IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: SS39/2010

DATE: 3 MAY 2010

In the matter between:

THE STATE

and

DENVER ISAACS Accused 1

DENZIL RUITERS Accused 2

J U D G M E N T

BOZALEK, J:

The two accused in this matter, Mr Denver Isaacs and Mr Denzil Ruiters, accused 1 and 2 respectively, face five charges arising out of the death of Juanita Josephs ("the deceased") and whose body was found in a wooded area in or about Sir Lowry's Pass on 25 October 2009. The charges are:

1. abducting the deceased by removing her from her parental home;

2. contravening section 3 of the Criminal Procedure Amendment Act (Sexual Offences & Related Matters) Act 31 of 2007 by penetrating her vaginally without her consent;

3. a further contravention of section 3 of the selfsame Act, by penetrating her anally without her consent;

4. murder by unlawfully and intentionally taking the deceased's life through the use of blunt force and/or strangling her.

Accused 1 and 2 were represented respectively by Advocate Fourie and Attorney Cloete, whilst the state was represented by Advocates Galloway and Cecil. Both accused pleaded not guilty to all charges. Accused 1 admitted, in relation to count 2, that he had intercourse with the deceased. He stated by way of plea explanation that he had only done so under compulsion after having been threatened by accused 2 with a knife. He offered no plea explanation in respect of the other charges. Accused 2 offered no plea explanation at all and the representatives of both accused confirmed that their clients were apprised of the provisions of the minimum sentence legislation applicable in respect of counts 2, 3 and 4.

Background:

The deceased was seven years old at the time of her death and lived with her mother in an area known as Sun City in Sir Lowry's Pass Village. Both accused were similarly residents of the village and accused 1 was well known to the deceased and her mother. The deceased was not in the immediate care of her mother, Ms Caroline Josephs, for most of the day in question since the latter mistakenly believed that the deceased was with her father.

That evening accused 1 reported the deceased to the police as missing and a partial search operation was commenced. It was resumed the following morning but halted when accused 1 led the police to a shallow grave in a wooded area nearby the village where the deceased's body was found. *Post-mortem* examination revealed that the deceased had been vaginally and anally raped and then strangled with a shoelace taken from one of her shoes.

The state case against the accused was largely built on circumstantial evidence. Its main building blocks were firstly, the evidence of three witnesses who had seen the deceased in the company of accused 1 on the day in question and, in the case of one witness, in the vicinity of the wooded area where the deceased's body was found. Secondly, there was the

evidence of two witnesses to a report made by accused 2 on the day in question regarding him encountering a person in the wooded area who had apparently sexually molested a young girl. Thirdly, there was medical evidence of the injuries sustained by and the cause of death of the deceased, as well as DNA evidence linking accused 1 directly to the rape of the deceased. Finally, there was evidence of a number of police officers concerning their dealings with the accused on the day of the murder and the following day when the deceased's body was found.

Accused 1 testified that accused 2 had led him to the deceased and had forced him at knife point to rape her. Thereafter, despite accused 1's attempt to prevent him from doing so, accused 2 had strangled the deceased. He called the investigating officer as a witness to testify concerning conflicting versions which accused 2 had given. Accused 2 also testified and denied any knowledge of, or complicity in the deceased's murder or rape. He testified however, that he had encountered accused 1 in the wooded area on two occasions shortly after each other on the morning of the day on which she was killed. Accused 2 also called a witness his common-law wife who testified regarding his movements on the day in question.

Summary of the Evidence:

The deceased's mother, Caroline Josephs, testified that the deceased was seven years old at the relevant time, having been born on 1 May 2002. Both of them knew accused 1 very well. The witness regularly socialised with accused 1 who also knew the deceased well through dance classes he used to give to local children and from regularly fetching her from crèche. On the morning in question, the witness had last seen the deceased between 11 and 12 o'clock when she had been playing nearby. She had not missed her child for the rest of the day because she had believed that she had gone off with her father to Somerset West in accordance with an arrangement which she had made with him earlier that day. At about 7 p.m. that evening she began to search for the deceased. Some time thereafter accused 1 arrived at the police and told her that he had seen the deceased earlier that day on the nearby railway line with her panties in her hand.

Earlier that morning accused 1 had come to her house looking for something to smoke, at which time the deceased was still playing around the house. She described accused 1's demeanour later that day as being nervous, with him chewing his nails and smoking constantly, and said that he had not been acting normally. Although it would appear that the witness had been under the influence of alcohol for a good

part of the day, the essentials of her evidence were not challenged in cross-examination and can be safely accepted.

Selwyn Louw is a 14 year old youth resident in the village. He knew the deceased and accused 1. On the morning of 14 October he had seen the two of them walk hand in hand along the dirt road which led from the village towards the N2 National Road. At the time he had asked the deceased where she was going but she had just kept walking and had not answered him.

Another resident of the village, a 19 year old woman named Hailie Perrin, testified that she too had seen accused 1 and the deceased together in the same vicinity on the day in question. Accused 1 had been holding the deceased's hand and the two of them were walking hurriedly. The witness had been with her friend, Janiene Wiese, who had called out to accused 1. Accused 1 had turned around but had not answered nor halted. She and Janiene Wiese had then gone their separate ways. The witness put the distance between her and Janiene on the hand and the deceased and accused 1 at about 100 metres but stated that she was certain that the man in question had been accused 1. At the time she had not known who the child was but her friend, Janiene, had known her.

Janiene Wiese testified that she knew both accused 1 and

accused 2. She had not known the deceased but had seen her a few times in the village. She confirmed that she and Hailie Perrin had seen accused 1 and the deceased walking quickly together hand in hand along the road from the village towards the N1 road on the day in question. She had called accused 1's name but he carried on walking. Hailie Perrin then left with someone she met whilst the witness remained behind waiting for Perrin's return. Sometime thereafter she saw accused 1 again going into and then emerging from a nearby wooded area. She also saw accused 2 emerging from the same wooded area some three to four metres apart from accused 1.

Accused 1 walked off along the railway line while accused 2 took the dirt road in the same direction. Before accused 2 left, he challengingly asked her why she was looking at him. A few minutes later Hailie Perrin arrived back and the two of them had left the scene. She testified that she knew accused 2 because her uncle and his sister were married. What is more, a few weeks before the day in question accused 2 had said some ugly things about her to her face.

In cross-examination accused 1 disputed that he had walked along the road in question together with the deceased and put it to these three witnesses that they were mistaken in this regard. Similarly, accused 2 disputed that he had any

encounter with Janiene Wiese on the day in question although he did concede that he had been in the wooded area on the morning in question.

Mr John Godfrey was another resident of the area known as Sun City and knew both accused. He had known accused 2 from the time when the latter was still young and at school On the morning in question he had been part of a card game that took place between 10 and 12 p.m. at the house of a Mr Chris Theunissen. During the game accused 2 had arrived and recounted how he had been on his way to the N2 road near a rubbish dump when, from some distance, he had seen an unidentified man pulling up a child's panties. Accused 2 had further told those present that he had shouted at the man who had turned and run into the wooded area. Accused 2 had unsuccessfully chased after the man whom he had not been able to identify. He then took the child and left her safely in the road near a fruit stall in the nearby Rasta camp section of the village and proceeded to the card game.

Mr Chris Theunissen testified in regard to the same incident. He too had known accused 2 since he was two or three years old and he was married to his sister. As was the case with Godfrey, there were no problems between him and accused 2. He confirmed Godfrey's account of what accused 2 had told

the card school and added that accused 2 had preceded his account by stating that he was a little stressed about what he had just seen. The witness described accused 2's demeanour as initially being somewhat nervous. Accused 2 did not challenge the account of either of these witnesses but put it to both of them that he had fabricated the story in question to portray himself as a hero. Neither witness was able to dispute this proposition although Theunissen testified that he had no previous experience of accused 2 fabricating stories and did not think that he would have done so then.

Sergeant Jacob Sass of the SAPS, Somerset West, testified that he had been on duty at about seven o'clock on the evening in question when accused 1 arrived and reported an apparently missing child. He had told Sass that he had last seen the child with accused 2 earlier in the day. Sass had opened a missing person's file and arranged for accused 1 to show the police where he had last seen the child.

Warrant Officer James Robertson, attached to the CID at Somerset West, testified that he became aware of the search for the missing child on the evening in question. He was taken to the wooded area where accused 1 had pointed out to him where he had last seen the deceased. However, by this time it was already dark and the search had to be suspended.

Accused 1 had told him that he had last seen the child with accused 2 whom he had seen remove the deceased's pants and have intercourse with her. Accused 1 told him that he had then left and proceeded to Somerset West but upon his return made enquiries with the child's parents as to whether she had returned home.

The following morning Robertson picked up accused 2 from the police station where he had voluntarily presented himself and took him and accused 1 to the spot in question near the wooded area. There the accused began to argue with each other, accused 1 repeating his allegations involving accused 2 and accused 2 responding that accused 1 was lying and that he, accused 2, had last seen accused 1 walking with the child across the railway line. Since he disbelieved both accused, Robertson had arrested both of them.

Sometime later he had been told that accused 1 wish to point out the whereabouts of the deceased's body. Accused 1 was brought back and had taken him deeper into the wooded area, about half a kilometre from the spot which he initially pointed out, and there identified the position where the deceased's body was found well concealed under branches and leaves. It was nearby a rubbish dump and about one kilometre away from Sun City. Neither of the accused challenged the substance of

the evidence of these two police officers.

Warrant Officer Yolande Te Bearts testified that she had transported accused 1 to Somerset West Police Station after his arrest and had explained his rights to him on more than one occasion. She asked him to let her know whether the child was still alive and at some point he replied that the child was dead and that he would point out where the body was. He had duly done so, although not in her presence.

Dr Daphne Anthony, a forensic science pathologist, testified that she conducted a *post-mortem* examination on the deceased. Her main findings were that the cause of death was consistent with asphyxia due to ligature strangulation and the consequences thereof. The main findings were that there was external evidence of blunt trauma to the deceased's face, abdomen, extremities and right lumbar area and that a neck ligature, evidently a shoelace removed from the deceased's shoe, and ligature abrasions were present. A shoelace was found tied tightly around the neck and her conclusion was that severe force had been applied which had resulted in the bilateral fracture of the hyoid bone.

Examination of the genitalia of the deceased revealed evidence of forceful penetration of the vagina and anus. The autopsy performed concluded that there had been forceful

sexual penetration with laceration of the posterior vaginal wall, contusion of both lateral vaginal walls and also evidence of ante-mortal anal penetration. The deceased's hymen had been obliterated. The deceased was 1.2 metres in length and had weighed merely 23 kilograms. She had also had a swollen right jaw and a small amount of haemorrhage involving the right parietal area of her scalp.

Further medical evidence was that swabs and specimens had been taken from the deceased and also from accused 1 on the day that the body was found. The doctor who took such swabs from accused 1 noted that he had admitted to sexual intercourse with the deceased but he was not entirely certain whether accused 1 used the word rape, as was recorded in his notes. None of this evidence was disputed on behalf of the accused.

The forensic evidence was completed by that of Lieutenant Colonel Sharlene Otto of the SAPS Forensic Science Laboratory. She had received articles of clothing from the deceased and suspects as well as various swabs and samples, including vaginal and anal swabs taken from the deceased. She testified that upon testing and analysis she had found accused 1's DNA on the swabs taken from the deceased's peri-anal and rectal area. On both such swabs she had found a

mixture of the deceased's and accused 1's DNA, but no sign of an additional male DNA. Three vaginal swabs had been taken from the deceased. Traces of semen were found on the deceased's panties but no male DNA could be identified there. She testified that, in the light of this, the "presence" of another male, i.e. other than accused 1, could not be excluded.

In the witness' experience of rape cases a positive DNA result (presumably in the sense of proof of penetration and the identity of the penetrator) requires penetration plus internal ejaculation. Amongst the reasons for a negative DNA result, apart from non-ejaculation and non-penetration, are the use of a condom, sterilisation or a low sperm count. Evidence was received and admissions were made on behalf of the accused to the effect that the chain relating to the taking, packing, sealing, handling and transmission of the various samples and swabs had not been broken and nor had any contamination taken place.

In his evidence, accused 1 stated that quite early on the morning in question accused 2 had arrived to collect a debt of R40,00. He paid half of the money to accused 2 who then said he must come with him and led him around the corner to where the deceased was waiting. Accused 2 had taken them down the dirt road to the wooded area and, when they had gone

deep into this area, had insisted that accused 1 must rape the child. He had refused but accused 2 had issued various threats against him and then produced a knife and threatened to kill him if he did not rape the child. Accused 1 initially testified that he had simulated vaginal intercourse with the child. Thereafter, accused 2 had removed a shoelace from the deceased's shoe, saying that she would inform, "*sy gaan pimp*". When accused 1 realised what accused 2 was doing he tried to stop him by grabbing the lace but was frustrated on each occasion by accused 2 stabbing at him. Over his protestations, accused 2 had strangled the deceased using the shoelace. Accused 2 had then picked her up and gone deeper into the bush and put her in a shallow hole covering her with branches.

Accused 1 had wandered around for the rest of the day, confused and not knowing what to do. Eventually he had reported the deceased as missing to the police station but did not disclose the entire story instead telling them that he had last seen accused 2 having sexual intercourse with the child in the wooded area. He stated that at no stage had he seen Selwyn Louw, Hailie Perrin or Janiene Wiese and that they were lying when they said that they saw him walking with the deceased.

Accused 1 called the investigating officer, Warrant Officer Lourens, as a witness to establish that accused 2 had given differing versions of his knowledge of and involvement in the disappearance of the deceased and her death. Louw's evidence was that accused 2 had first maintained that he knew nothing of the matter and then that he had seen accused 1 with the child in the wooded area on one occasion. Thereafter he had maintained that he had seen accused 1 with the deceased on two occasions in that area. When he gave these accounts the clear implication was that accused 1 was involved in sexually molesting the deceased. In his bail application accused 2 had added a further twist, namely that after observing the child being sexually molested by accused 1, the latter had offered him R300,00 to keep silent about the matter.

In due course accused 2 testified and initially denied stating this until the transcript of that portion of the bail application was put to him. Ultimately his evidence on this point was that the sum involved was R400,00 and it had not been a bribe but the amount that accused 1 had told him he was prepared to spend on a TV set and which he wanted accused 2 to procure for him.

His general version of events was that he had made his way to the wooded area in question that morning whilst foraging for

scrap iron. There he had seen accused 1, whom he knew only in passing, together with a young girl whom he had not recognised. He asked accused 1 what he was doing with the child and his reply was that her mother was looking for her and that he was taking her home. When accused 1 walked off with the child accused 2 had stayed behind to move his bowels. Some 10 to 20 minutes later, upon resuming his search for scrap iron, he again saw accused 1 in this wooded area with the child, whose pants and panties were now pulled down, with accused 1 wiping between her legs or near her rear with an item of clothing.

Accused 2 had seen nothing untoward in this and had merely demanded that accused 1 repay him a debt of R40,00 which he had just remembered. Accused 1 agreed to do so and the three of them walked back to the village where he, accused 2, had waited at a tap together with the deceased while accused 1 went into his house to fetch money to repay him half the loan. Accused 2 then left accused 1 and the child and went to join the card game at Chris Theunissen's house. There he had told the fabricated story of chasing an apparent child molester in the wooded area and rescuing the child.

Accused 2 then described his movements on the rest of the day in detail. In accused 2's account the incident involving the

deceased took place between eight and nine in the morning. He had not slept at home that night and when he heard that the police were looking for him in connection with the missing child, he had handed himself over to the police the following morning. He testified that he had not seen the child alive after leaving her with accused 1 and had played no part in raping, assaulting or strangling her. He denied seeing Janiene Wiese on the day in question. Accused 2 called his common law wife, Ms Maria van Wyk, as a witness. However, her evidence took his case no further, since it concerned itself mainly with his whereabouts and actions after they came together at Chris Theunissen's house, where the card game took place. On her evidence there was a substantial period beforehand when accused 2 had gone off on his own.

Approach to the Evidence:

It is apparent that the state is not able to offer any direct evidence implicating accused 1 or 2 in the murder and rape of the deceased and its case against both accused rests, to a lesser or greater extent, on circumstantial evidence. Such evidence must, of course, be evaluated in accordance with the cardinal principles relating to inferential reasoning classically set out in R v Blom 1939 AD 188. The two most important principles are that any inference sought to be drawn must accord with all the proven facts and, furthermore, must be the

only reasonable inference which may be drawn from such facts. It goes almost without saying that in evaluating the guilt or innocence of the accused and determining whether the state has discharged the onus of proving the accused's guilty beyond a reasonable doubt, the court must look at the evidence as a whole and not merely the evidence for the state or on behalf of the accused in isolation.

Furthermore, the conclusion which is reached must account for all of the evidence. See S v Van der Meyden 1999 (1) SACR 447. Further, inasmuch as part of the evidence to be considered is that of the accused, which directly or indirectly may implicate a fellow accused in the commission of some or all of the crimes charged, it must be borne in mind that the court is dealing, potentially at least, with the evidence of an accomplice. It is trite that such evidence must be approached with great caution. See S v Hlapezula & Others 1965 (4) SA 439 (A).

Analysis of the Evidence:

I turn first to the evidence of the state witnesses and in particular that of the three witnesses Louw, Perrin and Wiese. I can find no reason to reject the evidence of Louw and Perrin to the effect that they saw accused 1 leading the deceased in the general direction of the wooded area on the day in question. Their testimony was not materially damaged in

cross-examination. Both of them made reasonable concessions and neither appeared to have any axe to grind as far as accused 1 was concerned. More importantly they were independent witnesses who essentially corroborated each other's evidence. No motive was suggested on behalf of accused 1 why these witnesses would fabricate evidence against him.

The evidence of Janiene Wiese was challenged by accused 2 on his behalf. The contents of a statement made to the police by Wiese were put to her. This revealed some discrepancies such as that in her statement, in contrast to her evidence, when she called 1's name he had not turned around. Another discrepancy was that in her statement she stated that accused 1 had approached her for a cigarette after he emerged from the wooded area, something she did not mention in her *viva voce* evidence.

She was not taxed on this last point, however. Notwithstanding these discrepancies, Wiese's account of the material elements of her evidence remained the same and she too was unshaken in cross-examination. She herself volunteered that there had been an acrimonious incident between her and accused 2 some weeks before, which tends to diminish the possibility that she had some ulterior motive of

falsely implicating accused 2 in the deceased's fate. Wiese impressed, moreover, as a forthright and honest witness. More importantly, her evidence is corroborated directly and indirectly by that of Perrin, Louw and the accused themselves.

Perrin corroborated Wiese's evidence in respect of that period when they were together on the day in question and observed accused 1 and the deceased together. Louw's evidence was also corroborative in that he independently saw accused 1 walking together with the deceased along the road in question. Both accused 1 and 2 confirmed in their testimony that they had been in the wooded area together with the deceased on the day in question. It is correct that there was quite a wide discrepancy between the time when Wiese said these sightings had taken place, somewhere between 13:00 and 14:00, and in particular accused 2's version that this had taken place earlier in the morning. I do not, however, place great store by these discrepancies since, in the case of virtually all the witnesses, their evidence regarding time was that these were no more than estimates in circumstances when the precise times were of no particular importance to them.

Taking all these factors into account I have no hesitation in accepting the evidence of Wiese as honest and reliable in relation to its main elements, namely that she saw accused 1

walking hand in hand with the deceased and later saw him and accused 2 emerging at slightly different intervals, but essentially together, from the wooded area where the deceased's body was eventually found. I have already set out, in some detail, the medical evidence which was placed before the court. The DNA evidence directly implicated accused 1 in the anal penetration of the deceased, a rape which he eventually admitted late in his evidence. The forensic evidence also established that the deceased was vaginally penetrated and that the presence of another male in the sexual assault upon the deceased could not be excluded. A further point of some significance in the medical evidence was Dr Anthony's opinion that, by reason of the injuries she sustained, the deceased would not have been able to walk away after these assaults. All this medical evidence was not challenged and can be accepted.

The state's case against both accused relied also on the evidence that both furnished false or misleading accounts of their dealings with the deceased and each other on the day in question. In accused 1's case it was uncontested that he had made a partial and false report to Sergeant Sass late in the day concerning the deceased's disappearance and it was only well into the following day before he disclosed to the police that the deceased was no longer alive and where her body

could be found. Similarly uncontested was the evidence that on the day in question accused 1 had concealed from the deceased's mother that her daughter had been raped and murdered.

Accused 1 denied that it was he who had enticed the deceased from where she was playing near her home in Sun City to the wooded area. All the evidence, however, points in this direction. He was seen by three witnesses walked hurriedly along the dirt road towards wooded area hand in hand with the deceased. The undisputed evidence was that not only was he friendly with the deceased's mother but that the deceased knew him well as a family friend and as someone who fetched her regularly from crèche and gave her dance lessons. On the other hand there was no evidence to suggest that accused 2 had any relationship with the deceased. The probabilities are thus overwhelming that it was accused 1 who enjoyed the deceased's trust and who led her, upon some pretext, to the wooded area where she met her fate.

Accused 1 offered no explanation as to why the deceased was taken out of her mother's control and led so far from the village into a densely wooded area. This leads to the inescapable conclusion that the deceased was abducted for the purposes of sexual molestation. Accused 1 admits that he

was present when the deceased was strangled to death and he ultimately admitted to anally raping the deceased. There is no reason to doubt either of these admissions by accused 1, since the second is corroborated by the forensic evidence and the first admission is made against accused 1's interest and is potentially damning.

This does not mean, however, that accused 1's version of what took place that day can be accepted, including the details of how the deceased came to be raped and murdered. It is clear that accused 1 lied about what took place that day from the very outset. Although he pointed out the whereabouts of the body the following day, he lied about his role in the child's sexual molestation throughout his evidence. Prior to the trial he appeared to admit that he had raped the child and in his plea explanation admitted a vaginal rape. When he testified, however, he claimed that he merely simulated intercourse. He denied anally raping the child even though the forensic evidence established this.

Finally, in answer to questions from the court he admitted to anally raping the deceased. He insisted to the end that it was not he who had abducted the child and that the deceased had been brought to him by accused 2. As noted earlier, all the evidence points in the opposite direction. In the

circumstances it is clear that accused 1's evidence must be treated with the utmost caution and, at best, should only be replied upon where it is self-incriminatory or where there is independent corroborating evidence.

Accused 1's defences to the charges of rape and murder were that he was compelled to anally rape the deceased under the threat of violence by accused 2 and that he played no part in the child's murder and in fact actively tried to stop it. As far as the act of anal rape is concerned, it must be firstly be borne in mine that accused 1's entire defence was presented on the basis that he simulated vaginal intercourse with the deceased. In other words his defence was based upon a lie. To uphold his defence would require that the circumstances in which accused 1 claimed to have been forced to rape the deceased must be transposed to a different act, namely that of anally raping the child. Apart from this difficulty, there is the inherent improbability of this aspect of his defence. The improbability, if not the absurdity of accused 1's version, is perhaps best illustrated by the written statement which he made to the police in which he said that he raped the deceased, *inter alia*, because accused 2 threatened him that if he did not do so, accused 1 would falsely accuse him of having done so.

On accused 1's version, accused 2 threatened and ultimately forced him to rape the child for no clear reason. Accused 1 maintained throughout that accused 2 had not had intercourse with the deceased in his presence and there is, therefore, no rational explanation why accused 2 would compel accused 1 to rape the child. It is so that accused 1 suggested, in passing, that accused 2 may have wanted to use him as a cover and that he saw flecks of blood on the deceased's panties. This appeared to be a suggestion that accused 2 had earlier, outside of accused 1's presence, sexually molested the deceased. This explanation is belied, however, by accused 1's evidence that the deceased never complained at any stage whilst being led from the village into the wooded area and showed no signs of having been sexually molested.

Furthermore, on accused 1's own version of events, he had any number of opportunities to run away rather than rape the deceased. He also had many opportunities to encourage the child herself to run away and to give her time to do so. Finally, accused 1's version of events is completely at variance of how he acted throughout the remainder of the day. Instead of reporting the horrific event to the deceased's mother and to the police at the earliest opportunity he assiduously laid a false trail. In these circumstances I have no hesitation in rejecting accused 1's defence and in finding that he anally

raped the deceased of his own free will.

As far as the charge of murder is concerned, on a conspectus of the evidence as a whole, it is not possible to state who strangled the deceased. Accused 1 states that it was accused 2 but his evidence cannot, for the reasons already stated, be relied on. Accused 2 denies that he was even present when the deceased was murdered. Accused 1 places himself on the scene of the murder and there is, therefore, no realistic possibility that it was committed outside of his presence.

Before proceeding any further the question of accused 2's presence at the scene of the murder must be considered. Accused 1 identified accused 2 as the sole perpetrator of the murder. Accused 2 denied any knowledge or part in the murder but did admit to being in the wooded area on the day in question early in the morning. His version of events goes further than this, however. He places himself in the wooded rea at the same time as accused 1 who was there together with a young girl who could only have been the deceased.

However, the most significant evidence in this regard is that of Janiene Wiese who testified that she saw accused 1 and 2 emerge from the wooded area a little distance apart not long after she had seen accused 1 walking in that direction with the

deceased. After emerging, accused 1 and 2 then walked off in the same direction. A critical element of her evidence was that there was no sign of the deceased when she observed both accused exiting from the wooded area.

Seen within the context of the evidence a whole the conclusion seems inescapable that by this stage the deceased had shortly before been raped and murdered. She would hardly have been led into the wooded area and then left there alone, for no apparent reason, with every opportunity to escape whilst accused 1 and 2 left the area. The evidence of accused 1 and 2 leaving the area without the deceased is also completely destructive of accused 2's version that the two of them, together with the deceased, left the area and proceeded to accused 1's house and that accused 2 remained with the deceased at a tap and left her safely there with accused 1 before going off to his card game.

Accused 2's version that he had accompanied accused 1 and the deceased out of the wooded area and saw her arriving safely at accused 1's house is also contradicted by all the available evidence and is sharply at odds with the probabilities. No other person testified of seeing accused 1 and 2 and the deceased together, let alone making their way back to Sun City. If accused 2's version was correct, it would

of necessity mean that accused 1 had then returned later to the wooded area with the deceased and then raped and murdered her. To have done so in such circumstances would have rendered it almost inevitable that accused 2 would have come forward to say that he had seen accused 1 and the deceased in suspicious circumstances in the selfsame wooded area early that day, thus rendering accused 1 the prime suspect. In my view this possibility can safely be discounted.

There is furthermore the incriminating evidence relating to the fabricated story accused 2 told to the card school. It is significant that the theme of accused 2's tale was that he had intervened in a case of sexual molestation of a young girl. The only reason he could give in evidence as to why he had fabricated this story was in order to portray himself as a hero. What is telling, however, when his evidence is contrasted with his fabricated story, is accused 2's inability to explain why he had elevated what he testified he had <u>not</u> regarded as suspicious conduct on the part of accused 1 into an incident of sexual molestation.

Accused 2 could give no further reason for this embellishment which, in my view, belies his evidence of an earlier innocent or non-suspicious encounter with accused 1 and the deceased. I consider that the only feasible explanation for this behaviour

is that at this early stage accused 2, knowing well that the deceased would be reported missing sooner or later and her body eventually discovered, and knowing that there were at least two persons who had either been with him or seen him in the wooded area that day, namely accused 1 and Janiene Wiese, was already trying to position himself as an innocent party in relation to the sexual molestation and strangling of the deceased.

Furthermore, accused 2's account of what took place in the wooded area is inherently improbable. On his own version he appears to have been concerned at finding accused 1 in this remote spot with a young girl who was clearly not his own child. He is then satisfied by accused 1 telling him that he is taking the child back to her mother but 20 minutes later when he sees accused 1 still with the child, now naked from the waist down, he does not regard this with any concern. Instead he only raises the question of accused 1 owing him R40,00.

What must also be taken into account in evaluating accused 2's evidence are the conflicting versions offered by him of what took place on the day in question. At first he testified he knew nothing about the matter. His version then changed to one indirectly implicating accused 1, whom he first said he saw once and, thereafter, twice in the wooded area. In the bail

application he embellished this version by stating that in the wooded area accused 1 had offered him R300,00 for his silence which version he initially denied in his evidence until confronted with the transcript. Accused 2 then tailored his evidence, resulting in his final version, namely that accused 1 had mentioned the sum of R400,00 but that this related to a television set which accused 1 wanted him to procure for him. This latter evidence was clearly a fabrication.

Accused 2 was a poor witness. Where his evidence was non-contentious or not relevant he would furnish an abundance of distracting detail. This detail was absent, however, when he dealt with the key parts of his involvement with accused 1 and the deceased. He was frequently evasive in his evidence resorting, when pressed, to claims that a drug habit had affected his memory. This alleged memory problem did not present itself when he recounted the non-contentious parts of his evidence. Nor did number 2 accused scruple to give false testimony or to tailor his evidence as was most strikingly illustrated in his evidence concerning what he stated in his bail application. In my view accused 2's version of events as to what took place in the wooded area must be rejected as false. Having regard to the evidence as a whole and particularly that of Janiene Wiese, the only reasonable inference which can be drawn is that he was present, together with accused 1, at the

spot in the wooded area where and when the deceased was raped and murdered.

Turning back to accused 1, in my view not only was his account of being forced to rape the deceased farfetched, so too was his evidence that at worst he was a passive spectator whilst the deceased was strangled and in fact that he had tried to stop the killing. Had this been so, it would have been a case of him resigning himself to being identified by the deceased as her abductor and rapist. Furthermore, accused 1's version of events offers no explanation for the vaginal rape of the deceased nor how she sustained the further injuries to her body such as the bruising.

Accused 1's own account of how he tried to prevent accused 2 strangling the child is utterly improbable. This involved accused 2 performing quite intricate acts such as removing the deceased's shoelace, fashioning it into some kind of a noose, placing it around her neck and drawing it tight, at one stage putting his foot on the deceased's chest whilst strangling her and standing on one leg, and all this at the same time as using a knife to keep accused 1 at bay. Taking all these factors into account, I find that accused 1's defence, such as it is, to the charge of murder must be rejected as being false beyond reasonable doubt.

Notwithstanding accused 1's evidence identifying accused 2 as having strangled the deceased, accused 2's involvement in the crimes must be independently determined on the basis of inferential reasoning from circumstantial evidence. I have already found that accused 2 was present at the spot in the wooded area where and when the deceased was raped and strangled.

Against the background of the facts that are common cause or which I have found to have been proved, the only reasonable inference is that the deceased was murdered to ensure her silence and this whilst both accused 1 and 2 were present. As noted earlier there is no irrefutable forensic evidence that accused 2 raped the deceased. It is clear, however, that she was vaginally raped and that the participation of some other male, other than accused 1, cannot be excluded.

Accused 2 is an older man than accused 1 and worldly wise. He certainly does not impress as someone who would have subordinated himself to accused 1. Having regard to the evidence as a whole, I consider it most improbable that an innocent accused 2 would have stood by whilst accused 1 raped and strangled a seven year old child. The only reasonable inference to be drawn from the proven facts is that

the two accused reached an agreement that the deceased had to be killed in order to ensure her silence. Similarly, it is hardly conceivable that accused 2 would have been party to the murder of the deceased unless he stood to gain therefrom. If accused 1 had been the sole sexual assailant, the strangling of the deceased would have served only to protect accused 1 and it is highly improbable that accused 2 would have made himself a party to killing the deceased merely to protect accused 1.

In my view the only possible reason why accused 2 made common cause with accused 1 in the murder of the deceased was because he himself had raped her and because this fact too would inevitably have emerged had she not been silenced. As I have stated, the only reasonable inference to be drawn from the proven facts, and that which is consistent with such facts, is that accused 1 and 2 reached an agreement, either before or after the deceased was raped, that she had to be killed in order to ensure her silence. In these circumstances it is immaterial whether accused 1 or 2 or both fashioned the noose, placed it around her neck and strangled the deceased. Both were co-perpetrators to the murder. In the result, I am satisfied that the state has proved beyond reasonable doubt that accused 2 is guilty on count 2, namely that of the vaginal penetration of the child without her consent and on count 4,

the murder of the deceased.

I turn to the remaining counts that accused 1 face, namely counts 1 and 2. I have already found that it was he who led the deceased from the precincts of her home to the wooded area. The crime of abduction consists of unlawfully taking a minor out of the control of his or her custodian with the intention, *inter alia*, of having sexual intercourse with that minor. The "taking" does not necessarily imply the use of force which seems to have been initially absent in the abduction of the deceased. Nor does it matter that at the time of being abducted the deceased was not in her mother's custody. It is unclear precisely when accused 1 formulated the intention to sexually molest the deceased, but again this is immaterial to his guilt on this count. I find that the state has proved beyond reasonable doubt that accused 1 abducted the deceased.

As far as the vaginal rape of the deceased is concerned, which I have found was committed by accused 2, the state seeks a conviction against accused 1 as well, relying on the doctrine of common purpose. The difficulty in this regard is, however, the lack of any evidence pointing to an act of association by accused 1 with accused 2's rape of the child. The authorities seem to suggest that a person who does not effect the

necessary penetration for an act of rape cannot be found guilty as a perpetrator unless he rendered assistance to the person who performs the act of rape. See S v Gaseb 2001 (1) SACR 438 (NmS) at 452h-I and 466g-i.

It seems then that, at best for the state, accused 1 could be convicted as an accomplice to accused 2's rape of the deceased. However, in the absence of evidence of a prior agreement that accused 1 would bring the deceased to be sexually molested by accused 2, there is no evidence of accused 1 unlawfully and intentionally engaging in conduct whereby he furthered the commission of the rape by accused 2, i.e. conduct whereby he facilitated, assisted or encouraged the rape of the deceased by accused 2 or gave advice concerning its commission, ordered its commission or made it possible. In the result I consider that accused 1 must be given the benefit of the doubt in respect of count number 2 and acquitted on this charge.

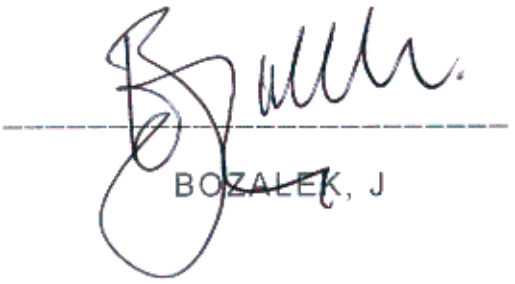
Turning to accused 2 as far as the abduction is concerned, his version is that he independently went to the wooded area on the day in question on a quest for scrap iron and there was thus no prior joint plan with accused 1 to bring the deceased to the area for the purposes of assaulting her. The possibility of this being the case can certainly not be excluded, particularly

in view of the fact that three witnesses saw accused 1 alone leading the child to the wooded area. This would mean that there was no evidence that accused 2 was a part to the initial abduction of the deceased. However, at some stage before the deceased was raped and murdered, accused 2 must have realised that accused 1 had abducted the child and from that point he was a party to her abduction. In the circumstances I consider that the state has proved accused 2's guilt on count 1.

As far as count 3, the anal rape, is concerned, once again there is a lack of any reliable evidence that accused 2 facilitated, encouraged or assisted number 1 in anally raping the deceased. He is, therefore, given the benefit of the doubt on this charge and is acquitted.

For these reasons, both **ACCUSED 1 AND 2 ARE FOUND GUILTY ON COUNTS 1 AND 4**, namely abducting and murdering Juanita Josephs. **ACCUSED 1 IS FOUND GUILTY ON COUNT 3**, that of unlawfully raping the deceased anally, **BUT IS ACQUITTED ON COUNT 2**, the other count of raping the deceased. **ACCUSED 2 IS FOUND GUILTY ON COUNT 2**, that of unlawfully raping the deceased vaginally, **BUT IS ACQUITTED ON COUNT 3**, the charge of raping the deceased anally.

I just want to make it clear for the record that the definitive version of this judgment is that which I have delivered in English. The Afrikaans version being merely my best attempt to translate into Afrikaans what I have said in English.



BOZALEK, J