Exhibit W.
7. A telephone conversation on the afternoon of 10th August 2000. The tape is Exhibit 10 and the transcript is Exhibit X.

8. A conversation on 11th August in the cells at the Magistrate's Court, Cape Town. The tape is Exhibit 11. The quality of the recording is bad and no transcript was handed in to Court.

The recording by the police of conversations between accused one and Kerridge raise several issues which need to be considered: (i) the legality of the taping; (ii) the authenticity of the recordings; (iii) the reliability of the transcripts, and (iv) the content of the conversations

Before I proceed to deal with the aforesaid issues, I wish to deal briefly with two other issues by way of introduction.

No trial-within-a-trial was held in regard to the admissibility of the tapes. The evidence relating to the admissibility and authenticity of the tapes was inextricably interlinked with the evidence pertaining to the "merits" and the credibility of witnesses. The procedure adopted in this case was given the stamp of approval in *S v Nieuwoudt* 1990 (4) SA 217 (A) at 231B—C where the following is said about the fact that no trial-within-a-trial was held in the Court *a quo*:

> "Hoewel die egtheid van die [bandopname] dus beoordeel is met die oog op die toelaatbaarheid daarvan, is daar nie 'n binneverhoor gehou nie: die Staat het, met die instemming van die verdediging, voortgegaan om al sy getuienis op die meriete – insluitende getuienis oor die egtheid van die band – voor te lê, waarna die verdediging dieselfde gedoen het. Die egtheid van [die bandopname] is eers in die slotbetoë beredeneer en in die Hof se finale uitspraak behandel. Hierdie prosedure was ongetwyfeld die mees praktiese omdat die egtheid van die band ten

> nouste verbonde was aan die geloofwaardigheid van ‘n hele aantal getuies wat ten beste beoordeel kon word na die aanhoor van al die getuienis.”

A similar procedure was followed in *S v Kidson* 1999 (1) SACR 338 (W) at 340e.

Dr LPC Jansen was called to give expert evidence about the identification of the voices on certain of the tapes and on the question of interference with the tapes. For the purposes of his investigation, Dr Jansen needed a sample of the voice of the first accused. Despite a court order, accused one refused to co-operate – that the magistrate was entitled to make such an order and that the accused was obliged to obey the order, is apparent from the decision of the Supreme Court of Appeal in *Levack and Others v Regional Magistrate, Wynberg and Another* 2004 (5) SA 573 (SCA). Eventually, use was made of a recording of his voice made during proceedings in the regional court.

When Dr Jansen was called to give evidence, it became clear that accused one did not dispute the fact that it was his voice on the tapes. In response to a question by the Court whether “die kwessie van stemidentifikasie” is in dispute, Mr Mihalik said that it was not and that what he puts in dispute is –

> “… dat daar wel met die bande gepeuter kon word.”

The cross-examination of Dr Jansen was accordingly confined to his findings in regard to the question whether or not the tapes could have been tampered with. The technical evidence which underpins his finding that he has no doubt that accused one was one of the participants in the three

conversations recorded on Exhibits 8 and 10 (the relevant transcripts are marked Exhibits V and X), was not canvassed in cross-examination and his findings were not put in issue.

The legality of the taping

The purpose of the Interception and Monitoring Prohibition Act 127 of 1992 ("the Monitoring Act") is to prohibit the interception and the monitoring of certain conversations, and to provide for the authorisation to do so in certain circumstances. The monitoring of conversations not carried out in pursuance to a direction properly and lawfully applied for, and issued, in terms of the provisions of the Monitoring Act, may be unlawful as having been prohibited in terms of section 2(1)(b) of the Monitoring Act. The Monitoring Act has been the subject of a number of reported decisions: *Lenco Holdings and Others v Eckstein and Others* 1996 (2) SA 693 (N); *Protea Technology Ltd and Another v Wainer and Others* [1997] 3 All SA 594 (W); *S v Naidoo and Another* 1998 (1) SACR (N); *S v Kidson* 1999 (1) SACR 339 (W) and *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W).

Section 2(2)(c) of the Monitoring Act provides that a Judge may direct that conversations "by or with a person, body or organisation", may be monitored. In terms of section 3(1)(a) such a direction may only be issued by a Judge designated by the Minister of Justice. It was not disputed that Justice Goodman Gordon who issued the directives on 4th August 2000 and 8th August 2000 was properly designated in terms of the section. It is further not disputed that he did so on applications approved by Assistant

Commissioner AW Eksteen and Divisional Commissioner JH Deysel, both police officers who had been authorised by the National Commissioner of Police in terms of section 3(2)(a) of the Monitoring Act to give such approval.

Section 3(1)(b)(i) of the Monitoring Act provides that a direction may be issued by the designated Judge if the Judge is convinced on the grounds mentioned in a written application that complies with the directives in section 6 –

> (i) that the offence that has been or is being or will be committed, is a serious offence that cannot be properly investigated in any other manner and of which the investigation in terms of this Act is necessary.

The directives referred to in section 6 are directives jointly issued by the respective Judges-President of the High Court regulating the manner and procedure of applications in terms of sections 3(1) and (4).

"Serious offence" is defined in section 1 as meaning, *inter alia,* any offence in Schedule 1 to the Criminal Procedure Act, including any conspiracy, incitement or attempt to commit such an offence, provided that –

> (i) that offence is allegedly being or has allegedly been committed over a lengthy period of time;
> (ii) that offence is allegedly being or has allegedly been committed on an organised basis by the persons involved therein;
> (iii) that offence is allegedly being or has allegedly been committed on an regular basis by the person or persons involved therein; or

(iv) that offence may allegedly harm the economy of the Republic; or

(b) …..

It was held in *S v Naidoo and Another* 1998 (1) SA 479 (N) at 505g—h that the semi-colons at the end of subparagraphs (i) and (ii) should, like that after subparagraph (iii), be regarded as disjunctive and the proviso should be read as if there was an "or" after subparagraphs (i) and (ii). It follows, and I agree with the conclusion reached by McCall J at 506b, that paragraphs (i), (ii) and (iii) contemplate three different ways of committing a serious offence such as referred to in Schedule 1 of the Criminal Procedure Act. The offences under consideration in this case fit the description in paragraph (ii) in that they were allegedly being committed "on an organised basis by the persons involved therein".

Mr Johnson raised the question whether there had been compliance with the requirement of section 3(1)(b)(i) that it must be shown that the offence "cannot be properly investigated in any other manner". Divisional Commissioner JH Deysel said in evidence:

> "Ons was oortuig dat ook ander ondersoekmetodes uitgeput gewees het en dat hierdie ondersoekbeampte wel ons hulp in hierdie geval nodig gehad het."

Van Dyk said that –

> "… in hierdie geval was die tydsbeperking wat ons gehad het, redelik dringend en daar was nie 'n ander manier om die inligting wat daar was, te verifieer behalwe die gesprekke tussen dan Allistair Kerridge en die persone soos genoem nie. Daar

> was nie ander beriggewers – daar was ander beriggewers binne-in die tronk, maar hulle sou moes infiltreer en al die klas goed wat ontsettend baie tyd sou neem."

As I have indicated above, the threat was an extremely serious one which warranted a covert operation under section 252A of the Criminal Procedure Act. The imminent threat was itself part of an undercover operation and, in the circumstances, I find Van Dyk's explanation acceptable as to why the offence could not properly have been investigated in any other manner. He conceded that other methods of investigation were available, but added that due to time constraints, those other methods were not feasible – in other words, the offences could not have been properly investigated by those methods.

Mr Johnson submitted that the fact that Kerridge had on occasion operated the recording apparatus attached to the telephone which Kerridge was using, constituted a contravention of the Monitoring Act. He submitted that nowhere in the Act has the legislature made provision for a member of the public, let alone an informer, to execute a direction or assist in the execution of a direction in terms of the Act.

In *S v Kidson, supra,* at 343c Cameron J (as he then was), relying on the jurisprudence of the North American Courts, draws a distinction between two forms of monitoring: third party monitoring (which the American courts refer to as third party surveillance) and participant monitoring. Third party monitoring involves an outsider monitoring the conversation between two participants thereto; participant monitoring involves one of the participants "monitoring" (recording) the conversation.

The prohibition on monitoring in the Monitoring Act does not apply to participant monitoring by members of the public (*S v Kidson, supra,* at 346f). When members of the Police, Defence Force or intelligence services wish to engage in monitoring conversations "with" a person, that is participant monitoring, they must obtain authorisation in terms of the Act (*S v Kidson, supra,* at 346e). Although it was held in *S v Kidson, supra,* that the monitoring in that case was participant monitoring by a member of the public which was not prohibited by the Act, the learned Judge described the situation as follows:

> "The events surrounding the conversation between the accused and Rabane certainly bore the hallmarks of a police operation. Even if the operation was not initiated by the police, the crucial equipment was supplied by them; they permitted Rabane to operate while he was under their supervision; they indeed directed him in how to go about the operation; and immediately after it was performed they retrieved the monitoring device and the recording from him."

On the facts before us, the Police initiated the monitoring, obtained a directive from the designated Judge and proceeded to engage in participant monitoring. Kerridge was acting as agent for the Police who had supplied the monitoring equipment which they permitted him to operate while under their supervision, and after the recording had been made, the Police retrieved the monitoring device and the recording from him.

The authenticity of the recordings

There have been differences of opinion in our courts as to the categorisation, and the criteria for admissibility, of audio and video tape recordings. In *S v Singh and Another* 1975 (1) SA 330 (N) and *S v Ramgobin* 1986 (4) SA 117 (N) the Natal courts have taken a strict and limiting approach to the reception of such evidence. In the latter case, Milne JP held (at 135C, and see 179F) that for recordings to be admissible it must be proved that they (a) are the original recordings and (b) that, on the evidence as a whole, there exists no reasonable possibility of "some interference". In *S v Mpumlo and Others* 1986 (3) SA 485 (E) and in *S v Baleka and Others (1)* 1986 (4) SA 192 (T) and *S v Baleka and Others (3)* 1986 (4) SA 1005 (T) the Eastern Cape and the Transvaal courts have taken a more liberal approach. In *S v Nieuwoudt* 1990 (4) SA 217 (A) the Appellate Division preferred the approach of van Dijkhorst J in *Baleka (1), supra,* to that of the Natal Provincial Division in relation to the distinction drawn by van Dijkhorst J between the originality of the recording and its authenticity, but did not express a view on whether or not authenticity affected admissibility or the evidential value of the recording. The different views were considered in *Mbulelo Klaas v The State* (unreported, Cape Provincial Division, case number A517/2003, 16 September 2004). In a joint judgment, Knoll J and Mitchell AJ held that the limitations to the admission of tape and video recordings set out in *S v Ramgobin, supra,* are not necessary to protect the rights of the accused (p 16 of typescript). They did, however, hold (at p 17 of typescript):

> "Whether the authenticity of the recordings is a criterion for admissibility, or goes only to the evidential weight thereof, it is quite apparent, in our view, that the State bears the onus to prove its accuracy and reliability before it can be given any evidential weight."

The prosecution adduced evidence of the circumstances under which the tapes were recorded, and the time and manner in which they were made. The original recordings, copies of the originals and transcripts of the recordings were handed in as exhibits. Counsel were afforded the opportunity to listen to both the originals and the copies, and they were furnished with copies of the transcripts. During the trial it became common cause that one of the voices on the recordings was that of accused one.

The principal thrust of the case made by the defence is that the tapes were deliberately tampered with and that neither the originals nor the copies that were handed in as exhibits give an accurate reflection of the conversations that had taken place. In others words, the objections raised by the defence pertain particularly to what has been termed (in *S v Nieuwoudt, supra*, at 232C) the "second rule" in *S v Singh and Another, supra,* at 333F and *S v Ramgobin, supra,* at 135C—D, namely, that for recordings to be admissible it must be proved that, on the evidence as a whole, there exists no reasonable possibility of "some interference". In *S v Ramgobin, supra,* at 179C—E it is said that in a criminal case it must be proved beyond reasonable doubt that the tapes "have not been interfered with in any way – whether by mistake or otherwise – since the original recordings were made".

In regard to this "second rule", Hefer JA said in *S v Nieuwoudt, supra,* at 232C – 233B that even if proof of authenticity is a prerequisite for admissibility, the fact that there has been some interference with the recording would not mean that the whole of the recording should be excluded from the evidence. Interference might affect its evidential value depending on the materiality of the missing or affected part. The crucial issue is whether the State has excluded the reasonable possibility of a false recording – as Hefer JA put it (at 232G) –

> "….. die gevaar waarteen gewaak moet word, [is] die toelating … van 'n opname ten opsigte waarvan daar 'n redelike moontlikkheid bestaan dat dit 'n verwronge weergawe van die werklikheid is."

Dr Jansen examined Exhibits 4A, 5A, 6, 7, 8, 9, 10 and 11A. His method of examination included –

1. Physical (visual) inspection and measurement of the tapes.
2. Electronic measurement of residual noise levels ("ruisvlakke") on the tapes.
3. Analysis of the wave patterns of the recorded signs on a computer screen, with specific regard to pulses that cannot be regarded as part of the sign that was recorded.
4. Listening to the tapes.

He found no signs of tampering with the tapes and no indications that the recordings were not original recordings.

The cross-examination of Dr Jansen was confined to the question whether the tapes could have been tampered with. His response was that the possibility of tampering always exists and that the question is whether in a particular case there had in fact been tampering.

It became apparent during the evidence of Dr Jansen that it may nowadays be possible, with sophisticated equipment, to edit audio tapes in a manner which makes it very difficult to find the footprints of the editing. By the same token, the sophistication of modern equipment makes it possible to detect even carefully disguised footprints.

Former Captain FC Scheepers was, before his retirement at the end of January 2004, attached to the Technical Support Unit of the Police and in charge of their electronic workshops. Though his evidence was brief and confined to an isolated issue, we found him a most impressive witness. He confirmed that, in his view, it is not possible, without sophisticated electronic and computer equipment, to edit tape recordings in such a manner that it would not be possible to pick up the alterations. He was adamant that with “gewone toerusting” it would not be possible to tamper with a tape without leaving traces of the tampering which can be detected with modern equipment. The Police did not have such sophisticated equipment while he was attached to the service.

In *S v Nieuwoudt, supra,* at 232G it is said that if it is kept in mind that the danger that must be guarded against is the admission of a recording in respect of which there is a reasonable possibility that it is a distorted version of reality, it follows that every interference has to be examined in order to

determine whether such a possibility indeed exists ("is dit vanselfsprekend dat elke steuring nagegaan moet word ten einde te bepaal of daar inderdaad so 'n moontlikheid bestaan".)

Accused one did not have the benefit of an expert to testify on his behalf. However, he participated in the conversations and one could reasonably have expected that he would have been able in his evidence to identify instances of interference. He referred to a number of instances where he believed passages had either been removed or had been transferred from one place to another. None of these passages were canvassed in the cross-examination of Dr Jansen. Moreover, one cannot but wonder, as Mr Cilliers did in argument, what was to be gained by transferring bits and pieces of a conversation from the beginning to the end of a tape? Furthermore, if there had been a purposeful tampering with the tapes, one might have expected that, for example, those parts of the conversations that deal with accused one's proposed appeal would have been eliminated.

When cross-examined by Mr Cilliers, accused one for the first time asserted (he did not do so in his evidence in chief) that certain passages which appear in the transcript and on the tapes did not form part of the conversations. He said that those passages might have been inserted by making use of the voices of actors who can, I quote form the record, "mimic your voice", or voices that are "computer generated". He denies whole pages of some of the transcripts as representing conversations that had in fact taken place. Thus, for example, he denies that large parts of the conversations recorded on Exhibit 8 (transcript Exhibit V) and on Exhibit 10 (transcript Exhibit X) ever took place. It will be recalled that these were the two tapes on which Dr

Jansen was requested to do voice identification tests. His conclusions were not put in issue – in fact, Mr Mihalik explicitly stated that voice identification was not in issue and that the issue in dispute was the possibility that the tapes might have been tampered with. However, accused one's subsequent evidence in cross-examination that passages might have been inserted by making use of the voices of actors or by way of computer generation makes the question of voice identification a major issue and one which should have been canvassed in the cross-examination of Dr Jansen. The inference is irresistible that it was only when he was under pressure from Mr Cilliers to explain certain passages in the recordings that accused one resorted to the expedient of asserting that the passages were inserted into the tapes.

There is interesting and significant extraneous confirmation of the accuracy of the recording of part of a conversation – significant also because it reflects adversely on accused one's credibility. The passage in question occurs in telephone conversations between accused one and Kerridge on the afternoon of the 9th August 2000 (Exhibit 8; transcript Exhibit V). The passage is as follows:

> Bron *[Kerridge]*: Yes, …(indisctinct) … so what? You are going to phone Abdullah now?
>
> Doc *[Accused one]*: Yes.
>
> Bron: Okay.
>
> Doc: Wait there for my call.
>
> Bron: Oh, … (indisctinct) … cool.
>
> Doc: Ja.
>
> Bron: Fine.

Doc: Cool.

Bron: Cool, bye.

(CONVERSATION ENDS)
(PHONE RINGS)

Bron: Hallo.

Doc: Allie?

Bron: Yes, Doc.

Doc: You can phone him.

Bron: Hey?

Doc: You can phone him. I just phoned Abdullah and speak to him and you can meet him and you can discuss it. Don't discuss anything over the phone.

Bron: Okay.

Doc: If he can do it, he will do it.

Bron: Yes, but I mean, so he knows nothing about …

Doc: No, he says that Slams did phone there.

Bron: Who is Slams?

Doc: Slams Faried, man.

After some conversation about Slams Faried, the following is said:

Bron: So what is his number? What is his number?

Doc: 715 5355.

Bron: 715 5355.

According to the record of calls (the record was handed in by agreement as Exhibit LLL) which were made to and from number 701 1008 in Pollsmoor prison, there was a conversation with number 534 1682 which started at

14h07. It is common cause that this was the phone from which Kerrdige made and received his calls. The call lasted a little more than five minutes. There then followed a call that started at 14h13 to number 715 5355, the number of Abdullah Brenner (accused seven). The call lasted one minute and forty-eight seconds and was followed at 14h15 by a call to 534 1682 which lasted just under three minutes.

The record of the calls made confirms the course of the conversations as recorded. Moreover, the denial by accused one that he phoned accused seven at 14h13 on that afternoon is without substance.

In view of all the foregoing, we are of the view that the recordings are an accurate reflection of the conversations between Kerridge and accused one.

The accuracy of the transcripts

The accuracy of the transcripts was also put in issue. In this regard it should be kept in mind that the real evidence is the tape itself, and that the parties (and if need be, the Court) can check the accuracy of the transcripts (*R v Koch* 1952 (3) SA 26 (T) at 30C; *S v Mpumlo and Others, supra,* at 490F—G); Zeffertt *et al The South African Law of Evidence* (2003) 708). As has already been pointed out, the defence was afforded the opportunity to listen to both the original tapes and the copies.

The transcriptions were typed by Mrs MW Botha who was employed at the time by Paarl Typing Services. For reasons that are not relevant here, two pages of Exhibit X were also typed by Mrs SF Ponzi. There are certain

differences between their transcriptions of the two pages which were canvassed in cross-examination. The high point of these differences is that at one point, the one typed “knife” and the other “life”.

Mr Robertson took Mrs Botha through Exhibits T, V, W, and X and pointed out to her what he thought were errors in the transcription. For example, he put it to her that at one point in Exhibit T, he hears the word “amount” on the tape while she had typed “demand”. Her response was simply that when she typed it, “[het] dit vir my seker soos ‘demand’ geklink”. Another example is that on the same tape she had omitted the word “Toyota” before the word “Corolla”. On Exhibit V, Mr Robertson pointed out, the word “Doc” occurs twice on the tape but Mrs Botha had typed it only once. Mr Robertson also said that he does not on the tape hear certain phrases which appear in the transcript. Perhaps Mrs Botha as an experienced typist of transcriptions has a better “ear” than counsel when it comes to listening to audio tapes – Mr Mihalik admitted that he is not a good listener to tapes!

Be that as it may. The errors, if such it be, pointed out by counsel are not substantial and the kind of error which is to be found on most transcriptions of audio tapes. Thus errors occur in the running record of the proceedings in this case (the transcript of a recording made in favourable conditions in the sense that there was little or no extraneous noise at the time of recording). Examples of such errors are, “Van Wyk” instead of “Van Dyk”; the attribution to counsel of a remark I made, and one of the transcribers did not know what to make of the name “Kerridge”. There are, no doubt, many other examples.

In our view, the transcripts handed in as exhibits, are a substantially accurate representation of the recording on the tapes that were handed to Mrs Botha for transcription.

The content of the conversations

Accused one's evidence was that in his conversations with Kerridge, he was mainly concerned with his proposed appeal against (review of) Van der Merwe's dismissal of the application for her recusal. He says that he always wanted to go the legal route, that he wanted an affidavit from Kerridge to use in the proposed legal proceedings, and for that reason he continued to maintain contact with Kerridge despite Kerridge's efforts to draw him into a conspiracy to murder the magistrate.

An analysis of the recorded conversations does not support this view. There are indeed references to the legal proceedings in the conversations, and there are passing references to the affidavit which accused one says he so desperately required.

I shall, in what follows, cite a number of passages which show that accused one was the initiative and driving force of the plan to murder Van der Merwe. In doing so, I shall take care not to quote passages out of context.

In a conversation on 7th August 2000 (Exhibit T) accused one gives the name of accused seven to Kerridge and a telephone number, 701 5355 – the number is incorrect, the correct number, 715 5355, being given to Kerridge by accused one during a conversation on 9th August 2000 (the relevant part

of that conversation is cited above under the head **The authenticity of the recordings**). The conversation turns to Roy (Vlotman), the late accused four, who was on the point of being released. Accused one says that Roy Vlotman "is coming out today", and, in response to a question from Kerridge, he says:

> Doc: Well, then we don't need these other at all to hit.
>
> Bron: Yes, but now what is going to happen? Must I pick him up or what?

On the 7th August 2000 (Exhibit U) there is a long conversation during the course of which there is again reference to Holland (accused four) as the possible hit man. Kerridge asks whether Hollland is safe and accused one assures him that he is:

> Doc: That is his work, to rob the place that is his work, man.
>
> Bron: But what has Wilma got to steal?
>
> Doc: She is mos … (indistinct) … she owns a place, jewellery.
>
> Bron: Okay; so you want to make it look like a robbery?
>
> Doc: No, he is going to do that, he wanted to rape her, so I said, no, don't, leave that kak man. He wanted to do that.
>
> Bron: He wanted to rape her as well.
>
> Doc: He was so keen on it.

Later in the conversation, accused one laments the fact that –

> "I can't work things out from inside".

The conversation of 9th August 2000 (Exhibit V) at one point turns to the affidavit and the following ensues:

Doc:	So you must have an affidavit you must give to my lawyer here.
Bron:	Okay, all right.
Doc:	Just to verify your story and then they .. you have to see, got to stand down, man, the bitch.
Bron:	What?
Doc:	That bitch, bastard, rubbish, pig.
Bron:	What …
Doc:	No, you must get rid of her.

The conversation then turns to Abdullah (accused seven) and the part of the conversation cited above under the head **The authenticity of the recordings** follows.

In a conversation on 10th August 2000 (Exhibit W) there is again talk of the affidavit that Kerridge must give to attorney Kahn. Thereafter the talk turns to the acquisition of a firearm. Kerridge says that accused seven wants to do the hit that evening and –

> "And then I told him, listen here, no, you have to speak to Doc. Doc is the one that must give the order and things like that, you know."

Later during the conversation, Kerridge says –

> "He wants to do it today, you know, and I can get it quickly done for you."

Accused one then says that he is going to arrange for Faried (accused two) to get a firearm.

The problem of the acquisition of a firearm again surfaces in a further conversation on 10th August 2000 (Exhibit X). The disappearance of Dawood seems to have caused a problem and there are references to him in colourful, uncomplimentary language. Kerridge then says:

> "Listen here now, listen here, what is the second option? What of for a … it is just the R450 that we need basically, you know. What do you suggest I do? I mean, if you tell me what, I will do it, you know. But I mean it is your … you have to …"

They agree that trying to get the money from accused one's father is not a good idea because, as accused one puts it, "he is not stupid" and he "already smells a rat". The conversation continues as follows:

Doc:	You see that R450 is not a problem.
Bron:	R450, ja.
Doc:	I can get that. The way to get it is …
Bron	Not now, you don't have to get it now.
Doc:	I can get it via Keith, you know Keith, look here, you need more money, a thousand rand, I need it urgently, you know what I am saying.
Bron:	Ah ha.
Doc:	Then I can get I back easily.
Bron:	So you want to say to me, you will get it … (indistinct) ..
Doc:	You can get it, you can organise it for me.
Bron:	Okay. So you want me to organise it, and you will repay him that?
Doc:	Obviously, yes.

Bron: Okay, no cool

Doc: No, I mos told you last time, man. I am just … it is just a matter of time. If that thing can happen, then I'm out of here.

Bron: Okay, Doc, so basically it is going to be done. If this Abdullah guy is genuine tonight, he is going to be there for me, I hope so, then it will be done, you know .. Then it will be done.

Doc: If you can get that, nè.

Bron: Ja.

Doc: I will sort you out, you know that.

Bron: Okay, obviously.

Doc: No problem, I can get it through Keith.

Bron: Look, he told me last night, this was his words, he doesn't want to talk payment, he wants to talk payment after it is done.

Doc: Oh, yes.

Bron: So obviously, I am going to say to him, listen here, I will arrange a visit with you and Doc and you guys can talk. Pick him up like a Friday, bring him with me [to] court, you know, or something like that, you know?

Doc: Ja.

Bron: Okay, so that will be done.

Doc: So you are going to do it tonight then?

Bron: He wants to do it tonight.

Doc: Finish, man.

In our view, it is apparent from the recorded conversations that accused one was the initiator and the driving force behind the plan to murder Van der Merwe, and that Kerridge was working on his behalf and regularly reporting back to him.

Finally, according to Van Dyk it was on the basis of the last conversation cited above that it was decided that the Director of Public Prosecutions should make the amount of R450 available for the rental of the firearm. This was part of the object of the covert operation to keep control of the situation.

THE EVIDENCE OF DAWOOD

Dawood gave evidence under the name Alex Petersen. He admitted that he was also known as Dillon Williams, Kelvin Keith Daniels and Dawood.

He was in Pollsmoor prison during 1999 and part of 2000. During that time, he converted to the Muslim religion. In prison, he met both accused one and Kerridge.

He was released on parole during July 2000 and took up residence with the family of Dawood Osman, the member of PAGAD who had in December 1999 been sentenced to a lengthy term of imprisonment.

Dawood said that while they were together in prison, Kerridge had given him his phone number. Out on parole, he was desperately looking for work and decided to phone Kerridge. Kerridge responded to the call and visited him at the Osman residence.

The further evidence of Dawood, in essence, amounts to the following:

1. Kerridge endeavoured to draw him into the plan to murder Van der Merwe.

2. He skipped his parole and disappeared.
3. He later heard that his photograph was in the newspapers and that he was being sought in connection with the bomb explosion at the Bronx Bar in Green Point in which people were killed. He admits that he was on the scene when the bomb went off.
4. He was in September 2000 arrested at the Waterfront on a charge of theft.
5. He was induced by Van Dyk to confess falsely to complicity in a plan to murder Van der Merwe.
6. He was induced by Van Dyk to plead guilty to a charge of conspiracy to murder Van der Merwe and to give false evidence in mitigation of sentence.
7. He was induced by van Dyk to make statements implicating not only accused one, but also a number of PAGAD members in a conspiracy to murder Van der Merwe.
8. He was induced into entering into an agreement with the Director of Public Prosecutions in which he was promised indemnity form prosecution in regard to his involvement in the Bronx bar bombing in exchange for information

The agreement that was entered into arose from an offer of conditional indemnification from prosecution made to him on 19th October 2000 by the Director of Public Prosecutions. Dawood responded in writing as follows:

1. Hiermee bevestig ek dat ek die skrywe van die Direkteur van Openbare Vervolgings gedateer 19/10/2000 deurgelees het, en dat ek die geleentheid

gehad het om die inhoud daarvan met my regsverteenwoordiger te bespreek.

2. Ek bevestig dat ek ten volle bewus is van die inhoud van die voormelde skrywe en ook die implikasies van die skrywe verstaan.

3. Ek, Kelvin Keith Daniels, aanvaar u aanbod vir vrywaring teen vervolging ten opsigte van die Bronx-"bar" ontploffing en onderneem:

   (i) Dat ek my volle samewerking deurgaans aan die ondersoekbeampte sal verleen by verdere ondersoek;

   (ii) Dat ek alle kennis en inligting wat ek aangaande enige persone se betrokkenheid by misdaad aan die ondersoekbeampte sal openbaar maak; en

   (iii) Om teen enige sulke persone te getuig in 'n daaropvolgende strafregtelike vervolging.

4. Ek bevestig dat ek kennis neem dat u bovermelde aanbod om vrywaring onmiddelik sal verval indien dit blyk dat:

   (i) Die inligting vervat in my bovermelde bekentenis met betrekking tot die ander betrokkenes nie akkuraat en korrek blyk te wees nie;

   (ii) Ek nie my volle samewerking aan die ondersoekbeampte verleen tydens verdere ondersoek nie;

   (iii) Ek nie verder bereid is om teen die persone genoem in par 1 (iii) te getuig as 'n artikel 204-staatsgetuie nie;

   (iv) Ek afwyk van my getuienis of onbevredigend getuig in enige daaropvolgende bovermelde strafsaak.

5. Ek neem kennis dat hierdie vrywaring teen vervolging nie geld ten opsigte van enige van my ander uitstaande sake wat reeds op die hofrol is of was

> of reeds aanhangig gemaak is voor die datum van hierdie bovermelde bekentenis nie.

On 14th September 2000 Dawood appeared in the Regional Court in Malmesbury on a charge of conspiring with accused one to murder Van der Merwe. The magistrate was Mr KM Nqadala, a regional magistrate from Kimberley. Dawood was represented at the trail by Mr GW Cook, and attorney form Malmesbury, who was instructed by the Legal Aid Board. Dawood said that the evidence he gave in mitigation of sentence in the regional court in Malmesbury was false and that everything he said there was said on the instructions of Van Dyk.

The evidence of Dawood must be approached with the greatest circumspection. Firstly, he admits to perjury. Secondly, there is the sheer improbability that Van Dyk would induce him to memorise pages of notes, the contents of which he then regurgitated in his statements to the Police, confession to the magistrate and in his evidence in mitigation. Thirdly, the agreement of indemnity from prosecution on certain conditions was openly entered into, and his case was heard by a regional magistrate from another regional division.

There is a small but significant piece of evidence which exposes the unreliability of his evidence. He says that Kerridge told him that there was a person by the name of Chalkie (that is accused five) in Bonteheuwel whom he wanted to visit but he was not sure that he was going to make it. Dawood said that Kerridge gave Chalkie's address to him and that he undertook to go round to Chalkie. In his evidence in this Court, Dawood said that he never

went to Bonteheuwel and that he threw the address away. In his evidence in mitigation in the regional court in Malmesbury, he stated that he did go to Bonteheuwel to get a firearm. When taxed by Mr Cilliers about the discrepancy, he said that he was told by van Dyk to say that he went to Chalkie's house.

When accused five gave evidence, he was adamant that Dawood had come to his house early in August 2000. He said that on 4th August 2000 a person who called himself "Doc" phoned him and asked him for a firearm. The person calling himself "Doc" said that he would send one Dawood to him. Accused five said that he had no firearm but he thought that he might "con" the people looking for a firearm – "'n kop aansit" as he put it. When Dawood duly arrived, he did not look like a suitable candidate to be "conned" and accused five thought it better not to speak to him. He asked his sister to put Dawood off.

Though he cheerfully admitted that he makes a living from housebreaking, theft and the sale of mandrax, accused five impressed us as a truthful witness.

In our view, no reliance can be placed on the evidence of Dawood.

THE EVIDENCE OF ACCUSED ONE

Certain aspects of the evidence of accused one have already been dealt with; for example, the underlying reasons he gives for the alleged conspiracy against him; his dissatisfaction with his conviction on the charge of murder

and his apology for the way in which he had abused Van der Merwe in the corridors of the magistrates' court building; his denial that the tape recordings are not an accurate reflection of the conversations between him and Kerridge, and his assertion that the tapes had been tampered with by moving, removing and insertion of material.

It is apparent from the evidence of accused one that he endeavours to minimise his involvement in the campaign of vilification to which Van der Merwe says she was subjected. Thus he denies authorship of the forged letter to the Minister of Justice in her name. And yet, comparison of the letter with the note in red ink, over a signature which purports to be that of Van der Merwe, which accused one admits he wrote and handed to Kerridge on 28th July 2000, is instructive.

The text of the letter is as follows:

> "Sir
> The accused (Mr Ismael) whom I convicted of murder on the 23-7-99 brought a recusal application against me on the grounds of prejudice.
>
> Yesterday he defamed me by calling me a whore since he spoke to the father of my illegitimate 3 year old son - ?????? Reg. Crt Magistrate Herman Badenhorst who also told him that prosecutor André Bouwer was my lover again after the birth of my son. This rubbish murderer told the court that he had written to you regarding my adultress *(sic)* affair with Magistrate Badenhorst and all I want to tell you is that my private life has got nothing to do with him or you. I don't care if you take disciplinary steps against me since I have a private job waiting for me with my colleague Adv Edwin Grobler, 2nd Floor 42 Keerom St Cape Town Tel

> 4220664. In any case, since you blacks took over the SA justice system is in shambles."

The note in red ink reads as follows:

> "July 2000
>
> I, magistrate Wilma van der Merwe presiding in Ct Regional court 31 hereby confirm I seduced married Gauteng magistrate Herman Badenhorst during 1996. I gave birth to his illeg bastard son – Alex. I would like to apologise to the community for my evil adultress *(sic)* affair. I would also like to take this opportunity to apologise to Mr Shaheem Ismail (Doc) for calling him a koelie. I was very angry because he called my ex-lover prosecutor Andre Bouwer a dutch pig and my friends Cathy Steyn a dutch bitch en Edwin Grobler a neonazi. Because of the above circumstances I hereby notify the public I will be recusing myself from Mr Ismails present murder case."

The tone and content of the letter (which in time precedes the note) and the note are similar, and the tell-tale spelling error "adultress" occurs in both. The inference is irresistible that accused one, who admits to authorship of the note, was also the author of the letter.

It may be objected that the handwriting of the letter to the Minister differs from the handwriting of accused one as it appears on his letter of 27 July 2000. In this regard it is not without interest that both Kerridge and Dawood remark on accused one's ability to imitate any handwriting. His skills in this regard are apparent from three documents before the Court which he admits emanate from him, viz the letter of 27th July 2000 to Kerridge's friends in

Pollsmoor, the note in red ink on the back of that letter and the sample of his handwriting which he gave to Captain Y Palm (Exhibit 12 T(v)).

The letter of demand and the Particulars of Claim of the summons in which accused one claims damages for defamation from Van der Merwe were hand-written by accused one. In both the letter of demand and in the Particulars of Claim, he bases his claim on the two advertisements in the Argus newspaper which he alleges she had placed. However, in evidence under cross-examination by Mr Cilliers, he said that the advertisements were placed by Mr David Tshabalala.

Mr Tshabalala was a former inmate of Pollsmoor who, after his release on bail, established the New Era Rehabilitation Centre. The Centre *inter alia* assisted people with applications for Legal Aid. In this capacity, he was allowed contact visits in Pollsmoor and had contact with accused one who seems to have assisted people in prison with legal aid applications. It was he who conveyed accused one's letter of 27th July 2000 to the friends whom Kerridge was visiting in Pollsmoor. If accused one knew that the advertisements were placed by Mr Tshabalala, the basis of his claim against Van der Merwe was fraudulent.

I have already dealt with two other features of his evidence which undermine the veracity of his testimony. The first is the introduction for the first time, on the 65th day of the trial, of what his counsel termed the central part of his defence; namely, that the whole case is built upon a conspiracy against him by Van Dyk and other officials.

The second is his *volte-face* in his attitude to the tapes. It is only in cross-examination that he raises the possibility that material might have been inserted in to the tapes by persons imitating his voice or imitation of his voice by computer simulation.

Finally, as has been pointed out above, the telephone records show that on the afternoon of 9th August 2000 a telephone conversation between Kerridge and accused one was interrupted for a call to be made to the telephone of accused seven. The records further show that after the call to accused seven, the conversation with Kerridge was resumed, and that accused one told Kerridge that he had "just phoned" Abdullah and that Kerridge can phone Abdullah, "and you can meet him and discuss it". The frantic efforts by accused one in cross-examination to deny that he made a call to accused seven do not hold water, especially in view of the evidence of accused seven that he in fact on that day received a call from accused one. The deliberate vagueness of accused seven about the time of the call must next be considered.

THE EVIDENCE OF ACCUSED SEVEN

Accused seven as the armed hit man who was arrested on the scene, was in a difficult position. His efforts in his evidence to extricate himself from that position were not impressive.

He said that Kerridge visited him on the afternoon of 9th August 2000 and that the conversation went as follows:

> "Hy het vir my gevra of ek vir Doc ken. Ek het vir hom gesê, wel, hier het een gebel wat hom bekend gestel het as Doc. Maar ek wou toe seker weet van wie hy praat, toe vra hy vir my of die persoon hom gevertel het wat om te doen. Toe sê ek vir hom nee. Toe sê hy nou, wel, die man wil hê jy moet iemand vermoor. Wel, ek was deurmekaar gerook en ek het nie vir hom ernstig opgeneem nie. Hy het toe ook verder bygevoeg dat hy wil hê ek moet die joppie doen, dan moet ek sommer sy huis inbreek, want hy wil 'n insurance claim insit."

He confirms that on 10th August 2000 he went with Kerridge to accused three in search of a firearm. In large measure, his version of what happened there is similar to Kerridge's version, including the detail that when they arrived at her home, she was not there, they went in search of her at another house where they were told that she had gone home, and that on their return they then found her at home. His version differs from that of Kerridge in so far as he says that she told him that she had no firearm, and that they did not meet Igsaan Moses at her house, but ran across him in the street after they had left accused three. He confirms that Igsaam Moses joined them in the car and that they went to the house of Clinton Mostert where they "rented" a firearm for R400.00. He also confirms that Clinton Mostert instructed accused six to accompany them and to see to it that the "dinges" (as he put it) is returned.

He said there was talk in the car that they would stop at Kerridge's house and that he would use the firearm to frighten the African servant and that he would then commit the robbery as arranged with Kerridge. When they stopped at the house, Kerridge handed him the firearm after he had cocked it ("Hy het vir my die vuurwapen gegee en dit ook oorgehaal"). One may ask,

why cock the gun when the idea was merely to frighten the African servant? He agrees that he was handed a scarf to wrap around the firearm.

He says that he was surprised to hear the voice of a white women over the intercom when he rang the bell at the front door. He realised that he was at the wrong house and threw the gun and the scarf to one side. He was then overwhelmed by the policemen who came rushing out of the house. His evidence that he threw the gun and the scarf away before he was overwhelmed by the Police is not confirmed by the video which shows that at the front door, accused seven held his hands behind his back and did not throw anything away.

In cross-examination by Mr Mihalik, he says that he received the call from the person who identified himself as "Doc" on the 8th or the 9th of August – "ek is nie seker nie." Accused seven said that after the person had introduced himself as "Doc", nothing more was said except –

> "… hy het ook gesê hy kan nie oor die telefoon praat nie, daar sal iemand kom na my toe."

When cross-examined by Mr Cilliers, he added that "Doc" told him that a person by the name of Ali Kahn would come to him. He further agreed that –

> "Daar kon meer gesê gewees het, maar ek kan nie onthou nie. Dit kan moontlik wees"

When confronted by Mr Cilliers with the telephone record of a call from Pollsmoor to his number at 14h13 on the 9th August 2000, accused seven was adamant, despite his earlier uncertainty about the time of the call from "Doc", that he had received the call on the morning of the 9th, that he had received no further calls during the day and that Kerridge came to visit him in the afternoon.

When asked by Mr Cilliers whether Kerridge had identified the person he was to murder as magistrate Van der Merwe, he said, "Ek kan nie onthou nie". In response to the further question whether he could have said it, accused seven's response is, "Dit kon wees, ek is nie seker nie", and "Dit is moontlik dat hy die naam genoem het, maar ek kan nie onthou nie".

In our view, the acceptable evidence leads to only one conclusion: that at 14h13 on the 9th of August 2000, accused seven received a call from a person who identified himself as "Doc". As indicated before, there can be no doubt that the call was made by accused one. The call lasted one minute and forty-eight seconds which suggests, as accused seven conceded, that more might have been said than merely that Ali Kahn would visit him.

Only one inference can be drawn from accused one's denial in the face of overwhelming evidence that he had spoken to accused seven, and accused seven's equivocation in regard to the time of the call and the content of the conversation: accused one had requested him to assassinate Van der Merwe and he had agreed to do so.

EVALUATION OF THE CONSPIRACY AGAINST ACCUSED ONE

Mr Mihalik, when he applied for the recall of Kerridge for further cross-examination, said that the defence of accused one, which had not been put to Kerridge in eleven days of cross-examination, is that Kerridge was in all probability a planted agent who worked together with other agents and informants of the State and National Intelligence. He said that it would be contended that with the co-operation of various officials attached to the Department of Correctional Services, Kerridge and other informants were involved in efforts to implicate accused one and senior members of PAGAD in crimes of violence, and that these activities were promoted with the active co-operation of the Police. [The full text of Mr Mihalik's own words is cited above under the head **THE NATURE OF THE CONSPIRACY AGAINST ACCUSED ONE**]

Dawood was called as a witness to bolster accused one's defence of a conspiracy against him. We have found the evidence of Dawood to be wholly unreliable.

Police complicity in the conspiracy is based, *inter alia*, on the contention that while he was in the witness protection programme, Kerridge was allowed free range to commit crimes, such as falsely giving himself out as a lawyer, committing fraud and driving around in a motor vehicle he had stolen from the estate of his late step-father.

Kerridge certainly posed as accused one's lawyer when he participated in the covert operation prior to the assassination attempt on Van der Merwe. It can

be accepted, as we do, that he did so with the knowledge of Van Dyk and perhaps with the knowledge of certain prison officials. It is, however, not without interest that the idea that Kerridge should pose as his lawyer, was first mooted by accused one in his letter of 27th July 2000.

Mr Mihalik sought support in the evidence of Captain Van Rooyen for the allegations vigorously stated in the cross-examination of Kerridge and van Dyk, that Kerridge was allowed freedom to commit crimes while in witness protection. Captain Van Rooyen is the Police officer in whose charge Kerridge was while in witness protection. The evidence of Captain van Rooyen did not support the allegations made in cross-examination. In his evidence, Captain Van Rooyen stressed that the purpose of witness protection is to secure the safety of persons placed in the programme. The conduct of people in the programme is not monitored by the Police. If a person in witness protection should commit a crime, the law will take its ordinary course. And this is precisely what happened in the case of Kerridge – at the time when Captain Van Rooyen gave evidence, Kerridge was under arrest and in prison awaiting trial for offences allegedly committed since April of this year while he was in witness protection.

In the cross-examination of Kerridge, the assertion was repeatedly and vigorously made that he had stolen a BMW vehicle from the estate of his stepfather. In the cross-examination of Van Dyk it was asserted that Kerridge was allowed to drive around in the vehicle which the Police knew had been stolen. These assertions are repeated in the heads of argument filed on behalf of the first accused.

The file pertaining to the estate of Mr Damoes, the late stepfather of Kerridge, was handed in by Mr Smit, an Assistant Master of the High Court. From the file it is clear that the BMW was not an asset in the estate. In the preliminary inventory, a BMW valued at R125 000.00, is listed as an asset in the estate. No final inventory, no liquidation account and no distribution account ever saw the light. In the file there is a copy of a credit (hire-purchase) agreement with a financial institution entered into in respect of the BMW by the Mr Damoes about a month before his death. In terms of the agreement, the ownership of the vehicle vested in the financial institution. At the time of the death of Mr Damoes on 12 October 1999, the value of the vehicle (judging by the purchase price) would have been in the vicinity of R94 000.00 and the amount owing to the financial institution (assuming that the first monthly instalment had been paid on 1 October 1999) was about 112 000.00. Mr Smit confirmed that when the value of an item which is subject to a credit agreement is less than the amount owing to the owner (financial institution) of the item, such an item is normally not reflected in the estate accounts as an asset. The documentation in the file does not support the allegation of theft repeatedly levelled at Kerridge in cross-examination.

The Police may have had reason to suspect that Kerridge came into possession of the vehicle in an unlawful manner. The only party that can clarify the position is the owner of the vehicle, the financial institution. An examination of the manner in which the financial institution dealt with the vehicle is not relevant to the issues in this case.

It is possible, and indeed probable, that in the climate of violence that prevailed in Cape Town during 1999 and 2000, the Police would have infiltrated informers into the ranks of groups suspected of being responsible for the acts of violence committed at the time. PAGAD was one of the groups so suspected. It would be safe to accept that there were attempts by the Police and security agencies of the State to infiltrate the ranks of the PAGAD members held in Pollsmoor prison at the time. The purpose of such infiltration, one would assume, was to prevent the commission of crimes of violence by early detection, and to bring to book those who had committed crimes of violence.

No evidence has been placed before the Court that the Police, the Department of Correctional Services and security agencies of the State devoted their energies to building an intricate plot against accused one in order falsely to implicate an innocent individual in the planning and commission of a serious crime.

ILLEGAL POSSESSION OF FIREARMS AND AMMUNITION

In counts 2 and 3 of the indictment, the accused are charged with the illegal possession of a pistol and nine rounds of ammunition in contravention of sections 2 and 36 of the Arms and Ammunition Act 75 of 1969.

What is prohibited by those sections is the existence of a state of affairs, namely, having possession of a firearm or ammunition. A conviction will be competent only if that state of affairs is shown to exist (*S v Mbuli* 2003 (1) SACR 97 (SCA) at 114h). That state of affairs will exist simultaneouly in

respect of more than one person if they have common, or joint, possession of the firearm or ammunition. In *S v Mbuli, supra,* at 114i – 115b it was held that the contravention of the sections does not arise from an application of the principles applicable to common purpose (as was held in *S v Khambule* 2001 (1) SACR 501 SACR (SCA) at 508b (par [10])) but rather from the application of the ordinary principles relating to joint possession. In *S v Mbuli, supra,* at 115b – d the Supreme Court of Appeal gives its stamp of approval to the exposition of the legal position ("apart from a misplaced reference to common purpose") in *S v Khosi* 1998 (1) SACR 284 (W) at 286h—i:

> "The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:
>
> (a) the group had the intention (*animus*) to exercise possession of the guns through the natural detentor and
>
> (b) the actual detentors had the intention to hold the guns on behalf of the group.
>
> Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns."

The position of accused seven presents little difficulty. He was clearly in possession of the pistol and the ammunition in contravention of the relevant sections.

Even though accused one may have had a hand in the acquisition of the firearm and ammunition, he was not part of any group that had the intention (*animus*) to exercise possession of the firearm and ammunition through the natural detentors, Kerridge and accused seven, nor did the actual detentors have the intention to hold the firearm and ammunition on behalf of a group of which he formed part.

Accused six was instructed by Clinton Mostert to get into the car with Kerridge and accused seven, and to see to it that the pistol is returned. He was the *custos* of the firearm, on behalf of Clinton Mostert, who was due to take physical possession of the firearm at a later stage. He was part of a group that had the intention (*animus*) to exercise possession of the firearm and ammunition through the detentors, first Kerridge and then accused seven, and the actual detentors had the intention to hold the firearm and ammunition on behalf of a group of which he formed part.

THE PRINCIPAL FINDINGS

As is apparent from the foregoing, the case turns very largely on the evidence of four witnesses: Kerridge, Van Dyk, Dawood and accused one.

The evidence of Kerridge is such that it can only be accepted to the extent that it is corroborated by other acceptable and credible evidence.

The evidence of Dawood and of accused one is of questionable veracity and must be treated with circumspection.

Van Dyk was a good witness; he was fair in his evidence and prepared to make concessions and admit mistakes. He was, however, a participant in a covert operation and as such his evidence must be treated with the measure of circumspection set out in *S v Ramroop, supra,* at 559g—i.

The principal findings of the Court on the totality of the acceptable evidence are as follows:

Accused one was arrested on charges of fraud and murder. Kerridge was subsequently arrested on charges of fraud and met up with accused one in prison.

Accused one was tried on the charge of murder by Van der Merwe and on 23 June 1999 she convicted him on the charge. After his conviction, he brought an application for her recusal. The application for recusal was heard on the 1st December 1999 and Kerridge testified at the hearing on behalf of accused one.

After she had convicted accused one, Van der Merwe became the target of a vicious and crude campaign of personal vilification. Accused one played a major part in this campaign.

During March or April 2000, accused one told Nico Slabbert that “they” were planning to murder Van der Merwe, Edwin Grobler and Kathy Steyn.

In March 2000 Kerridge was transferred to Drakenstein prison and for practical purposes lost contact with accused one.

In July 2000 Kerridge was released on bail. He visited friends who were being held in Pollsmoor prison. Accused one heard that he was visiting friends in Pollsmoor and on 27th July 2000 sent them a letter, delivered by Mr David Tshabalala, in which he conveyed to them his request to Kerridge to visit him. Kerridge duly visited accused one on 28th July 2000.

Kerridge thereafter informed the Police, first Eilward and thereafter van Dyk, that accused one was planning an assassination attempt on Van der Merwe, and that accused one had requested him to assist him with the necessary organisation and planning from his position outside prison. From subsequent events, particularly the recorded conversations between Kerridge and accused one, it is apparent that accused one had in fact so requested Kerridge.

Van Dyk set in motion a covert operation under the provisions of section 252A of the Criminal Procedure Act and under the provisions of the Interception and Monitoring Prohibition Act 127 1992 obtained a directive from the designated Judge authorising the monitoring of certain conversations.

Conversations between accused one and Kerridge were monitored and recorded. The recordings and transcripts that were handed in as exhibits are an accurate reflection of the content of the conversations that had taken place.

From the conversations it is apparent that accused one was the brain behind the planned assassination of Van der Merwe, and that Kerridge was acting on his instruction and behalf.

Various possible assassins were identified. The first was Dawood who was out on parole. He and Kerridge visited accused three in search of a firearm. Dawood also visited accused five in search of a firearm but accused five avoided him. Thereafter Dawood skipped his parole and disappeared.

The late Roy Vlotman, who was accused four, seems to have agreed with accused one to do the hit (we did not, of course, have the benefit of hearing Mr Vlotman's side of the story).

In a conversation with Kerridge, accused one identified Abdullah Brenner, accused seven, as a suitable assassin. On 9th August 2000, accused one had a telephone conversation with accused seven and agreement was reached that accused seven would do the deed. Kerridge visited accused seven shortly thereafter and arrangements were set in motion for the hit on 10th August 2000.

The acquisition of a firearm was a problem. Various possibilities were discussed by Kerridge and accused one. In the end, a firearm was obtained from one Clinton Mostert at a "rental" of R400.00. The money was made available to Kerridge by the Director of Public Prosecutions under the aegis of the covert operation under section 252A of the Criminal Procedure Act.

On the evening of 10th August 2000, Kerridge and accused seven went to the house of Clinton Mostert who handed them a firearm. Clinton Mostert instructed accused six to get into the car with them and to see to it that the firearm was returned later that evening.

The party drove to the house of Van der Merwe. Accused seven approached the front door and rang the doorbell. After a short while, policemen came rushing out, overwhelmed accused seven and in the process the firearm he was carrying, was sent flying. Accused seven, Kerridge and accused six were then arrested.

The firearm that was sent flying by the onrush of the Police was retrieved. It was a 9mm Parabellum Astra semi-automatic pistol 0786E that had been stolen on the morning of 10th August 2000 in Mitchells Plain.

Accused one was not the victim of a conspiracy by Van Dyk and other State officials to implicate him in a crime which he had not committed.

CONCLUSIONS

Accused one (Dr Shaheem Ismail)

From the evidence that was adduced and the principal findings of the Court, the conclusion inevitably follows that accused one had conspired with accused seven to murder Van der Merwe.

Although accused one had a hand in the acquisition of the firearm and ammunition, he was never in possession thereof in contravention of the relevant sections of the Arms and Ammunition Act 75 of 1969.

Beskuldigde twee (Faried Davids)

Daar is geen direkte getuienis wat beskuldigde twee verbind met die misdaad nie. Hy het Kerridge nooit ontmoet nie.

Beskuldigde twee het ‘n verklaring voor ‘n landdros gemaak wat as ‘n bewysstuk ingehandig is. Daar is namens hom erken dat die verklaring voldoen aan al die toelaatbaarheidsvereistes wat vir so ‘n verklaring gestel word. In kort kom sy verklaring daarop neer dat beskuldigde een hom genader het vir ‘n vuurwapen en dat hy besluit het om beskuldigde een te kul. Hy het sy vrou, beskuldigde drie, gebel en gesê sy moet die mense wat opdaag aan ‘n lyntjie hou. Hy het ook later beskuldigde sewe se telefoonnomer aan beskuldigde een gegee sodat beskuldigde een hom kan kontak om ‘n werkie vir hom te doen.

[Daar moet, tussen hakies, beklemtoon word dat beskuldigde twee nie getuig het nie en dat sy bovermelde verklaring dus nie toelaatbare getuienis teen beskuldigde een daarstel nie]

Daar is geen getuienis dat beskuldigde twee ‘n samesweringsooreenkoms met beskuldigde een gesluit het om Van der Merwe te vermoor nie. Beskuldigde twee het nie ‘n vuurwapen gehad nie, en daar steek miskien waarheid daarin dat hy sy vrou aangesê het om die mense aan ‘n lyntjie te

hou. Volgens haar het sy eers gesê dat sy met haar man moet praat. Hoewel hy beskuldigde sewe se telefoonnomer vir beskuldigde een gegee het, is daar nie getuienis dat hy geweet het waaroor beskuldigde een met beskuldigde sewe wou praat nie.

In die lig van voorgaande het Mnr Cilliers, na ons oordeel tereg, toegegee dat beskuldigde twee die voordeel van die twyfel behoort te geniet.

Beskuldigde drie (Alivia Davids)

Sy word by die sameswering betrek slegs deur die getuienis van Kerridge. Alleenstaande is sy getuienis nie voldoende om haar skuldig te bevind nie.

Uit die getuienis is dit duidelik dat sy self geen vuurwapen gehad het nie. Die rede waarom daar telkens na haar toe gegaan is om ‘n vuurwapen te kry, kan wees dat die indruk bestaan het, as gevolg van wat beskuldigde twee aan beskuldigde een gesê het, dat daar wel ‘n vuurwapen was.

Haar getuienis dat net Kerridge en beskuldigde sewe by haar huis was, word deur beskuldigde sewe gestaaf. Hy staaf haar ook dat hy uitgeklim het en na haar gegaan het en dat sy gesê het dat sy nie ‘n vuurwapen het nie.

Sy was nie in alle opsigte ‘n bevredigende getuie nie, maar op die totaliteit van die getuienis kan daar nie gesê word dat sy deel gehad het aan ‘n ooreenkoms om Van der Merwe te vermoor nie.

In die lig van voorgaande het Mnr Cilliers, na ons oordeel tereg, toegegee dat beskuldigde drie die voordeel van die twyfel behoort te geniet.

Beskuldigde vyf (Ikram Norton)

Beskuldigde vyf het vir ‘n paar ligter oomblikke gesorg tydens sy getuienis. Hy het geredelik toegegee dat sy beroep is huisbraak, diefstal en mandrax verkope.

Volgens hom wou hy kyk wat hy uit die ding kon kry. Na ons oordeel is hy uitgeslape genoeg om juis dit te probeer doen. As hy ernstig was, sou hy Dawood te woord gestaan het toe dié by sy huis opgedaag het. Op die ou end verklaar hy teenoor Kerridge dat hy bereid is om die werk te doen teen ‘n prys wat hy baie goed weet onrealsities en onaanvaarbaar is. Hy probeer van sy kant nie weer om met Kerridge kontak te maak ná Kerridige se besoek aan hom nie. Daar is bowendien geen getuienis dat hy probeer het om ‘n vuurwapen in die hande te kry nie.

Ook in sy geval is die toegewing tereg gemaak dat hy die voordeel van enige twyfel behoort te geniet.

Beskuldige ses (Ashraf Lee)

Die posisie van beskuldigde ses is minder eenvoudig. Hy was die *custos* van die vuurwapen in dié sin dat hy opdrag ontvang het van Clinton Mostert, die verskaffer van die vuurwapen, om toe te sien dat die vuurwapen terugkom.

Mnr Cilliers het aangevoer dat as hy nie deel was van die sameswering nie, hy minstens skuldig is aan poging tot moord en onwettige besit van die vuurwapen en ammunisie.

Volgens Kerridge het beskuldigde ses nie kennis gedra van die oogmerk van die operasie nie. Hy was, volgens Kerridge, bloot “op die verkeerde plek op die verkeerde tyd”.

Beskuldigde ses se ontkenning dat hy nie geweet het nie dat dit ‘n vuurwapen is wat hy moet terugbring, kan nie aanvaar word nie. Sy ontkenning dat hy kennis gedra het van die aard van die beplande operasie het meer om die lyf. Miskien is hy gelukkig dat die bandopname wat gemaak is van die gesprek in die motor, niks opgelewer het nie. Die bandopname kon moontlik aangedui het dat hy moes kennis geneem het van die aard van die beplande operasie. Onder die omstandighede moet hy egter die voordeel van die twyfel kry en kan hy nie skuldig bevind word op die aanklag van sameswering om Van der Merwe te vermoor nie.

Hierbo is reeds bevind dat, in die lig van die toepaslike beginsels soos uiteengesit in *S v Mbuli, supra,* en *S v Nkosi, supra,* beskuldigde ses skuldig is aan onwettige besit van ‘n vuurwapen en ammunisie ter oortreding van artikels 2 en 36 van die Wet op Wapens en Ammunisie 75 van 1969.

Accused seven (Abdullah Brenner)

From the evidence that was adduced and the principal findings of the Court, the conclusion inevitably follows that accused seven had conspired with accused one to murder Van der Merwe.

Upon his arrest at the scene of the crime, he was found in unlawful possession of an unlicensed firearm and of ammuniation.

VERDICT

In view of the foregoing, our verdict is as follows:

Accused one (Dr Shaheem Ismail)

Count 1: Guilty
Count 2: Not Guilty
Count 3: Not Guilty

Accused two (Faried Davids)

Count 1: Not Guilty
Count 2: Not Guilty
Count 3: Not Guilty

Accused three (Alivia Davids)

Count 1: Not Guilty
Count 2: Not Guilty
Count 3: Not Guilty

Accussed five (Ikram Norton)

Count 1: Not Guilty
Count 2: Not Guilty
Count 3: Not Guilty

Accused six (Ashraf Lee)

Count 1: Not Guilty
Count 2: Guilty
Count 3: Guilty

Accused seven (Abdullah Brenner)

Count 1: Guilty
Count 2: Guilty
Count 3: Guilty

HJ ERASMUS, J