

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case No: SS33/2009**

In the matter between:

**THE STATE**

**Appellant**

Versus

**ZAKAYO FRANCIS KIMEZE**

**First Respondent**

**BENJAMIN MARIA DIVAN POVLSEN**

**Second Respondent**

**STELLA JOSEPHINE BAGENDA SSENGENDO**

**Third Respondent**

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**JUDGMENT DELIVERED ON 25 FEBRUARY 2013**

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**Allie, J**

[1] The state charged all three accused with the murder of Preben Povlsen, the husband of accused 2 and with robbery with aggravating circumstances in that the deceased was allegedly robbed of his wristwatch, gold ring and Mazda motor vehicle.

[2] The accused are siblings who came to South Africa after leaving their place of birth, namely, Uganda.

[3] Accused 1 initially dismissed his first legal representative and later his second legal representative withdrew due to a conflict of interest. Thereafter accused 1 elected to conduct his own defence despite suggestions by the

court that since the offences for which he is charged can attract a sentence of life imprisonment, he should obtain legal representation.

[4] Accused 1 was sent for observation after his second legal representative made an application for his mental condition to be investigated. The court appointed a psychiatrist for the accused personally over and above those provided by the state.

[5] The panel of medical practitioners at Valkenburg Hospital and the private psychiatrist of accused 1 agreed that he was mentally fit to stand trial. They also agreed that he is not certifiable in terms of the Mental Health Care Act and he was able to appreciate the wrongfulness of the alleged offence and act accordingly.

[6] The accused pleaded not guilty and elected to make no plea explanation statement.

[7] Two trials within a trial were held to determine the admissibility of statements to the police made by accused 1 and 3 respectively. Accused 1's statement was declared to be admissible, while accused 3's statement was declared to be inadmissible.

[8] The state brought separate applications to have the further evidence of Joan Kjaergard, the Danish daughter of the deceased, Randy Jo and Per

Jonathan, the children of the deceased and accused 2, heard by electronic media in terms of Section 158 of the Criminal Procedure Act. The applications were refused because the state failed to indicate what form the electronic media would take and how long the trial would be delayed for that media to be set up.

[9] Joan Kjaergard had already begun testifying but went back to Denmark before completing her testimony and as a consequence of the court's refusal to allow her to complete her evidence by electronic medium, her initial testimony became inadmissible by virtue of the fact that it was not subjected to cross examination.

[10] The state made an application in terms of section 170A of the Criminal Procedure Act to have Finn Ssengendo, the 12 year old son, of accused 3 testify through an intermediary and that application was granted.

[11] The state brought an application in terms of section 3(1)(c), of the Law of Evidence Amendment Act to admit the hearsay evidence of what the deceased would have told his daughter, Joan Kjaergard some time before his murder and to admit the evidence of what Per Jonathan (PJ) would have told, a witness, Alan Gillow. Both those applications were refused.

[12] The admission of the hearsay evidence of Joan was refused because the state failed to provide the court with the content of the hearsay evidence.

The hearsay evidence of PJ was refused because he was in the company of various adult family members and could have been influenced by what they told him at his young age when his father was killed. The reliability of his evidence was not proved.

[13] The following evidence was adduced at the trial:

**ANITA ANGELIQUE BOTHA:**

[14] The witness lived in Gordon's Bay during 2008. She and her husband were involved in a networking company, called Amway. They visited the deceased at his Gordon's Bay home so that they could meet his wife on Friday 11 January 2008. She had recently returned from overseas and was working late on that day. Accused 2 eventually arrived. It was agreed that the deceased and accused 2 would accompany the witness and her husband to a network meeting at Canal Walk on Monday 14 January 2008 at 20h00. It was arranged that the witness would call to confirm on the 14<sup>th</sup> whether she should pick up the deceased and accused 2 by 18h30 – 18h45.

[15] By lunchtime on 14 January 2008, the witness made several attempts to contact the deceased or accused 2. The witness eventually succeeded in speaking to accused 3 on the landline shortly after lunch. Accused 3 said that neither the deceased nor accused 2 were at home. Thirty minutes later

accused 2 returned the call. Accused 2 assured the witness that they would find their way to Canal Walk and meet the witness and her husband there.

[16] By 20h05 the deceased and accused 2 had not arrived at the venue and the witness and her husband went into the meeting which ended at approximately 22h00. The next morning, Tuesday 15 January, the witness received a telephone call from accused 2. She wanted to know whether the deceased attended the meeting the previous evening. Accused 2 told the witness that the deceased left his home the previous day in the morning to play golf and had not yet returned. Accused 2 said that the deceased did not usually stay away from home and that she was worried.

[17] During the course of the day, the witness obtained a special police telephone number which she gave to accused 2.

[18] On Tuesday evening the witness and her husband called at the deceased's home but did not find anybody at home. On Wednesday the witness called the deceased's home a few times and spoke to accused 2.

**MOMIENA BASTRA:**

[19] The witness testified that she lives in the Strand area and operates a shop as a trader of curry and spice and other consumables which included a multipurpose gel. She used to market the product to customers and explained

that it removed any stains, including blood stains. The witness also confirmed that accused 3 would buy the gel every two or three months.

[20] She confirmed knowing accused 3, as Stella and that their friendship extended over a year as accused 3 worked in a shop next to her shop. On 14 January 2008 at approximately 08h45, accused 3 entered her shop in search of the multipurpose gel. She remembered the date because it was two weeks after New Year and it was a Monday. Accused 3 looked upset when she could not find the gel on the shelves. When the attorney for accused 3 enquired about the time and date given to the police in the statement, the witness stated that she had consulted a calendar to determine the date. She went on to state that the error of 18 January which was amended to 14 as the day of the said visit, was just a police error as she had stated that the visit by accused 3 had been on the 14 January at 08h45.

[21] The witness calmed accused 3 and eventually took her to Mr Dalvie's shop which was two shops away from her shop where the gel was then being sold. She walked with accused 3 to the shop and left her at the entrance. It was put to the witness by the attorney for accused 3 that she would deny that the witness put her arm around accused 3 on the way to Mr Dalvie's shop. The witness replied that she had to calm accused 3 as she appeared upset when she could not find the gel in the shop and she reassured her that it was available at Mr Dalvie's shop since she had stopped keeping it in her shop.

When she was asked to describe the appearance of accused 3 on the said day, the witness was firm in her recollection that accused 3 was very upset when she could not see the gel on the shelves.

[22] The shop sold the gel in 500 millilitres and 1 litre packaging and accused 3 usually purchased the latter as she bought the gel every two or three months. It was put to the witness that accused 3 was suffering from a serious asthma condition which affected her on 14 January 2008. She denied that accused 3 appeared ill and said the strong smell of the multipurpose gel would have adversely affected her condition, yet she bought the product at regular intervals. She believed that accused 3 was not gasping for air but had an upset look on her face when she could not find the product on the shelves. Accused 3's facial expression was nervous. That was the last time the witness had contact with accused 3.

**VERONICA TITUS:**

[23] The witness confirmed that she lives in Gordon's Bay and was the owner of a dressmaker shop and she had a partner by the name of Chereen Steward. Accused 3 was known to her as Stella and on the 14 January 2008 at approximately 08h45, accused 3 visited the shop which opens at 08h30 am and was two shops away from that of Mrs Bastra. During cross examination by counsel for accused 3 about how she remembered the date, the witness

explained that the business closed for Christmas holidays on 23 December 2007 and reopened on Monday 14 January 2008.

[24] Accused 3 appeared at the gate and she asked whether she should open the gate and/or call Chereen who was at the back and accused 3 gestured with hand movements in the negative.

[25] While standing at the gate of the shop, she observed a burnt orange Jeep 4x4 motor vehicle which was driven by a younger lady. Accused 3 climbed in and it drove off.

[26] She found accused 3 to be very nervous on 14 January 2008. She knew her as soft spoken and friendly. She saw the pictures of all three accused in the District Mail newspaper which circulated in the area after the incident.

**CHEREEN STEWARD:**

[27] The witness testified that she was a partner in a dressmaking shop with Veronica Titus in Strand. Before that she had been working with accused 3 doing alterations. She confirmed that she and accused 3 became friends who visited each other. Accused 3 later started working from home but they remained in contact with each other.



[28] The witness confirmed that the shop re-opened on 14 January 2008 which was a Monday, after the Christmas holidays. She was busy at the back of the shop and Veronica mentioned that accused 3 was at the shop. She decided to call accused 3 but there was no reply on her cell phone in the morning and when she tried her number later, it was answered by accused 2 who said that accused 3 was sleeping as she went to the doctor because she was not feeling well. Accused 2 informed the witness that it was not possible to visit accused 3 at that time but she could do so later during the day.

[29] She knew accused 2 as Maria, the sister of accused 3. She decided to pay accused 3 a visit after work on 14 January 2008. She went to the Gordon's Bay house with her daughter who was a friend of accused 3's son. Accused 3 and her son, opened the door and the children went to play together. The witness sat with accused 2 and accused 3 and chatted in the kitchen. There were friends with them. It was put to the witness by the attorney for accused 3 that she had been there in the house that day but there had been no adult guests visiting her. The witness was quite adamant in stating that there had been visitors sitting with accused 2 and 3 when she visited that day.

[30] The witness said that accused 2 had been talking to the guests, who were there with their children who attended school with accused 3's child. It was put to the witness by the attorney for accused 2 that she denies being at

home on that day as she worked late that afternoon until the evening at the bookshop. She replied that accused 2 had been there during her visit. She wanted to enquire about the wellbeing of accused 3 and what the doctor had diagnosed, but was interrupted by accused 2 who talked to her and stood close to her at the time. The witness was unable to find an opportunity to talk to accused 3 alone and the visit lasted less than 30 minutes.

[31] The witness said that at the time she was in the house during the visit to accused 3, she noticed nothing strange except when she left using the lobby. Then she saw that the main bedroom door was closed. The witness confirmed that the main bedroom door was always open as the bathroom was used by visitors but on the day of her visit, she noticed that the door was closed.

[32] The witness said that accused 3 had not been her true self as she knew her to be soft hearted, very friendly and kind to other people but on that day she looked sick. She elaborated that they always hugged each other when greeting and the children would do likewise but on that day the greeting had been not like that.

[33] The witness first said that she gave the police a statement in January 2008. Later she stated that in January 2008 she was interrogated by the police but her signature was provided later. She signed a statement for the

police on 28 October 2011. The witness admitted that she made a mistake when she said that she made a statement in January 2008.

**NASSER ALI DALVIE:**

[34] The witness confirmed that he had an auto-electrical business and knew Ms Bastra as a fellow trader. He sold a multi-purpose gel which he obtained from Ms Bastra in 500ml and 1 litres. In 2008 on a date he could not remember, he sold the product and remembers Ms Bastra brought a lady to the shop who bought 1 litre of the multi-purpose gel. He could not say who the lady was.

[35] The State presented evidence regarding the alleged replacement of the existing carpet in the main bedroom with a new underfelt and carpet. Three witnesses were called in this regard.

**REINHARDT ANTHONY ISAACS:**

[36] The witness was the office manager at Mats Carpets, Fagan Street, Strand. On Monday 14 January 2008 at 17h00, the witness arrived at the shop and found the three accused waiting in a car in the parking area. The three accused followed him into the shop. In cross examination it was put on behalf of accused 3 that she and accused 1 walked to the shop after having

been dropped off elsewhere and later left the shop on foot. This was denied by the witness. It was put to the witness by Counsel for accused 1 that accused 1 and accused 3 were at the shop between 9h00 and 10h30 on Monday 14 January 2008. The two accused returned to the shop at approximately 11h00 when the transaction to install the carpet was concluded. It was put that the transaction did not take place at 17h00 on 14 January 2008. The witness replied that he was very sure that all three accused were present in the shop and that he attended to them at 17h00 on the 14 January 2008. He acknowledged that he had been aware that the accused were at the shop earlier that day in his absence.

[37] The witness pointed accused 2 out in court as the person who approached him and said that she wanted a carpet installed. It was put in cross examination on behalf of accused 2 that she was not present and that in his statement made to the police on 30 January 2008 the witness mentioned the presence of a "black woman and male" in the shop. The witness responded by saying that there were definitely three persons in the shop but that he had no interaction with accused 3.

[38] The witness testified that accused 2 wanted a second hand carpet installed and when that was not available she requested the price for a new carpet. When discussion turned to particulars of the carpet required, accused 2 indicated any cheap carpet would do. She eventually chose a cottage

weave, colour Bella Vista described as a short loop brown carpet. The estimated cost of a 4 x 4 metres carpet, including labour, vat and materials were R2 550. Accused 2 paid the required 50% deposit of R1 300. A copy of the receipt issued by the witness was received into evidence as "Exhibit E1". At the end of the day the office secretary issued a receipt for the books after she received the balance. A copy of the receipt was handed up as "Exhibit E3".

[39] After some initial disagreement with accused 1 over, the inability of the company to fit the carpet before close of business that day, it was agreed between the witness and accused 2 that the carpet would be fitted early the next day, Tuesday 15 January. Accused 2 requested that the carpet be fitted early the next day as they had to pick somebody up at the airport at 10h00. In cross examination on behalf of accused 3 it was denied that any mention was made of fetching people at the airport.

[40] According to the witness he requested a name in order to issue a receipt and was told by accused 2 that a receipt was not required. When the witness insisted on issuing a receipt, the name "Francis" was provided. It was put in cross examination by the attorney for accused 3 that the witness could not pronounce the surname of accused 1 and therefore made the receipt out to Mr Francis. This was denied by the witness.

[41] Accused 2 then indicated that they would fetch the workmen the next morning. The witness however explained that they make use of their own transport to convey workmen and materials and he requested an address where the carpet had to be installed. Accused 2 gave the address as Chapman Avenue. When pressed for the number, a discussion took place between accused 2 and 3. Accused 2 gave the number of the property as 47 Chapman Avenue. Accused 2 and accused 3 however appeared unsure whether that was indeed the correct number. Accused 2 said that they would stop by the next morning to direct the workmen to the address. Entries made in business records by the witness on Monday 14 January 2008 showed the street number as 47 which was altered to 46 Chapman Avenue. According to the witness these entries were corrected on the 15 January when he learnt from the workers returning on completion of the job that the address was 46 Chapman Avenue. "Exhibit E4" was received in evidence in support of the evidence of the witness in this regard. "Exhibit E4" is a record of, *inter alia*, the company's work for Tuesday 15 January 2008.

[42] The next morning the witness noticed two persons waiting in a car one of whom was a male person. It was put to the witness in cross-examination by Counsel for accused 1 that accused 1 was not in the vehicle on the morning of the 15 January 2008. This was not disputed by the witness who indicated that he was unable to say who the male person was.

[43] According to the witness he did not see the three accused again in person but saw photographs of them published in the District Mail within three days of his dealing with them in the store.

**BHEJILE TOKWE:**

[44] The witness confirmed that he was part of the crew who installed a carpet at 46 Chapman Avenue, Gordon's Bay on Tuesday, 15 January 2008. The crew left the company's premises at approximately 9h00 and when they arrived at 46 Chapman Avenue they were admitted to the house by accused 2 who was also pointed out by the witness in court. The witness further stated that accused 2 was a stranger to him and that that was the first time he had seen her. In cross-examination the witness said that subsequently he had seen photographs of all three accused published in the "Son" newspaper in connection with the death of the deceased soon after the event. It was also pointed out to the witness by the attorney for accused 2 that the witness made a statement to the police claiming that Stella Ssengendo, accused 3, was the person who received them at the house and who was present when the carpet was installed. The witness however maintained that he did not provide a person's name when making the statement. It was put to the witness that it was indeed accused 3 who opened the door and that accused 2 denies being the person who opened the door and speaking to them that day. The witness insisted that it was accused 2.

[45] According to the witness, accused 2 then took them to the room where the carpet had to be fitted. The room is depicted in photograph 146, "Exhibit B". According to the witness the room appeared to have been renovated. When he first observed the room it had no underfelt, carpet or skirting. There was also no furniture in the room. The walls of the room smelled of fresh paint. It was put to the witness in cross-examination by both counsel for accused 1 and the attorney for accused 2 and 3 that the room where the carpet was fitted on Tuesday, was not freshly painted and that other rooms in the house had been painted the previous week. It was suggested that this could account for the paint smell. The witness however insisted that the smell came from the paint in that particular room.

[46] The witness testified that except for a small area at the entrance door, "grippers" were found to be present in the room. The witness explained that "grippers" were either wooden or metal strips attached to the floor around the perimeter of a room. The grippers contain small hooks to grip the carpet and allow the carpet to be stretched tight when fitted. The witness pointed out strips of red coloured wood on photograph 163 fitted by him at the door.

[47] With reference to photograph 159, the witness confirmed that the carpet depicted was fitted by them. The colour of the carpet was known as Bella Vista. Photograph 160 depicts the rear side of the carpet where the date 12 December 2007 indicates the date of manufacture of the carpet.



[48] He said that he was told by accused 2 that the previous carpet had been water damaged. It was put to the witness by the attorney for accused 2 and 3 that the carpet was removed the previous week by accused 1 and the deceased.

**DENVER MILLER:**

[49] The witness was employed by Mats Carpets in 2008 and is still employed there. On 14 January 2008 he commenced work at 8h00 and was in the workshop of Mats Carpets when an orange 4X4 vehicle stopped in front of one of the three entrances to the shop. Two black persons, one male person and one female, entered the workshop and enquired where they could buy a carpet. The witness directed them to the showroom and did not deal with them again that day. The witness pointed out accused 1 and 2 as the persons he encountered. On the 15 January accused 2 again arrived in the orange 4X4 vehicle and directed the work crew to the address where they had to fit a carpet. The work crew used their own transport. He pointed out accused 3 in court as the person who opened the door and showed them the room where the carpet had to be fitted.

[50] According to the witness the room was empty and there was no carpet in the room. He could also still smell fresh paint in the room. The floor was damp in the centre and pieces of underfelt still stuck to the cement. The damp

pieces of underfelt had to be scraped off. New underfelt and carpeting were fitted. New threshold metal strips were also fitted to the room and bathroom. The new carpet was fitted around the cupboard. The old carpet on the floor inside the cupboard was not removed.

[51] In cross-examination it was put to the witness that accused 2 was not at the shop on Monday 14 January and that she did arrive at the shop on Tuesday at approximately 8h00 only to be told by an elderly gentleman that the work crew had already left. The witness denied both statements and stood by his evidence that accused 2 was at the shop on Monday and that they followed her to the address where the carpet had to be installed on Tuesday morning.

[52] It was put to the witness on behalf of accused 3 that she and accused 1 came to the carpet shop on Monday 14 January. The witness was however adamant that accused 2 and 1 entered the shop through the workshop on Monday 14 January to buy a carpet. It was also put to the witness that the room where the carpet was fitted had not been freshly painted but that "painting was going on" in other rooms in the house. The response by the witness was that he could see that the room had been freshly painted and he could smell the paint.

**GAVIN MZAMO:**

[53] The witness is currently employed at City of Cape Town in the Sport and Recreation department. During January 2008 he was employed at Strand Golf Club as an assistant in the Pro Shop. His duties included booking golf rounds for members. He knew the deceased as a member of the golf club who normally played on Mondays with the senior members. On 14 January 2008 the deceased was not at the golf club. He received a call on 14 January 2008 at 11am from a lady who identified herself as his wife. She enquired whether the deceased played his round of golf as he had not come home. He was not challenged by accused 2's counsel on this. He last met the deceased the previous Friday, on 11 January 2008.

**SERGEANT CHARLES:**

[54] The witness confirmed that she was stationed at Strand SAPS. She said that on 15 January 2008 she was on duty in the charge office.

[55] The witness pointed out accused 2 as the lady who had reported her husband as a missing person.

[56] The witness testified that accused 2 said that the last time her husband was seen was when he left his house in Gordon's Bay. Accused 2 said that

the person had been missing since 14 January 2008 and his age was 71 or 72. Accused 2 also described the clothing he wore as a khaki shorts, collared T-shirt and Nike sneakers. Accused 2 had last seen him at 07h15am on 14 January 2008 when he left to play golf. Accused 2 said he wore his ring and watch.

**INSPECTOR GELDENHUYS:**

[57] The witness said that in 2008 he was a warrant officer in the detective branch at SAPS, Gordon's Bay with more than fifteen years' experience. He confirmed that on 16 January 2008 he was on duty from 07h00 at the detective offices in Gordon's Bay.

[58] He received the SAP 55A form of a missing person "Exhibit H", in the morning.

[59] He arranged to meet the lady who had reported the case at her residence. On the morning of 16 January 2008, he met the lady who was with two minor children at 46 Chapman Avenue, Gordon's Bay. The witness pointed out accused 2 as the lady who had identified herself as Maria. Under cross examination by counsel for accused 2 it was put to the witness that on 16 January accused 2 met him to confirm the content of "Exhibit H" and she

had stopped the bank cards. He could not remember being told by accused 2 that she had stopped the bank cards.

[60] He and accused 2 sat in the kitchen where she explained to him that her husband had gone missing on 14 January. Accused 2 opened a case of a missing person on 15 January 2008. She further explained where he had gone and what he had been wearing on that day.

[61] The witness told accused 2 that the police would visit the golf club and she provided three photos of the missing person. On 17 January 2008 the witness compiled a missing person's pamphlet shown in "Exhibit J".

[62] On 18 January the witness, accompanied by Warrant Officer Greeff met accused 2 and 3 together with the overseas family of the deceased at the family home in Gordon's Bay.

[63] A member of the Danish family raised a question posed about the keys belonging to the deceased and accused 3 replied that they were at the house. It was at that stage that the detectives decided to separate accused 2 and 3 from the other members of the family in the house. The Danish family members suggested that a meeting be held at the police offices in Gordon's Bay. The Danish family had a suspicion that something was wrong.

[64] He contacted Colonel Kock and also handed the case over to Warrant Officer Greeff. He met Colonel Kock from the Biology Department of the Forensic Science Laboratory together with a Sergeant from the fingerprint department at Chapman Avenue. He did not meet accused 1 during his visits to the house at Chapman Avenue.

**LUNGA MKUMATELA:**

[65] In January 2008 he was employed at a car wash situated at NY 112 in Gugulethu. On a Saturday morning, after 10h00, a blue Mazda driven by a male who resembled accused 1, arrived for a car wash. The driver of the blue Mazda enquired from an employee whether the place was indeed a car wash.

[66] According to the witness, the blue Mazda was followed by a maroon BMW. The driver of the Mazda parked it at the car wash and thereafter climbed into the passenger seat of the BMW and drove off.

[67] After it became dark, the car was abandoned by a car wash employee since the driver did not return to fetch it. It was abandoned two streets from the car wash at a neglected house next to a church.

[68] According to the witness the normal procedure in a car wash was that the driver or owner leaves the keys of the car with the washer. The Mazda had no keys and the driver did not pay for the wash and vacuum.

**CONSTABLE VUYANI PITOLI:**

[69] He was stationed in Gugulethu SAPS. At approximately 08h00 on 20 January 2008 there was a report of an abandoned Mazda motor vehicle which had been found at NY 111 No. 124.

**FORENSIC EVIDENCE:**

[70] Evidence led by the State established that a comprehensive forensic investigation of the deceased's residence at Chapman Avenue, Gordon's Bay was conducted from 18 January 2008 to 23 January 2008. The forensic investigation was not limited to the house but also extended to the deceased's blue Mazda vehicle recovered after it was abandoned in Gugulethu and a white Toyota Corolla vehicle that was temporarily parked in the garage at the time of the deceased's disappearance from his home.

[71] A number of police officials called by the State to testify were involved in the initial investigation that included the identification of potential evidence and

collection of specimens. Observations and findings at the scene were recorded and photographed.

**THEUNIS GERHARDUS BREDENHAN:**

[72] The witness is a police officer stationed at the dog unit, Paarl. He received special training in the handling of dogs trained to detect biological body fluids and more particular minute amounts of blood.

[73] The witness testified about several occasions between 18 January and 23 January 2008 when he had been called out to conduct searches in the course of the investigation in this matter, for the presence of body fluids as referred to above, involving the use of his official dog. On those occasions, an officer of the forensic unit would then also be present on the scene in order to document the outcome of the search by the dog and if necessary to carry out the necessary forensic investigation and collection of specimens.

[74] On 18 January 2008 between 11h00 and 12h00 the witness conducted a search of the dwelling. The dog reacted positively to an area of the cement garage floor near the door that gave access to the kitchen.

[75] On 19 January 2008, the witness was called out to Emerald Flats, Greenways, Gordon's Bay to conduct a search of the external area of a white



Toyota Corolla motor vehicle, parked in the covered parking area. The dog reacted positively to the left hand corner of the black plastic front bumper.

[76] On 20 January 2008 at 11h15 the witness was called out to Gugulethu NY 111 No 124 to conduct a search of a light blue Mazda vehicle. The dog, amongst others, pointed out two places in the boot namely on the rubber lining of the lid of the boot and secondly a place close to the lock of the boot.

**PETRO CRONJE:**

[77] The witness said that in 2008 she was employed in the SAPS and stationed at the Local Criminal Record Centre, Somerset West where she was an official photographer and forensic examiner.

[78] According to the witness she was requested on a number of occasions in her capacity as official photographer to attend various locations from 18 January to 23 January 2008 in the course of the investigation pertaining to the instant matter and in this regard undertook amongst other, crime scene photography at the residence of the deceased in Chapman Avenue, at Blouberg Strand where the body of the deceased was discovered; and at Gugulethu where a blue Mazda motor vehicle was discovered.

[79] She confirmed that she compiled "Exhibit B", containing photographs taken by her with an affidavit setting out instructions received by her in the performance of her duties. She also read into the record and elaborated on the key to the photographs and sketch plan compiled by her and contained in "Exhibit B".

[80] She further stated that she was requested by Detective Inspector Geldenhuys to photograph an alleged suspect, accused 1, at Gordon's Bay, CID on 19 January 2008 at 12h35.

[81] The witness was also requested by Detective Inspector Greeff to collect a specimen, namely a curtain, at 46 Chapman Avenue, Gordon's Bay, for forensic examination and dispatch.

[82] According to the witness she also received a specimen (cream coloured piece of cloth) in a sealed evidence bag from Dr Brouwer at Salt River Mortuary for forensic examination. The witness confirmed that she dispatched the above evidence bags to the Forensic Laboratory, Pretoria.

**DANIE VAN DER WESTHUIZEN:**

[83] The witness is employed by the SAPS and stationed at the Local Criminal Record Centre, Somerset West as a crime scene investigator. The

witness is a fingerprint expert with special training in the enhancement and development of footprints in particular prints made in blood.

[84] The witness assisted in the forensic investigation on 18 January 2008 by searching the crime scene at 46 Chapman Avenue for the presence of blood. The witness applied the chemical, Amidu Black, to surfaces in the house. According to the witness Amidu Black reacts with the protein found in blood. Applying the above technique, indications of possible blood were found in the garage, on the stairs leading from the kitchen to the garage and in the flatlet. In the middle of the garage floor a void pattern was created after application of the chemical. According to the witness the pattern represents an area where the chemical did not react. An explanation for the void could be that a car was parked in that position at the relevant time when blood was deposited in the garage. In the flatlet a large area reacted with the chemical indicating the presence of possible blood.

[85] According to the witness specific marks also developed on the stairs to the garage and on the floor in the flatlet. The mark on the stairs was a footprint and the mark in the flatlet was that of a toe. Both marks were documented by the photographer. The first mentioned mark is depicted in photographs 52 (location of mark) and photograph 54 (appearance of mark). The last mentioned is depicted in photograph 55 (location) and 56

(appearance). The toe mark did not provide sufficient ridge characteristics for identification.

**JOHANNES MARTHINUS KOCK:**

[86] The witness is employed by the SAPS and stationed at the biology unit of the Forensic Laboratory as Chief Forensic Analyst. The duties of the witness involve that of crime scene manager and analyst and more specifically, attending crime scenes to obtain biological evidence. The witness also received special training in the field of blood stain patterns. In this regard the witness mentioned that a blood stain pattern could be either a smear mark or impact splatter. A smear mark is created when a bloody object comes into contact with a surface. Impact splatter is the result of force applied on a blood source. Small droplets will reach the target.

[87] The witness attended the scene at 46 Chapman Avenue, Gordon's Bay on a number of occasions from 18 January 2008 to 23 January 2008. The crime scene was examined particularly for the presence of blood and blood stain patterns. The witness elaborated on the technique employed in discovering the presence of possible blood. Application of the chemical, Luminol, to a surface where blood was present would produce a blue luminescent reaction as the chemical reacts with the iron present in blood.

[88] Possible blood was identified in particular areas of the house namely on the stairway leading from the kitchen to the garage and adjacent laundry, the flatlet and in the bedroom used by the deceased. Possible blood was also observed on the blind (marked AE on "Exhibit Q") of the door leading from the kitchen to the patio and flatlet. Possible blood was also discovered in the boot of the deceased's blue Mazda car and on the front bumper of a Toyota Corolla that was parked in the garage and removed after the deceased's death.

**Stairs:**

[89] The witness collected specimens of possible blood on the right hand side of the wall of the stairs leading to the garage at locations marked AA, AB and AC on "Exhibit Q". In the opinion of the witness these possible blood stains were smear marks. Two samples were also collected of possible blood on the stairs (Photographs 3 and 7 and photographs 15 and 16 of Exhibit Q) marked AG. According to the evidence of DNA Analyst Ridwaan Boltman the above specimens were tested for the presence of DNA and no results were obtained.

[90] Application of Luminol to the floor of the laundry produced a reaction indicative of the presence of possible blood.

**Deceased's Bedroom:**

[91] In the bedroom, possible blood was discovered which is indicated and marked "AK, AL, AM, AN and AO" on "Exhibit Q".

[92] "AK" marks possible blood on the bottom panel of the built in cupboard. The witness referred to enlarged photographs contained in "Exhibit Q" taken of the above stain patterns for purposes of analysis. "AK" in the opinion of the witness represents impact splatter. According to the evidence of DNA analyst Mr Boltman, this sample matched the reference sample of Francis Kimeze.

[93] "AM" marks possible blood observed on the bottom edge of the door of the right hand side built in cupboard. According to the evidence of DNA analyst Mr Boltman, the DNA result of this sample matched the reference sample of Francis Kimeze.

[94] "AL" marks possible blood discovered on bedroom wall to the left of the door. According to the evidence of Mr Boltman, not enough DNA results were obtained from this sample to provide a DNA profile for comparison.

[95] "AN" marks possible blood discovered on the metal threshold strip. According to evidence of DNA, analyst, no DNA results were obtained from this sample.

[96] "AO" marks possible blood discovered on the bottom of the bathroom door on the outside. According to the evidence of DNA analyst, Mr Boltman, the DNA result indicated the DNA profile of an unknown male.

[97] In the opinion of the witness all the above blood stain patterns with the exception of "AK" represent smear marks.

[98] On the floor of the en-suite bathroom, Luminol was applied and the reaction indicated the presence of possible blood.

**Flatlet:**

[99] In the flatlet possible blood was discovered which was marked "AF" and "AH" on "Exhibit Q".

[100] "AF" marks a spot on the floor on the left hand side of the bed. "AH" marks a spot on the floor at the door between the couch and beds. After application of Luminol to the floor, the witness observed wipe marks as well as a shoe and footprints made in diluted possible blood at locations marked "AF" and "AH".

[101] Specimens of possible blood were collected at “AF” and “AH” and submitted for analysis. According to the evidence of the DNA analyst, the DNA result obtained from specimen “AH” matches the control specimen of Francis Kimeze specimen, “AF”, when tested for DNA produced no results.

[102] The State further presented evidence regarding the analyses of specimens submitted to the forensic laboratory and interpretation of those results.

**CORNELIA ELIZABETH BERGH:**

[103] The witness is employed by the SAPS and stationed at the Forensic Science Laboratory at Silverton as Chief Forensic Analyst. The specific duties of the witness are in the field of fibre identification and comparison.

[104] According to the witness she received a sealed evidence bag on 12 May 2009 from the Material Analysis Component at the laboratory. The bag contained two sealed bags. The first bag contained a piece of cream coloured fabric and the second bag contained one large piece of cream coloured fabric.



[105] She was requested to determine whether the fibres from the two exhibits were comparable. She examined the exhibits and concluded that the fibres of the two separate exhibits were comparable.

[106] Features identified in the two pieces of fabric, such as fibre thickness, composition (cotton and polyester) and colour amongst other are not unique to these two pieces of fabric. They represent mass produced products and although comparable or similar there would be other products from the same source and comparable to the exhibits in question.

**BRIAN ADONIS:**

[107] The witness is employed by the SAPS and stationed at the Local Criminal Record Centre. The witness is a finger, palm and footprint expert. According to the witness he was requested on 15 July 2012 to establish whether a left footprint contained in the docket of this case is that of accused 1. The witness prepared a chart for court purposes. The chart contains two images for comparison. Image 1 is an enlargement of an area of photo "P1" which is an enlargement of Photo 54, "Exhibit B". Image 2 is a left footprint taken by the witness of accused 1 at court on 2 August 2012 at 11.25. He marked out seven points of similarity between the two images after comparison of the two images. There were also no unexplained differences

found between the images. The witness concluded that the footprint found on the scene in 2008 was that of accused 1 in court.

**RIDWAAN BOLTMAN:**

[108] The witness is employed by the SAPS and is attached to the Biology Section of the Forensic Science Laboratory as a Forensic Analyst and a Reporting Officer. Apart from the evidence by the witness referred to above regarding certain DNA results, the witness also gave evidence confirming the presence of human blood on the crime scene at 46 Chapman Avenue, as well as the Mazda Vehicle and Toyota Corolla vehicle. Specimens which produced DNA results, whether complete profiles or partial results (due to there not being enough DNA results) confirm the presence of human blood as opposed to a mere presumption of the presence of human blood. He said that blood could be diluted when washed down with water.

**DR LINDA LIEBENBERG:**

[110] She did 13 000 autopsies since 1989. She obtained an MBChB and a MMed Path (Forensics) as well as a diploma in forensic medicine. She was on duty and worked with the doctor who conducted the post mortem, Dr Brouwer. She worked at Salt River mortuary. She looked at parts of the post

mortem when Dr Brouwer did it. Dr Brouwer was overseas and not available. The post mortem report was marked "Exhibit F1" and was handed in by agreement with the defence.

[111] Several pathologists work together in the same work space with their own cases. At times, they also collaborate and consult one another. She recalled that Dr Brouwer was busy with this case. Specifically when neck injury was discovered, she went to see her finding and a discussion ensued from that. Extensive photos were taken of the autopsy. She looked at the photos in preparation for her testimony and to correlate them with her findings, specifically Photos 109 – 132.

[112] Page 1, paragraph 4 of her report reflects that 40 stab wound were present on the left anterior aspect of the body including the neck. Three penetrated into the left chest cavity. There is one superficial stab wound track in the left upper lobe area of the lung. A further 8 stab wounds were present in the neck area. One penetrated the left internal jugular vein. There was one stab wound in the right temporal area of the head. An incised wound in the right ear lobe. No skull fractures were found. Tramline abrasions on the vertex of the head were found. Those are usually caused by something with a linear shape. There were blunt trauma signs to the neck with a fracture to the left posterior horn of the thyroid cartilage and hyoid bone. A ligature was loosely tied around the neck. That is usually associated with strangulation. The neck fracture of the cervical spinal column are all injuries that occurred

while the deceased was still alive. Multiple skin lesions were caused by post morbid burns. Due to this and decomposition, skin loss occurred and it did not assist in interpreting the cause of the neck injury. Between the 5th and 6th neck vertebrae, the neck was broken. The clothing was extensively burned. Parts of the left lung and oesophagus showed changes consistent with burning. Numerous sharp trauma injuries were found, especially to the left side of the chest and to the neck. Of these, 48 were stab wounds which were sustained during life. One entered the lung and one entered a major blood vessel but was fatal. Abrasions were seen on the scalp and under the scalp and on the back and side of the head. Despite these injuries, there was a marked lack of defence wounds. There was a small incised bruising on one of the arms at the back of the wrist. The cause of death is multiple injuries. Some kind of burning occurred to the body which charred clothing and parts of the skin and cooked the content of the upper airways. In the post mortem report under the heading appearance, it is stated that the body was wrapped in a duvet and ligatures were tied around the legs and arms. The skin showed advanced decomposition including mummification i.e. drying out. There was a marked lack of large maggots only small ones, indicating that the body was hidden where flies only discovered the body at a late stage. Multiple stab wounds, signs of strangulation and neck injury caused death.

[113] The left leg had 8 superficial stab wounds. The right ear lobe had a stab wound through but not deeper. There is a group of 13 wounds most

superficial except for 1 or 2 and another 13 wounds that were not life threatening. Although superficial, they were not painless and would each contribute to blood loss. Fear and pain is what the deceased would have experienced. If a person is unconscious or under the influence of alcohol or intoxicating substance or if restraints or paralyses after neck injury occurred, then he would not fend off blows.

[114] Her opinion was sought in respect of the instrument/s used to inflict the injuries to the body of the deceased:

- She was not able to say whether more than one instrument was used;
- With reference to the knife depicted in "Exhibit G" she was of the view that the injuries could have been caused by this particular instrument. Mention was made of the appearance of the knife namely the length of the blade and serrated edge in this regard. The witness in particular referred to wound 4, a very deep incised wound. Reference was also made to wound 10 that appeared to have been caused by a knife with a serrated edge.

[115] The witness' opinion was also sought regarding possible evidence that the body was moved from one place to another:

- The witness was of the view that the body could have been moved;
- Diagonally aligned parallel running linear abrasions crossing the wound described in paragraph 4, page 3, point to the body having been dragged over a rough surface;
- The limited amount of fly eggs deposited on the body is also an indication that the body had been disturbed or moved;
- She expressed the view that death would have ensued within 30 minutes in the absence of medical assistance;
- Death would have ensued due to blood loss caused by the incised wounds.

**JOSEPH BORMAN:**

[116] On 20 January 2008 he had been busy with fellow workers laying cables. He pointed out photograph 95 of "Exhibit B" as the place where they had been working on the side of the road.

[117] He took a smoke break inside the bushes. He observed that something was lying on top of a little mound of sand. On closer inspection, he discovered a person's arm with a wrist watch just above the hand.

**MR KANNEMEYER:**

[118] The family called him to do some plumbing work for them at 46 Chapman Avenue. The deceased, when in Denmark would call him to fix things in the house and he would pay him electronically. Accused 2 would also call him if there were plumbing problems in the house. He had no knowledge of damp in the deceased's room.

[119] The state brought an application to admit into evidence extracts from the bail proceedings in the magistrate's court. Accused 1 was not represented then and he did not have an interpreter. Accused 1 said that he did not understand the distinction between bail proceedings and the main trial then. This court accordingly refused the application.

**MADS KJAERGARD:**

[120] The witness testified that he was a Danish national and Joan Kjaergard, the deceased's daughter is his wife.

[121] He knew accused 1 as the brother of accused 2 and 3. He met him during his visit to South Africa in November/December 2007. Accused 1 was doing some maintenance and repairs to the property in Gordon's Bay.

[122] He was aware that accused 1 painted the pantry and repaired some tiles. In cross examination by accused 1, the witness was asked why he said that accused 1 was not allowed in the premises. He said that the deceased had told him that accused 1 was allowed in the premises during the day and not at night.

[123] The deceased married accused 2 in March 2001 and they had two minor children, Per Jonathan (PJ) who was 6 years old and Randy Jo who was 4 years in 2008.

[124] Problems had surfaced in the marriage after six months as accused 2 had not been happy.

[125] He knew accused 3. He had met her during his November/December 2007 holiday. She was taking care of the house and staying in the flat on the property. She had a son named Finn. The deceased had a good relationship with Finn and Finn called him Fa.



[126] The deceased went back to Denmark three days before the Kjaergards went back for the 2007 Christmas holidays. The family enjoyed activities together in the deceased's house in Denmark. The deceased appeared to be unhappy on Christmas day.

[127] The deceased travelled back to Cape Town on 6 January 2008 with accused 2 and the two minor children.

[128] Accused 2 called him and Joan on 15 January 2008 to tell them that the deceased was missing as he did not come home on the 14 January 2008. She called them around 10am. It was strange as the deceased was not a person who would stay away the whole night and accused 2 said that she first had to buy food for the children before reporting him as a missing person.

[129] Mads, Joan and Tom travelled to South Africa and arrived on Thursday, 17 January 2008. They saw that the house was sparkling clean especially the garage. A white Toyota Corolla was parked inside the garage as it had been in 2007 during their visit.

[130] Everything was neatly packed in the garage but in 2007 it had been untidy as everything was lying around. The house inside was also clean as the stairs appeared to be recently painted near the right pillar. He observed this from his experience as a painter.

[131] The Danish family had been welcomed by accused 2 and 3. They greeted and hugged each other.

[132] Accused 2 told him that the deceased left in the morning to play golf but she did not see him leave because she was sleeping upstairs and he slept downstairs. The deceased had called "goodbye Maria" from the steps as he left.

[133] They went with Desmond Davis, who joined them in the search for the blue motor vehicle at approximately 16h00 to 17h00 on 17 January 2008.

[134] In 2007, the blue Mazda motor vehicle always parked in front of the garage. He said that the 4x4 Land Rover had been new in 2007 and the blue Mazda was old and that was the reason for the Land Rover being parked inside.

[135] The deceased had some golf equipment he kept in Cape Town and he left them inside the blue Mazda motor vehicle.

[136] They became worried about their safety in the house as it posed a problem for their sleeping there. They were puzzled that accused 2 and 3 were not so concerned about their safety in the house. They were also worried about the keys to the car and the gate of the house.

[137] Accused 2's counsel put it to the witness that the norm in the house had been that accused 2 would keep a bunch of keys and accused 3 another bunch in order to assist whoever would call for exit or entrance. In 2007, he saw that the deceased had one set of keys in his possession. They decided to discuss the safety issue with accused 2 and 3 in the morning when the detectives arrived at the house. They had wanted to put the question when the police were present. They were surprised that in South Africa where everybody would lock their doors such a situation would arise that the keys were not checked properly.

[138] On 18 January 2008 detectives arrived led by Greeff met the family in the morning and asked questions about the missing person.

[139] While the detectives were asking questions, accused 2 and 3 were standing in the kitchen. The witness asked the question about the safety in the house since the deceased's keys were missing and accused 3 replied that he left without the house keys. He had not found it likely that the deceased would leave the house without keys and he thought that accused 3 was not telling the truth. The bunch of keys that the deceased used in 2007, had the car keys and the house keys on it. Accused 3 said that the deceased had opened the gate as he left through the garage on the morning of 14 January 2008.

[140] Accused 3's counsel said that there were only two sets of keys which operated the property. The witness said that there had been more than two sets of keys as the third set had another function through his own observation.

[141] The witness said that accused 2 told accused 3 to go and fetch the keys from the flat. Accused 3 returned from the flat and the discussion about the keys stopped.

[142] Detective Greeff and the Danish family agreed to meet at the police station the following day. The witness with his wife met the police without accused 2 and 3. The witness told detective Greeff that the deceased always left with his keys during their first visit to South Africa. Detective Greeff told them that there would be a technical forensic investigation at the house later that day and nobody was allowed inside. The police were also looking for the blue Mazda motor vehicle.

[143] Everyone was asked to come out and to be on the neighbouring grass as the forensic team went in. They sat outside for many hours. After it became dark, they were allowed to go inside the house but only in the children's room. This made him feel unsafe in the house. Around midnight the Danish family took the three children and went to a hotel leaving accused 2 and 3 at the house.

[144] The following morning officer Greeff called to ask the Danish family to come to Gordon's Bay police station. They were told by Greeff that accused 1 had been arrested and he confessed to killing the deceased.

[145] On 20 January 2008 the Danish family were called to the police station because they had to bring the children to meet a psychologist. On arrival at the police station they waited outside while the sessions were held with the psychologist.

[146] The children were with them until 27 January 2008.

[147] The witness said that the deceased had been angry with accused 1 and did not want him to have unlimited access to the property. Accused 1 put it to the witness the reason why the deceased was angry with accused 1, was because the blue Mazda had been driven and petrol was not re-filled but the witness said the deceased was angry about the car being driven for 15 000 kilometres while the deceased was away. He believed accused 1 had driven the car.

[148] The Danish family met social workers on Monday to apply for temporary parental authority for two days for all three children. Temporary custody was granted to Joan and Tom. The Danish family were contacted by police at the safe house as a body was discovered. They went to identify the body.

[149] In 2010 Randy Jo and PJ were reunited with the Danish family in Denmark. The children stay with the Kjaergards in Denmark but full custody lies with the Furesoe Municipality as guardian of all minors according to Danish law.

[150] PJ does not talk much as he suppresses his moods. He needs to be accompanied to bed at night and lights have to be left on at night for him to feel safe. The witness said that his brother-in-law, Tom was traumatised because the deceased was also his business partner and golf partner. Joan Kjaergard was unhappy during the first six months but has recovered since she received treatment from a psychiatrist and she continues to see a psychologist. She was hospitalised in 2011 after testifying in court.

**FINN SSENGENDO:**

[151] The 12 year old son of accused 3, testified through close circuit television and through an intermediary after the state's application for his testimony to be given in that form was granted.

[152] He confirmed that in January 2008, he lived at 46 Chapman Avenue, Gordon's Bay with his mother in the flatlet. When the Povlsens were at the house, he stayed and slept with his cousin, PJ, in the main house. His female cousin Randy Jo, slept with her mother, accused 2. In January 2008, one

Sunday night he remembered going to the toilet after having fallen asleep. He heard some noise and started walking down the stairs but stopped and heard his uncle, Preben Povlsen, the deceased saying the following: "*Maria, Maria, please help me.*" He then heard a female voice which he believed to be that of accused 2, saying: "*how could you*". He felt tired and went back to sleep. He did not see what was happening downstairs that night.

[153] The next morning, before he brushed his teeth, dressed and had breakfast, he went to look for the deceased in his room to say good morning as he usually does but the room was locked. He looked for the deceased in his study but he was not there. He did not see accused 2 at the time but assumed she was still in bed upstairs. He did not ever see the deceased again since then.

[154] That Sunday night, when he went to bed, all three accused and the deceased were at home. He said accused 1 was downstairs in the house. Accused 1 did not challenge this witness' evidence. Accused 2's counsel said she would deny uttering those words. In response to a question from accused 2's counsel, he said he was not aware that the deceased's room was being repaired. Accused 3's counsel put it to him that he told the social worker that when he heard the noise his eyes were closed and he was still in bed. He replied that when he heard the voices, he went one step down and closed his eyes. He said he was very tired and half asleep.

**PIETER JACOBUS GREEFF:**

[155] On 18 January 2008, the witness accompanied Inspector Geldenhuys to 46 Chapman Avenue in order to meet the Danish family of Preben Povlsen, who was reported missing on 15 January 2008. At the address they met accused 2, accused 3 and the Danish relatives consisting of the son, Tom Povlsen, the daughter, Joan Kjaergard and her husband Mads Kjaergard. Those present gathered at the kitchen counter and the conversation was mainly about the circumstances surrounding the disappearance of Preben Povlsen.

[156] A discussion ensued between the Danish relatives and accused 2 and accused 3 regarding the keys of the deceased. Accused 3 left to fetch keys. She returned with keys. The discussion about the keys did not resume. Joan Kjaergard spoke to the witness aside and a request was made on behalf of the Danish relatives for a private meeting with them.

[157] According to the witness he then reviewed the information furnished by accused 2 regarding the circumstances of her husband's disappearance. Accused 2 said she last saw the deceased between 7h00 and 8h00 on Monday 14 January. The witness asked whether she actually saw her husband. She did not see him. He came halfway up the stairs and called out that he was going to play golf. The witness then asked accused 2 what she



did after that to which she replied that she visited the Somerset Mall. She also said that she either heard the gate or garage door shortly after he called out to her. Accused 2 confirmed that these events took place on Monday 14 January 2008.

[158] Further questioning of accused 2 regarding her visit to Somerset Mall, revealed that she allegedly used the Woolworths entrance early or just after the shops opened at 8h00.

[159] At the police station the family expressed concern regarding the unusual clean state of the house.

[160] According to the witness, it was clear to him and Geldenhuys that they would have to commence the investigation at the house of the missing person as this was the last place he had been seen or heard of. The witness suggested to Geldenhuys that the house be searched for possible evidence.

[161] According to the witness it was then agreed between him and Inspector Geldenhuys to contact Superintendent De Kock of Somerset West Local Criminal Record Centre, for assistance with a forensic team to search the house. At 15.00 on Friday 18 January 2008 Colonel Kock of the Biology Unit of the Forensic Science Laboratory arrived on the scene with photographer, Inspector Cronje and other members of the Forensic Unit.

[162] According to the witness it did not take long for the forensic team to discover indications of blood that was visible to the naked eye at the entrance to the garage from the house as well as on the stairs leading from the kitchen to the garage. The witness elaborated on procedures carried out by the forensic team. According to the witness indications of blood were found in the garage where prior to the application of certain chemicals, it was not visible to the naked eye.

[163] A footprint in blood was observed on the stairs leading to the garage from the kitchen..

[164] Accused 2 and 3 were requested to participate in an eliminating process in regard to the footprint as they were occupants of the premises at the time of the disappearance of Mr Povlsen. Captain Van der Westhuizen of the Local Criminal Record Centre examined the footprints obtained from accused 2 and 3. He informed the witness that it did not match the print found on the stairs to the garage. The footprint found in the garage could however be that of a person related to accused 2 and 3 as it displayed certain characteristics common to their prints.

[165] The witness established from accused 2 and 3 that they had a brother who lived in Cape Town and frequented the house. According to the witness

both accused 2 and 3 immediately expressed the view that their brother must have been involved.

[166] The witness was given the name of the brother by accused 2 and 3. He knew that he required the assistance and cooperation of accused 2 and 3 to apprehend Francis Kimeze.

[167] The forensic investigation of the house continued. It had however become dark outside and consideration had to be given to overnight arrangements for the occupants of the house. The Danish relatives indicated that they intended to book into a hotel and offered to take the children for the time being. The witness suggested to accused 2 and 3 that they avail themselves of facilities at the Gordon's Bay Police Station. The trauma room at the Police Station was placed at their disposal.

[168] In the course of the evening, Captain Fleischman took a witness statement from accused 3. Saturday morning at approximately 1am the witness and Inspector Geldenhuys reached agreement with accused 2 and accused 3 that they would assist in luring accused 1 to Gordon's Bay.

[169] Accused 2 and accused 3 were to contact accused 1 using one of their cell phones. They were to tell him that the police had been to the house and

that the police had no idea what took place there. They were also to offer accused 1 money to enable him to leave the area before he could be apprehended.

[170] The call was made to accused 1 and at approximately 11h00 accused 1 appeared in Gordon's Bay and was arrested. Captain Van der Westhuizen of the LCRC obtained the footprint of accused 1 and compared it to the footprint processed on the stairs to the garage. The witness was informed that it was identical. Accused 1 was thereafter retained in custody at Gordon's Bay Police Station by Constable Fredericks.

[171] On Saturday, 19 January the minor children were interviewed by a Social Worker, Aida Buys from "Patch," in order to try and establish whether they had any knowledge of the disappearance of the deceased.

[172] This information received from Aida Buys immediately raised the suspicion of the witness that accused 2 and 3 knew more regarding the matter than they would admit.

[173] On Saturday the white Toyota Corolla was traced to Greenways, Strand.

[174] At approximately 12h00 on Sunday 20 January the body of the deceased was discovered. At 16h00 on Sunday accused 1 was charged with the murder of Preben Povlsen.

[175] The witness and Geldenhuys reviewed the evidence uncovered in the matter and decided to arrest accused 2 and accused 3. On Monday 21 January accused 2 and 3 were formally charged with murder of Preben Povlsen.

[176] Sunday morning the witness received information that lead to the recovery of the deceased's Mazda vehicle in Gugulethu.

[177] The existence and whereabouts of Frank was investigated. Frank could not be found.

[178] On 23 January the witness returned to 46 Chapman Avenue with Colonel Kock and searched the house once more for possible further evidence, amongst others, in the deceased's bedroom. The witness stood at the entrance to the deceased's bedroom and noticed the bronze coloured metal strip were held in place by new shiny silver coloured nails. He examined the metal strips found in other rooms in the house and discovered that the nails in those strips were rusty and had a dark colour. A similar strip that the witness noticed earlier, stored in the garage, was compared to the

house and it had a similar appearance to the strip found in the garage, with nails still attached.

[179] He then considered the possibility that it was a new carpet and that it could account for the absence of blood on the floor of the room during the earlier examination of the room. Other surfaces in the room were then examined, such as the white doors of the cupboard. The doors appeared to have been scrubbed and the brown wood underneath the white paint was visible.

[180] The doors of the cupboard were therefore removed and examined. The bottom edge of the right hand door of the cupboard showed areas of dark red discolouration.

[181] Possible blood was discovered on the bottom panel of the built in cupboard. Marked "AK", photograph 25 "Exhibit Q". A further location where possible blood was discovered was on the bedroom wall to the left of the door and marked "AL". According to the witness there was no indication that the wall where "AL" is indicated, was freshly painted.

[182] The steel pin in the hinge of the door to the deceased's bedroom was not properly in place and protruding slightly. This also supported the possibility that the door had been removed and replaced.

[183] The final location where possible blood was discovered was on the bottom of the bathroom door on the outside, marked "AO".

[184] According to the witness points "AM", "AK", "AL" and "AO" where possible blood was discovered are all located on vertical surfaces in the room.

[185] The discovery of possible blood on the outside of the deceased's bathroom led to an examination of the deceased's bathroom for blood. Application of luminol by Colonel Kock indicated the presence of possible blood.

[186] The witness on the 24 January viewed video footage taken at the Woolworths entrance of Somerset Mall for the 14 January 2008 from the time that the doors opened until approximately 11h00. The footage did not support accused 2's claim that she entered the mall at the stated time and entrance.

[187] It was further put to the witness that accused 2 denied saying that she heard either the garage or gate soon after her husband called out to her. The witness was adamant that this was said by accused 2 despite him not recording it in the witness statement.

[188] It was also put to the witness by counsel that accused 2 would not have told the witness that she went to the Somerset Mall on Monday 14 January,

because she never went to the Mall on 14 January. She went to the Mall on 15 January. On 14 January accused 2 took the children to Strand area for breakfast at the Wimpy. On 15 January accused went to buy food at the Mall before going to the police station to report her husband missing. The witness stood by his evidence that accused 2 told him that she entered the Somerset Mall at the Woolworths entrance when the shops opened at 8h00.

[189] Counsel referred to the evidence of the witness regarding the scrubbed appearance of the cupboard doors in the deceased's bedroom and put it to him that according to accused 2 the doors were indeed washed as the children had used markers on that cupboard during a previous holiday. The witness expressed doubt regarding the explanation. The affected areas on the doors would hardly be reached by the children even if they stood on chairs. The children were 4 and 6 years old at the time.

[190] Responding to a question by counsel for accused 3 regarding the location of Mats Carpets in relation to Basra's and Dalvie's shops the witness confirmed that the relevant businesses were within walking distance of each other.

[191] It was put to the witness that as early as 2008 mention was made that dampness in the bedroom of the deceased necessitated the removal of the carpet. The witness agreed that dampness was raised and possibly during a bail application.



[192] It was further put to the witness that it was intended to remove the carpet even before the disappearance of the deceased and that they had already been in the process of removing the carpet when the deceased disappeared. Counsel corrected the statement by putting it that the carpet had already been removed when the deceased disappeared.

**Evidence of Accused 1:**

[193] According to the accused, on Sunday night 13 January 2008, he was out drinking and smoking with his Nigerian friend, Frank, who fetched him at his home in Woodstock. In the course of the evening the accused requested Frank to take him home as he had to be at work the next day. Frank however persuaded him to stay longer and undertook to drop him off in Gordon's Bay when they were done. Eventually the accused and Frank set off for Gordon's Bay. According to the accused it had to be past midnight.

[194] On arrival in Gordon's Bay, the accused presumed that the family was asleep. He had also been drinking and therefore would not consider ringing the bell to gain access to the premises. He and Frank climbed over the wall. They continued smoking and drinking on the premises next to the water tank.

[195] The accused approached the house after a while and opened the sliding door to the living room. He had previously effected repairs to the door

after a burglary and was able to open the door from the outside without a key. The accused returned to Frank and they continued smoking. The wind outside however made smoking difficult and the accused suggested to Frank that they enter the house and continued smoking in the car in the garage.

[196] They had been sitting in the car smoking and drinking for a while when the accused heard the sound of the television. The television was off when they entered the house earlier and the accused went to investigate. He found the deceased busy making coffee.

[197] The deceased then had a conversation with the accused regarding the work he was busy carrying out at the house and which was overdue. The accused had already received a sum of money from the deceased on Monday of the previous week for the materials needed. According to the accused, the deceased told him he was going to play golf and would on his return expect to see some progress.

[198] The accused returned to the garage and continued smoking and drinking with Frank. Minutes had passed when the deceased unexpectedly entered the garage carrying a shirt and pair of socks. In cross-examination by counsel for accused 2, accused 1 estimated the time to be 6h00 and said that it was starting to become light outside. The deceased became very angry when he saw the accused smoking. The deceased said that the accused could no longer work for him and slapped the hand of the accused, knocking

the glass pipe out of his hand. According to the accused he had been smoking "Tik" with the pipe.

[199] When the accused bent down to pick up the pieces, the deceased pushed him against his forehead with his fingers. The accused became cross and "recalled very clearly" that he grabbed the deceased very tightly by his shirt at his neck with his left hand. The deceased also held the accused by his shirt as they stood facing each other. The deceased then grabbed the "jack knife" attached to the belt of the accused and stabbed the accused on the left arm while he was holding the deceased. According to the accused, he then experienced great fear. In cross-examination by accused 2's counsel, the accused said the assault on the deceased had lasted minutes. The accused next remembered Frank pulling him up from the floor. The accused had fallen next to the deceased on the floor. Accused 1 had the jack knife in his hand and saw blood. In cross-examination by counsel for accused 3, the accused estimated the length of the blade to be 8cm.

[200] According to the accused he panicked and lifted the deceased into a sitting position between the two cars. He tried to help the deceased but realized he was dead. He cut the shirt from the deceased's body and cleaned off blood with it. He saw the wounds and realized the positioning of the wounds resembled a technique of fighting he had been trained in, namely, "joksu". He didn't want to face the consequences and decided to get rid of the

body. Frank agreed to help him after they had a discussion and exchanged ideas.

[201] The accused dressed the body in the shirt the deceased had dropped on the bonnet of the car. He was asked in cross-examination by counsel for accused 3 on why he had dressed the body. The accused replied that he dressed the body because he had cut the T-shirt off the body. The accused went into the house, after listening at the door, to find cloth to wrap the body in and for cleaning materials. He went into the deceased's bedroom and realized his arm was dripping blood. His hands had blood on as well and he opened the cupboard by touching the bottom of the door to avoid getting blood everywhere. He took a bedcover and another cloth from the cupboard and retracing his steps, cleaned the blood all the way to the garage.

[202] The accused and Frank tore strips of cloth and tied the deceased's arms and legs. When wrapping the body in the cloth, blood seeped through and the accused fetched plastic from outside that he used for painting. Frank was doing some cleaning and cleaned inside the car so as not to leave fingerprints in the car.

[203] The body was placed in the boot of the Mazda once it was wrapped in the plastic. He used a cloth, mop and bucket from the laundry to clean in the bedroom and poured water in the basin in the laundry. He changed his

clothing after fetching his extra clothes from the laundry. He put on brown shoes. The bloodstained cloths, clothes and his sandals were put into the boot of the car. At some stage he looked at himself in a mirror.

[204] He opened the garage door and gate with the intercom. In cross-examination by accused 2's counsel, the accused estimated the time it took him to leave after the deceased had died as 30 minutes. He drove to a shopping centre with Frank following him in his car. He parked the car and Frank took him back to the house. He had left the gate halfway open and entered the premises. In cross-examination by counsel for accused 2 he however said when he returned to the house the gate was closed. In cross-examination by the State the accused repeated that he left the gate halfway open when he removed the body and when he returned he found somebody had closed the gate. He went to Accused 3 flat after retrieving Frank's jumper at the water tank and handing it to him.

[205] Accused 3 was still in bed and he asked her for plaster. He told her he had injured himself whilst working. He went to the bathroom and removed the cloth around his arm and applied the plaster. He lit a cigarette and Accused 3 told him not to smoke inside. He went out and returned. He asked Accused 3 to lend him some money. She knew he would need some to pay for the carpet and skirtings. He thought he would just take off if she gave him money. She refused as he had misused the money Preben gave him.

[206] She would only assist him by paying the carpet shop directly and he would have to repay her. He told her he would take her to the carpet shop. It was put to the accused in cross-examination by counsel for accused 3 that when they requested a second hand carpet it was because they wanted to pay less. This was confirmed by the accused.

[207] In cross-examination by counsel for accused 2 he said it was approximately 6h00 when he went to accused 3. When he drove to the shopping centre with the body there was very little activity in the streets and the security officer with his dog was still on duty. He was asked in cross-examination by counsel for accused 3 whether he was bleeding when he went to accused 3 in her flat. He said he was not bleeding. He had a cloth around the injuries and only took the cloth off in her bathroom. When it was put to him that he cannot dispute that he bled in the main part of the flat, he was adamant that he took the cloth off in the bathroom.

[208] He went to the main house. Everything looked in order and he did not see Maria and the children. He left the gate on pedestrian mode, took a taxi to Strand and went to Biggie's. He met accused 3 later in Strand and went to the carpet shop. The lady attendant told him and accused 3 to return later as all the staff were occupied. Accused 3 said she had to meet accused 2 and the children at the Wimpy. They went there and found accused 2. It was the

first time that day that he saw accused 2 and the children and they all had something to eat.

[209] He and accused 3 returned to the carpet shop. Accused 3 gave him R1 500 and a receipt was made out in his name. He could not remember who issued the receipt however accused 3 took the receipt from him. She refused to give it to him as she wanted a refund from the deceased. What he planned, namely to cancel the carpet order and get the money back, didn't work.

[210] After that he and accused 3 found accused 2 and the children playing on the beach. He asked accused 2 for money and she gave him R150. Accused 2 and 3 dropped him in Strand and he told them he was going to Cape Town and would return later. He took a taxi to Gordon's Bay, fetched the Mazda at the shopping centre, drove to Woodstock where he lived and parked the car in the yard. He had the keys to the Mazda and the remote control. The keys were usually left in the Mazda.

[211] According to the accused he then called Frank for assistance in disposing of the body. Frank agreed to assist around midnight. He was not sure Frank would indeed come. He therefore mixed swimming pool acid which he had under the car seat with a tin of Amway product. In cross-examination by counsel for accused 3, he indicated that he saw the acid in the garage and put it in the car before driving off with the body. He said that he

used the mixture to prevent decomposition and smells. He opened the boot, stabbed holes in the plastic around the body and poured the mixture in.

[212] Frank turned up and drove ahead of the accused to a bushy area at Blouberg. They dragged the body out of the boot into the bushes. The plastic around the body unravelled. Other things also fell out of the boot and the accused picked everything up and returned it to the boot with the plastic. The accused said he saw Frank bending down where the body was. He was using a lighter and the accused said he was not sure whether Frank had dropped something there and was looking for it.

[213] The accused returned to Woodstock where he emptied the contents of the boot into a plastic bag and disposed of it in a garbage bin. The accused followed Frank to the Gugulethu where Frank gave him a "missed call" indicating where he had to pull in and park the Mazda car. He put the golf bag in the boot of the car. The accused got out and locked the "gear" of the car. He cannot remember whether he locked the car. Frank left the accused at the rubbish dump after he gave him some money and something to smoke. The accused returned to his flat in Woodstock. The accused went to sleep and slept until late that night. He then called Gordon's Bay. He was told the deceased was missing and they were crying.



[214] Later, he received a call from accused 2 and 3 and they were speaking English. He suspected that the police were looking for him and that accused 2 and 3 “were under instruction” when they called him. The accused said he was not sure whether they knew where his flat was and he did not sleep there.

[215] The next morning the accused went to Gordon’s Bay. When he reached Strand he noticed plain clothes police and their cars. He felt very paranoid. When he reached Spar in Gordon’s Bay he saw accused 2 and accused 3 together. Then he was arrested.

[216] The accused concluded by saying that he did not go to Gordon’s Bay with a plan to kill the deceased. He did not want to kill the deceased. The deceased was very good to him and he had not met anybody who cared for others the way the deceased did.

[217] The accused was cross-examined at length by the State regarding his presence at the deceased’s residence during the night of Sunday 13 January and the early hours of Monday 14 January 2008 allegedly, in the company of a Nigerian friend, Frank.

[218] According to the accused he often went to Chapman Avenue at unusual hours such as at night when the deceased was there. He conceded that he never had keys to the house and that it had never been considered necessary

to give him keys. He entered by the living room's sliding door. The deceased was not aware that entry could be gained in that manner. He was not given permission to enter the house in that manner. The deceased would find him in the house and they never talked about it. He had however never entered the house in that manner in the company of somebody else.

[219] The accused was also cross-examined regarding the assault upon the deceased. According to the accused he recalled engaging the deceased. He and the deceased were facing each other, holding each other and the deceased stabbed him in the left arm after taking the knife of the accused from his belt.

[220] It was put to the accused that he appears to remember what he was doing that night despite drinking and smoking. The accused did not dispute this. It was further put to the accused that he appears to remember even minute details, which he conceded, but not the details of how many times and where he stabbed the deceased.

[221] He was questioned about which aspects of his statement that he made to Superintendent Spangenberg were true and which parts were lies. Although admitting that he killed the deceased as indicated in the statement, he maintained that he had made up a version of the surrounding circumstances such as the time the assault took place and the nature of the

assault. It was put to the accused that he mentioned in his statement that he pricked his arm during the altercation with the deceased. The accused reiterated that the deceased stabbed him in the arm. It was put to the accused that his injuries were self-inflicted as mentioned in the statement. The accused said that part of the statement was false.

[222] Allegations by the accused made in cross-examination by counsel for accused 2 and counsel for accused 3 regarding a pre-existing condition of damp and mould in the bedroom of the deceased necessitating urgent replacement of the carpet on Monday 14 January were also challenged by the State in cross-examination. It was put to the accused that Geldenhuys and Greeff were not cross-examined on their observations regarding the condition of the floor.

[223] The accused was also confronted in cross-examination by the State with the evidence of Reinhardt Isaacs that he attended to all three accused on Monday 14 January at 17h00, issued a receipt for a deposit, and made arrangements for the carpet to be installed. The accused responded that accused 2 was not present on 14 January and that he and accused 3 actually were at the shop at 9h00 and 11h00 and were attended to by a lady. According to the accused he had no recollection of Isaacs attending to them.

[224] The accused was asked what his intention was regarding the deceased's Mazda car once he had removed it from the premises in Chapman Avenue to dispose of the body. He had intended to abandon the car where he had parked it in Gugulethu. He had no intention of returning it.

**Evidence of Accused 3:**

[225] She lived in the main house at the Chapman's Avenue property in Gordon's Bay ever since she arrived in South Africa in 2000. At the time she was 7 months pregnant and her sister, accused 2 was already in a relationship with the deceased. Her son Finn was born in South Africa. Accused 2 and the deceased married in 2001. The deceased had the property renovated by building a swimming pool and the flat-let beneath it. After the building work was complete, a mound of building sand remained outside the boundary fence of the house which made it possible for people to jump over the fence into the grounds. The deceased knew about the problem and intended to rectify it.

[226] She went to live in the flat-let. While the building operations were being conducted, she reported its progress to the deceased whenever he was in Denmark. She was employed as a caretaker of the property by the deceased who gave her R5 000 cash and R2 000 in the form of a cheque as petty cash for operational expenses of the house. She had to account for how she spent

the money by providing the deceased with invoices and a book of account recording all relevant transactions. He also paid her R1 000 per month as remuneration for taking care of the property.

[227] On one occasion, the house was burgled and she called her brother, accused 1, to help her find out how access was gained to the house. He discovered that a sliding door in the living room had been broken in such a way that the only means of repairing it properly was to replace the entire door frame. Accused 1 however repaired the door temporarily. She did not know that the door was not permanently repaired and that someone could come into the house through it.

[228] During the week of 7 January 2008, a week before the deceased was killed, accused 1 was painting and repairing the house at the request of the deceased. He painted most of the internal walls except the garage, laundry, deceased's bedroom and the living room. The entire house's floors were damp but the deceased's bedroom required more urgent attention than the other rooms and accused 1 had lifted up the entire carpet in the deceased's room, removed most of it and the underfelt that was moist because of mould and left a few small pieces of carpet for people to walk on.

[229] She often found accused 1 early in the morning at the house and so did the deceased. She did not think that it was ever necessary to ask him how he

gained entry to the house when she found him inside. She could not recall the house burglar alarm ever being switched on at night when people were home. The alarm was only switched on when everyone left the premises.

[230] According to accused 3, on the morning of 14 January 2008, while daylight was beginning to show outside, accused 1 knocked on the door of her flatlet. He was bleeding on his left arm and he asked her for plasters. She told him where the plasters were and he took it himself. She saw two drops of blood on the floor. He said that while removing the carpet, he scratched his arm. After he left, she went back to bed for a while because her asthma made her feel ill. She went to see the doctor already on Friday, 11 January 2008.

[231] Approximately, 45 minutes later she went to the bathroom and then to the main house where she found the kitchen sliding door open. The deceased usually left it open after looking at the view in the morning. She heard the children upstairs. She found the children jumping on accused 2's bed while she was sleeping. They called accused 2 sleepy head. Later, in her evidence in chief, accused 3 said that she had arranged to meet accused 1 at the Somali shop so that they could go buy a carpet for the bedroom of the deceased. She did not at that stage explain when she and accused 1 had discussed buying the carpet for the first time. She said that when she did not find accused 1 in the house, she called him on his cellular phone and they arranged to meet.

[232] She did not see the deceased in his bedroom that morning but saw that his bed had been pushed up on its side. She feared that the children would be harmed by the sharp nails in the room that was exposed by the bed being lifted on its side, so she locked the bedroom door and put the key in a cupboard. She found the external gate of the house was open wide enough for a pedestrian to pass through and assumed that the deceased left it open as he usually did. She closed the gate by pressing the closing button on the intercom panel. She assumed the deceased had gone to play golf as he told her the Sunday evening when they had dinner, that he intended doing so. She later also said she made that assumption because she found the bed on its side.

[233] Accused 2 and accused 3 took the children to the Wimpy in Strand for breakfast that morning. She left accused 2 and the children at the Wimpy and walked to the Somali shop where she met accused1. She walked with accused 1 to Mats Carpet shop in Strand. On the way, she saw Veronica Titus and waved at her. She denied making a hand gesture signifying 'no' to her.

[234] At the carpet shop, they chose a carpet and were attended to buy a lady. She gave the deposit of R1 300 for the carpet to accused 1 who handed it to the lady. An elderly man was also standing with the lady at the time. The receipt was written out in the name of accused 1 but she took possession of it

because she needed to recover her money from the deceased who had already given accused 1 money for the carpet. Accused 1 had spent the money.

[235] She paid for the carpet because she was eager to show the deceased that accused 1 could complete the work that the deceased had asked him to do. The carpet was to be fitted the following day, namely Tuesday, 15 January 2008 as that was when the staff at the carpet shop was available to do it. She could not explain why her attorney had not put it to Reinhardt Isaacs that that was why the carpet was only fitted on Tuesday, 15 January 2008. She and accused 1 went back to accused 2 who was playing with the children on the beach. At approximately 10h30 am, she and accused 1 walked back to the carpet shop as she wanted to speak to the man who would allocate the work to the staff, about the time that they would come to the house on Tuesday. The elderly man said his staff would arrive at 8h30 am. Thereafter she joined accused 2 and the children at the beach and accused 1 walked to Strand station.

[236] Finn regarded the deceased as his primary male figure and referred to him as Fa, which means father. Finn slept in the main house on the night of 13 January 2008 with his cousins.

[237] At approximately 17h30 on 14 January 2008, she and accused 2 realised something was amiss as the deceased had not returned from playing



golf. They called his golf friends who said they did not see him that day. She called Anita Botha shortly after that but she had not heard from the deceased either. She first said accused 2 went to work in her place at the bookshop at 2pm on 14 January 2008 until approximately 6 pm when the deceased was supposed to pick accused 2 up from the bookshop and take her to Canal Walk. Later she said accused 2 only worked that day until 4 pm. She stayed in the main house with accused 2 until 1 am on 15 January before going to her flat-let. During further cross examination on behalf of accused 2, she admitted that she could have been mistaken about the time accused 2 returned from the bookshop on 14 January 2008 and it could have been at 7pm.

[238] On 15 January 2008, she stayed home waiting for the carpet company to install the carpet while accused 2 and the children drove to the Strand golf course to look for the deceased. She, single handed, moved the furniture out of the deceased's room before the carpet men arrived. At approximately 11 am accused 2 arrived back home after reporting the deceased as missing to the police. A friend, Chris Petty and his wife also came to the house at the same time. Accused 2 and the Pettys went looking for the deceased.

[239] She said Mads Kjaergard was correct when he said there were three sets of remote controls for the house. One was a set which has limited functionality as it only had one button on it while the other two remotes were full sets. When the Povlsens were in South Africa, they kept one full set while

accused 3 kept the other two sets. The deceased never took the keys of the house with the remote when he went out as he always relied on accused 2 or 3 to open the house for him. She was not surprised that he did not take the keys and remote with him on 14 January 2008.

[240] Finn was correct when he said he always greeted the deceased when he woke up. Finn could not always distinguish her voice from that of accused 2 but he did not mistake other people's voices for theirs.

[241] The deceased bought a pool table that was put in place of the dining room table in 2007. The old dining room table stood in the garage in 2007 very clumsily. Children's toys lay around the garage in 2007. Mads was correct in saying the garage was untidy in 2007. In 2008, when the Povlsens were in South Africa, they helped her clear up the garage. Inspector Geldenhuys arrived at the house to investigate the missing person's report that accused 2 had made at the police station on Tuesday, 15 January on Wednesday, 16 January 2008 and he wanted to see where the deceased slept. Accused 3 said she showed him the deceased's room and all the other rooms in the house which had damp marks clearly visible. Geldenhuys also said that only accused 2 and her children were home when he came to speak with her about the report, yet accused 3 said in her evidence for the first time, that she was also present when Geldenhuys was at the house on Wednesday. She could not explain why it was not put to Inspector Geldenhuys, when he

testified, that she had shown him all the rooms and he would have seen the dampness in them.

[242] She said that Chereen Steward came to visit her on Tuesday, 15 January and not on Monday, 14 January as she testified. She said Desmond Davis was present and they spoke about the deceased having gone missing. Chereen Steward was not presented with these allegations during cross examination nor was she challenged on how she could say that she only read about the deceased going missing in a newspaper when she would have heard about it from accused 3 and Desmond Davis.

[243] Wednesday, 16 January 2008 in the evening after the children were asleep, accused 2 and 3 cleaned the house with the multi gel accused 3 bought on that day in preparation for the Danish family's arrival on Thursday. She cleaned tiled surfaces excluding the deceased's bathroom, bedroom and the garage.

[244] She said that accused 2's children and Finn were to attend school from Thursday, 17 January 2008. Accused 2 bought their stationery while accused 3 bought the multi gel. The children attended school on 17 and 18 January 2008. Accused 2's children returned from school each day at approximately 12h40 and Finn at approximately 13h00. It was not put to Mads that the

children were at school when he arrived From Denmark on Thursday, 17 January 2008.

[245] Accused 3 said that the garage was untidy in 2007 when Mads saw it because the children used to play in it. They played in between the cars. Finn played there in November 2007 and Mads played with him. This was never put to Mads during cross examination.

[246] During cross examination she was asked why she did not clean the house in preparation for the arrival of the deceased in November 2007 as she had done in 2008 for Mads, Joan and Tom after the deceased went missing. She responded that she was alone with Finn and worked at the bookshop in 2007. In 2008, however she only had accused 2 as one more adult when she cleaned. She was still working at the bookshop then and when she didn't work, accused 2 worked in her place, so accused 2's time was also limited by having to work at the bookshop. Moreover, accused 3 was suffering from a serious bout of asthma at the time in 2008 and Ms Bastra said that the multi-gel that she used to clean the house, had a strong smell that would aggravate the condition of an asthmatic.

[247] She said that the deceased usually played golf 4 or 5 times a week. She persisted with her explanation that he never took the house keys and remote with him when he went to play golf, even though he went so often. She also said the deceased did not play golf on the Friday before he was

killed because his hip was paining yet her attorney did not dispute, Mr Mzamo's evidence that the deceased played golf on Friday, 11 January 2008.

[248] For the first time during cross examination she said that the set of keys that were in the house when the Danish family, the police and accused 2 and 3 discussed the keys, was visible as it was kept near the fridge in the kitchen where everyone had met. This new evidence was given in response to the question why accused 2 did not show the Danish family and the police her keys and why accused 3 had to be the one to fetch keys in her flatlet. She also said for the first time, that the conversation about whether the deceased took the house keys with him occurred on the Thursday when the Danish family arrived, despite the evidence of Mads. Inspectors Geldenhuys and Greeff that it occurred on Friday, 18 January 2008. Their evidence concerning the day was not challenged by accused 3's legal representative.

[249] She did not pay the money to the carpet shop staff herself and did not have the receipt made out in her name because she did not want to interfere with accused 1's work even though she intended to obtain reimbursement for the money she spent on buying the carpet.

[250] She thought it was not important to ensure that her advocate put it to Finn that accused 1 was not at the house on the last evening he saw the deceased.

[251] She said that the doors of the wardrobe in the deceased's room was at some stage lying in the garage and the children wrote on them with markers then. This allegation was not put to Greeff when he testified about the faded condition of the wardrobe doors. It was merely put to him then that the children wrote on the doors with markers previous and it had to be wiped off, hence the faded condition.

### **EVALUATION:**

#### **Robbery with aggravating circumstances:**

[252] The state has proved that accused 1 used the deceased's Mazda motor vehicle to transport the body away from the deceased's home and eventually dispose of the body.

[253] The state has not proved that accused 1 killed the deceased in order that he may steal the motor vehicle. Accordingly robbery has not been proved.

[254] The evidence does however reveal that, after disposing of the body of the deceased, accused 1 abandoned the vehicle in Gugulethu and had no intention of returning the vehicle to the heirs of the deceased. Although

accused 2 and 3 initially told the police and the Danish family of the deceased, that the deceased had disappeared after leaving home to play golf and although the abandoned vehicle in Gugulethu would lend credence to that theory, accused 1 dispossessed the deceased and his estate of the vehicle.

[255] Since all three accused assisted one another in staging circumstances that could lead the police to believe that the deceased was abducted while travelling to or from golf, the stealing of the Mazda vehicle of the deceased was an integral part of their plan to conceal the true circumstances in which the deceased was killed.

[256] Theft is a competent verdict to robbery with aggravating circumstances, which is count 1 in the charge sheet. The elements of theft are also the elements that define robbery but less elements have to be proved for theft than for robbery. They are: that a perpetrator appropriates the property of another unlawfully with the intention of depriving the owner or any other person having a right to that property permanently. [see: **Criminal Law, 5<sup>th</sup> ed, C R Snyman at pages 483 - 486**].

[257] Accused 1 must accordingly be convicted on the competent verdict of theft of the motor vehicle.

[258] Snyman, in discussing why South African law does not recognise accessories after the fact in theft explains at pages 509-510 that since theft is a continuing offence, there can be no perpetrator who assists the original thief after theft has been completed. [see: **S v Morgan & others 1993 (2) SACR 134(A)**].

[259] In this case, Accused 1 admitted that he abandoned the car with the intention of not returning it to the deceased or his heirs. While the car remained under the control of accused 1 and later was abandoned, accused 2 and 3 led the police and the Danish son and daughter of the deceased to believe that they had no way of establishing where the car was nor where the deceased was. They are accordingly guilty of theft of the Mazda motor vehicle that belonged to the deceased.

[260] The state has conceded that the deceased's body was found with the wristwatch on it. No evidence was adduced about the deceased's alleged missing gold ring and so no finding can be made on the alleged theft of the ring and wristwatch.

### **Murder:**

[261] Finn said that accused 1 was in the house when he last saw the deceased the night before he disappeared. Finn was uncertain whether



accused 1 was downstairs or where in the house he was at the time. The defence did not challenge this evidence.

[262] It is patently clear that for accused 1 to succeed with his admission that he killed the deceased, without the knowledge of accused 2 and 3, he needed to provide an explanation of how he gained entry to the house, which will not implicate accused 2 and 3 in him gaining entry or in knowing that he was in the house then.

[263] To achieve this end, accused 1 came up with an elaborate but wholly unexplained and unconvincing account of how he opened a sliding door that was locked from inside.

[264] Accused 3, as the caretaker of the house, said that she was not aware that anyone could enter the house through that sliding door. She said that sliding door could only be opened from the inside and she could not open it from outside.

[265] Accused 3 said that she usually came into the house in the morning through a kitchen sliding door that the deceased would leave open after watching the view. If that door was not opened, she would fetch her house keys and open the side door in the laundry. She confirmed that accused 1 did

not have keys to the house. She said that if accused 1 arrived suddenly at the house, she would find him outside on the patio upstairs.

[266] Accused 1's version of how he came to be at the house early on 14 January 2008 falls to be rejected for all of the above reasons.

[267] Accused 1 said that when he heard a noise in the house that morning, he encountered the deceased making coffee and the deceased offered him some. They then had a discussion about the work that accused 1 was meant to be doing at the house. It is unlikely that the deceased would express no surprise at finding accused 1 in his home so early without anyone having opened a door for him.

[268] The evidence has to be evaluated with reference to the probabilities. It is improbable that the deceased would be content with accused 1 entering the house late at night or early in the morning through unconventional means, especially since, the deceased, on the version of accused 1, was anxious that accused 1 finish work which was overdue and was not pleased with him.

[269] The forensic evidence showed that traces of large quantities of blood were found in the garage and in the flat-let. Traces of blood were also found in the bedroom and bathroom used by the deceased, the laundry, the steps and wall leading to the garage and at the kitchen door. None of those could be

positively identified as belonging to the deceased. The blood at the bottom of the wardrobe in the deceased's bedroom, at the kitchen door's blinds and on the tiled floor in the flat-let were all found to belong to accused 1. They did not constitute large areas of blood.

[270] Accused 1's footprint made in blood was also found on the steps leading into the garage. Since it is common cause between the state and accused 1 that the body of the deceased was loaded into the boot of the Mazda vehicle which was in the garage at the time when the body was put in it, one would expect to find traces of large quantities of blood in the garage. Hence the forensic evidence showed blood smear patterns in the garage. Blood smear patterns, a toe print and shoe prints in blood, were also found in the flatlet.

[271] On the evidence of accused 3 and the statement that accused 1 made to the police, it is clear that accused 1 only had a small injury on his left arm. Dr Viljoen, the district surgeon who saw accused 1 after he gave his statement to the police, said in the J88 form completed for accused 1, that he had two 1 cm lacerations on the left arm. That injury of accused 1 could clearly not account for the large amount of blood traces found. When regard is had to the 48 stab wounds sustained by the deceased, then it is clear that he bled profusely before he died. Dr Liebenberg, confirmed that the deceased would have suffered blood loss.

[272] The blood of the deceased was found in the boot of the Mazda and on the bumper of the white Toyota that was parked in the garage at the time when the body of the deceased was placed in the boot of the Mazda.

[273] Accused 3 admitted that she bought multi-gel and she and accused 2 cleaned and washed down tiled surfaces with the gel. Despite her denial that she cleaned the bathroom of the deceased and the garage, she admitted cleaning the laundry floor. Possible blood was found with the application of Luminol on the tiled floor of the laundry and is visible on photos 36 and 37 of "Exhibit Q". It is evident that accused 3 attempted to distance herself from having cleaned the garage and bedroom of the deceased in an effort to exculpate herself.

[274] Although the blood traces could not be positively identified as belonging to the deceased, the forensic expert, Mr Boltman indicated clearly that a positive conclusion could not be drawn precisely because the blood had been diluted to such an extent that it had insufficient DNA profile material.

[275] Confirmatory tests conducted on suspected blood led to the conclusion that DNA results or partial results that were obtained from swabs marked: "AD, AL, AO, AK, AH, AE, AM, CA and BA" showed the presence of human blood.

[276] Since the state and accused 1 agree that the deceased was killed inside the house, it is reasonable to infer that the large traces of blood is that of the deceased.

[277] Dr Liebenberg said that there were no defensive wounds on the deceased, save for a small cut on the wrist. Dr Liebenberg said that it is instinctive for a person to fend off blows. In addition to the 48 stab wounds inflicted upon the deceased, he had a ligature around his neck and a fracture to the thyroid cartilage and hyoid bone which indicates strangulation. She also found a complete fracture between the 5<sup>th</sup> and 6<sup>th</sup> vertebrae which she said was caused by a jerking, backward movement of the head. She found tramline abrasions on the top of the head and further abrasions on the side and back of the head which indicate blunt force trauma.

[278] The number of superficial stab wounds show that deceased was attacked with the intention of initially bringing him to submission. Dr Liebenberg said that the stab wounds caused subcutaneous bleeding and so they were not immediately fatal. From those wounds, if left unattended, the deceased would have bled to death within 30 minutes.

[279] This shows that initially, the intention was not to kill him swiftly. The further deep wounds, fractures, abrasions and strangulation were inflicted to ensure that he was finally killed.

[280] Accused 1 testified about the attack on the deceased which culminated in the death of the deceased. He alleged that he was high on drugs and alcohol and could not remember inflicting any blows to the deceased's body, yet he can remember in fine detail all the events leading up to those moments and all the subsequent events. Accused 1's selective memory is completely inexplicable.

[281] It is common cause that the carpet in the deceased's bedroom was replaced on Tuesday 15 January 2008.

[282] The State contends that the replacement of the carpet is connected to the assault on the deceased in the early hours of Monday 14 January. The State further contends that the replacement took place urgently to destroy evidence and to conceal at least some of the circumstances surrounding the death of the deceased and that all three accused were involved in the latter.

[283] Reasons advanced by the defence were that the carpet was replaced in the process of renovation because of damp and mould that had spoiled the carpet. According to accused 1 and 3 the carpet was purchased by them and they made all the arrangements for the fitting of the new carpet.

[284] Mr Reinhardt Isaacs was a credible witness whose evidence was not disturbed during cross examination. He testified that he saw all three accused

come into Mats Carpet's shop at 17h00 on 14 January to buy a carpet and arrange for it to be installed the same day but they agreed that the carpet could be installed early the next morning when Mr Isaacs said it was not possible to do it the same day. Isaacs was aware that they had been at the shop earlier on that day when he was not present.

[285] According to Isaacs, on 15 January 2008, accused 2 was waiting in the Land Rover outside the carpet shop with a male and Isaacs told accused 2 that the workmen were just loading. That evidence was not disputed by accused 2's attorney during cross examination of Isaacs. Isaacs also said accused 2 wanted a second-hand carpet. It indicates that accused 2 did not care that a second hand carpet would be installed, as she must have known that she would not need to explain it to the deceased.

[286] A further curious aspect in the conduct of the accused when dealing with Isaacs, is accused 2's insistence on no receipt and in giving an incorrect street no.

[287] Accused 1 and 3 say they did not deal with Isaacs yet there are several documents showing the receipt, the weekly planner and the message book written in Isaacs' handwriting.

[288] Tokwe said that accused 2 opened the house for him and showed him in which room the carpet should be fitted. Clearly Tokwe made an error on this

aspect as Isaacs and Miller both place accused 2 outside the carpet shop on 15 January 2008.

[289] Tokwe also smelled fresh paint in the bedroom of the deceased. This evidence is supported by Denver Miller.

[290] Veronica Titus saw accused 3 at her shop at approximately 8h45 am and she saw accused 3 climb into the orange Land Rover driven by a lady. Accused 3's evidence is that on 14 and 15 January, only accused 2 drove the Land Rover. Clearly Titus saw accused 2 drive away from her shop at 8h45 am with accused 3 on 14 January 2008.

[291] Denver Miller's testimony is that he saw accused 1 and 2 enter the carpet shop at approximately 8h30 am on 14 January 2008. Accused 2's counsel put it to Miller that she came to the carpet shop on 15 January 2008 to fetch the carpet staff but was told that they had already left.

[292] The evidence of the staff at the carpet shop clearly place all three accused as being involved in seeking to purchase the carpet early in the morning soon after the deceased was killed.

[293] This is an indication that accused 2 knew that the carpet was being installed on 15 January 2008 and was in great haste to facilitate the carpet



installation at a time when she had not yet reported the deceased as a missing person.

[294] Isaacs evidence supported by the evidence of Miller has to be accepted and the evidence of the accused on the reason for installing the carpet must be rejected.

[295] Accused 1 and 3 's evidence that they bought the carpet without accused 2 is a strange attempt to distance accused 2 from what would otherwise have been innocent conduct.

[296] Colonel Kock of the Forensic Science Laboratory gave evidence that a number of stains resembling blood was found on the vertical surfaces in the bedroom on 23 January. Application of luminol to the tiled floor of the en-suite bathroom also showed the presence of blood. The newly fitted carpet was removed and the cement floor exposed. According to Kock it was a clean cement floor and there was nothing out of the ordinary in respect of the floor. The underfelt was in good condition. Testing of the floor for possible blood produced a negative result. This would support an inference that the old carpet protected the floor against possible blood stains.

[297] Greeff was present and witnessed all of the above procedures and gave evidence to this effect. Neither Kock nor Greeff's evidence on this aspect was challenged in cross-examination by any of the accused.

[298] Miller found remaining underfelt and the centre of the floor in the deceased's bedroom to be moist.

[299] Accused 1's evidence that there was no damp in the centre of the floor contradicts what Miller found. Accused 1 said he removed the carpet on 7 January 2008 and left the floor to dry.

[300] It is inconceivable that the moisture that Miller saw on 15 January 2008 would be the damp which accused 1 and 3 alleged was present on the perimeter of the external walls in the deceased's bedroom.

[301] According to accused 3, she locked the door after 8h00am Monday 14 January to protect the children against exposed nails. The exposed nails and the children's safety was however not a concern from Monday to Sunday the previous week. Finn was surprised to find the door locked early on Monday the 14th. Accused 2, only reported the deceased missing once the carpet had been replaced. Accused 3's evidence that Geldenhuys was informed on 16 January of the damp problem throughout the house and the replacement of the carpet in the deceased's bedroom was not put to Geldenhuys. Accused 3's evidence in this regard has to be rejected as not reasonably possibly true.

[302] The above assertions by the defence do not support a finding that the carpet was replaced in the process of renovation because of mould and damp

in the room but rather that it had been replaced **urgently** in order to destroy and conceal evidence.

[303] Finn testified that he heard the deceased calling out to accused 2 to help him while he was downstairs in the house on the last night Finn ever heard or saw the deceased. Finn also heard accused 2 or 3 say 'how could you'.

[304] It is highly improbable that the deceased would have remained silent once 48, ante-mortem stab wounds were inflicted on him. Dr Liebenberg said those wounds would not have been painless.

[305] Accused 2 slept upstairs in a bedroom near Finn. It is even more unlikely that accused 2 would not hear any crying or shouting by the deceased while he endured the pain associated with being stabbed. Finn clearly heard some noise and he was sleeping upstairs.

[306] Accused 1 dressed the deceased's body in golf clothes and disposed of the body and car with the golf clubs in it, to create the impression that the deceased was high-jacked while going to play golf. In his statement to the police, he said that he attacked the deceased after the latter had returned from playing golf.

[307] Conveniently, accused 2 and 3 arrive at the conclusion that the deceased went missing after leaving home to play golf. Accused 2 reported to the police that the deceased went missing after going to play golf. She provides the police with a detailed description of the clothes he wore when he left home. The t-shirt, short pants and sneakers described, were later found to be similar to what he wore when his body was found.

[308] Accused 2 told Mads Kjaergard that she did not see the deceased leave the house but the deceased told her he was going out to play golf. Her description to the police of his clothes remains unexplained as accused 2 elected not to testify. It is clear that all three accused co-operated with each other in a manner which would have the police and the Danish family believe that the deceased went missing after going to play golf.

[309] In **S v Boesak 2001 (1) SACR 1 (CC)** at 11d – 12a the court said the following:

*“The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching*

*to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in **Osman and Another v Attorney-General, Transvaal**, when he said the following:*

*'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'*"

[310] Accordingly accused 2's failure to testify, leaves the state's case concerning her involvement in concealing the death of the deceased unanswered.

[311] Mr Mzamo, said that a lady who told him she was the wife of the deceased called him at 11am on 14 January to find out if the deceased played golf that day. During cross examination by accused 2's counsel, the telephone call allegedly made by accused 2 was not challenged. Once again, the court was provided with no explanation why accused 2 would make that inquiry if the deceased had indeed said goodbye and told her that he is going to play golf and if accused 3's evidence is correct, that she and accused 2 only became concerned about the deceased much later on 14 January at approximately 17h00.

[312] Accused 1 said he could have dropped blood in the bathroom of accused 3's flat-let and not on the floor of the main part of the flat-let. This was after he was already dressed in clean clothes.

[313] Accused 3 said there were two drops of blood on the floor of the main part of the flat-let which she dabbed up. The forensic evidence of Van der Westhuizen and Kock described large areas with shoe prints, a toe print and smear marks, all in blood in the flatlet.

[314] Most of the traces of blood were also diluted. According to the forensic expert, water alone could dilute blood to such an extent that a positive DNA identification is not possible. Accused 1's evidence of cleaning up his blood in the main house did not include cleaning up in the flatlet.

[315] Accused 3 must have, at the very least, seen accused 1 covered in the blood of the deceased, as he entered her flat or when she eventually went into her flat after the deceased was killed, she would have seen the blood on the floor. Her evidence of two drops of blood on the flatlet floor must be rejected as not being reasonably possibly true

[316] Mads testified, the deceased used house keys and the remote control for the gate with the car keys when he was in South Africa in 2007. Yet accused 3 told the police and the Danish family that the deceased left home on 14 January without the keys of the house.

[317] Accused 2 and 3's disavowing of all knowledge about the brutal and sustained attack upon the deceased in his own home where they lived as well, rings hollow.

[318] Accused 2 and 3 had no factual basis for concluding that the deceased had gone out to play golf on the morning of 14 January 2008.

[319] Accused 2 claimed to have no knowledge of the deceased's injury or death by reporting him as a missing person. She acquiesced in accused 3's explanation for why the deceased would not have taken the house keys with him. She drove accused 3 to Bastra's shop to buy the multi-gel early in the morning of 14 January. She was instrumental in ordering and paying for the

replacement of the carpet in the deceased's room early that morning. She assisted accused 3 in washing down surfaces in the house with, inter alia, multi-gel. She led Anita Botha, Chris Petty, Desmond Davis, the Danish family and the police to believe that the deceased definitely went out to play golf early that morning and disappeared.

[320] Murder is defined as the unlawful, intentional causing of the death of another person. Accused 1 admitted that he caused the death of the deceased. He raised his lack of intent as a defence to murder but his selective memory and the nature and extent of the assault together with the injuries he caused, proves his intent.

**Accessory after the fact:**

[321] The state did not show that accused 2 was beyond any reasonable doubt, present when the fatal blows were dealt to the deceased. The state adduced no evidence that accused 2 was aware that the deceased was being killed and actively associated herself with the killing.

[322] The evidence proves beyond reasonable doubt, that accused 2 assisted in concealing the fact that the deceased was murdered by accused 1 in his house.



[323] Accused 3 lived in the flat-let and apart from Finn's evidence that the voice he heard could have been that of accused 2 or 3, there is no other evidence placing accused 3 in the house at the time when accused 1 killed the deceased.

[324] Accused 3 clearly took it upon herself to cover the tracks of accused 1 and to distance accused 2 from any knowledge of the murder.

[325] An accessory after the fact is defined as a person who assists the perpetrator unlawfully and intentionally after the offence has been completed, to avoid being apprehended and charged with the offence. An accessory after the fact does not further the commission of the offence but conceals the perpetrator's involvement in the offence.

[326] In the absence of evidence showing beyond reasonable doubt that accused 2 and 3 were present while the deceased was being killed and in some way aided accused 1 and in so doing helped cause the murder, accused 2 and 3 cannot be co perpetrators with accused 1 nor can they be found to be accomplices to accused 1 on the murder count.

[327] It is precisely because it is often difficult to prove causation in murder where multiple perpetrators are alleged, that the doctrine of common purpose was introduced into the law. The doctrine requires a co- perpetrator to commit

an act which associates him or her with the misconduct of the primary perpetrator. [**S v Safatsa & others 1988 (1) SA 868 (A); S v Mgedezi & others 1989 (1) SA 687 (A); S v Govender & others 2004(2) SACR 381 (SCA); S v Sibeko & another 2004 (2) SACR 22 (SCA)**]. The state has been unable to adduce evidence of an act of association committed by accused 2 and 3 at the time when the deceased was being assaulted.

[328] Accused 3 has been shown to have assisted accused 2 in contriving a story that the deceased went missing while going to play golf.

[329] Accused 2 and 3 however assisted in concealing the fact that the deceased was murdered in his home by accused 1 by falsely alleging that the deceased went missing after going out to play golf, by replacing a carpet in the deceased's room and by diluting the traces of blood found in the house and flat-let to such an extent that very little positive identification through DNA could be obtained.

[330] The evidence that leads the court to conclude that accused 2 ought to have heard the deceased crying out in pain while being attacked, does not, despite an answer by a female voice saying: *"how could you"*, conclusively prove that accused 2 was present during the attack.

[331] Section 257 of the Criminal Procedure Act reads as follows:

***“Accessory after the fact***

*If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence of which he may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence, and shall, in the absence of any punishment expressly provided by law, be liable to punishment at the discretion of the court. Provided that such punishment shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory.”*

[332] In **S v Phallo & others 1999 (2) SACR 558 (SCA)**, it was held that a failure to report a crime alone does not make a person an accessory after the fact. There has to be some other material assistance given to the main perpetrator.

[333] Accessory after the fact to murder is a statutory offence. According to the above definition, accused 2 and 3 are accessories after the fact on the murder count.

**IT IS ORDERED THAT:**

1. On count 1, accused 1, is guilty of **theft of the motor vehicle**;
2. On count 1, accused 2 is guilty of **theft of the motor vehicle**;
3. On count 1, accused 3 is guilty of **theft of the motor vehicle**;
4. On count 2, accused 1 is guilty of **murder**;
5. On count 2, accused 2 is guilty of **accessory after the fact to murder**;
6. On count 2, accused 3 is guilty of **accessory after the fact to murder**.



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ALLIE, J