

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

7/1/56

Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

Handwritten initials

RADA K. NAIDOO

Appellant.

versus/teen

THE QUEEN

Respondent.

Appellant's Attorney *George P. ...* Respondent's Attorney *C. ...*
Prokureur van Appellant Prokureur van Respondent

Appellant's Advocate *H.G. ...* Respondent's Advocate *J. Liebenberg*
Advokaat van Appellant Advokaat van Respondent

Leave granted

Set down for hearing on: Monday, 4th June, 1956
Op die rol geplaas vir verhoor op: -

(W.L.D.)
1, 3, 5, 7, 8

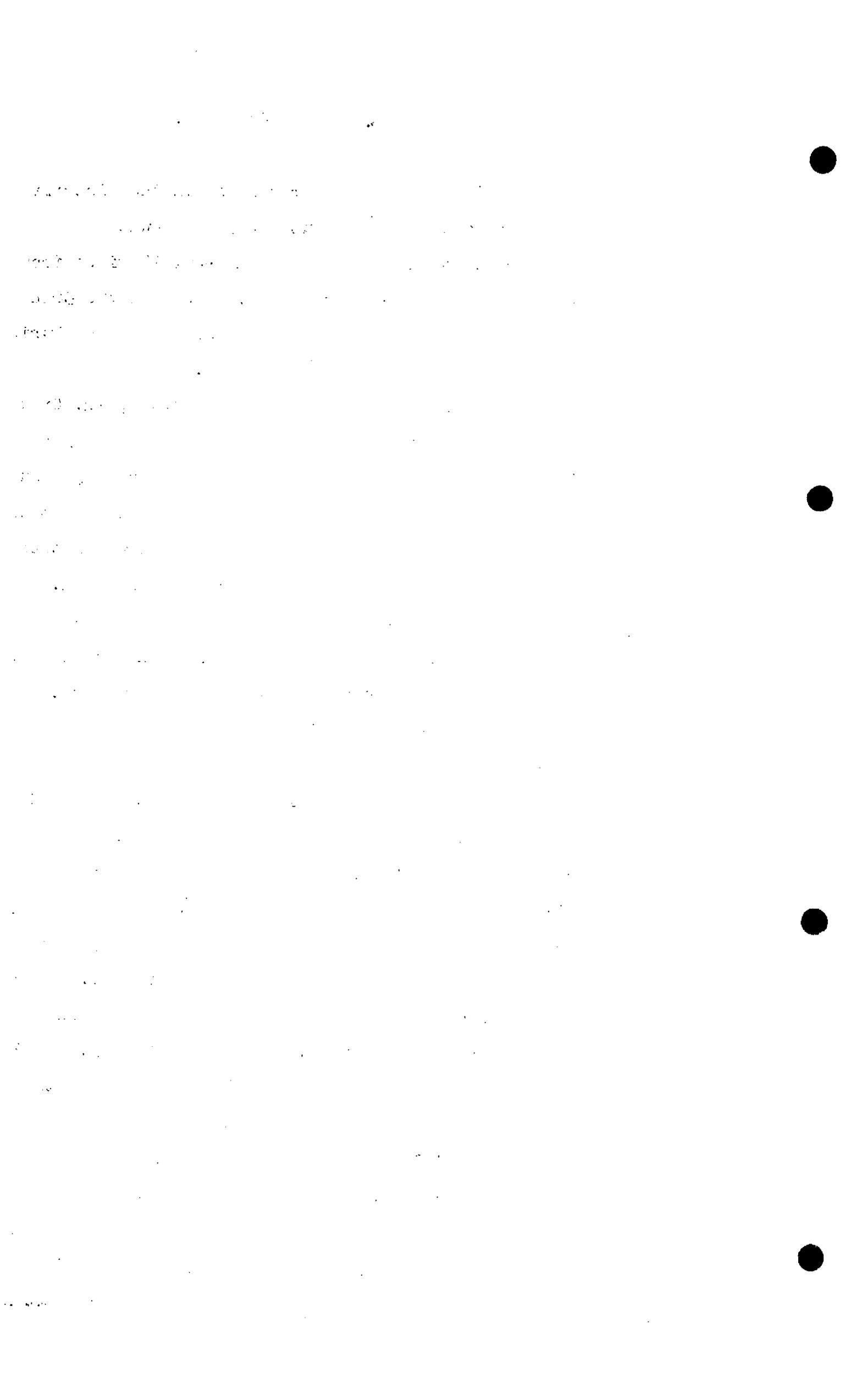
9:50 - 12:45. (C.A.V.)

Appeal dismissed
Kenlums C. Hunter, Skyn,
Rignolds, + v. Blerk (A). } *McCarte*
App. 11/6/56

Narsoo Naidoo at or near Bronkhorst in the district of Johannesburg on or about the 3rd of June 1955. Bronkhorst is the name of a farm about 18 miles from Johannesburg near Jacksonsdrift. There on the 30th of June 1955 the body of the deceased was found buried in a shallow grave in a mealie land.

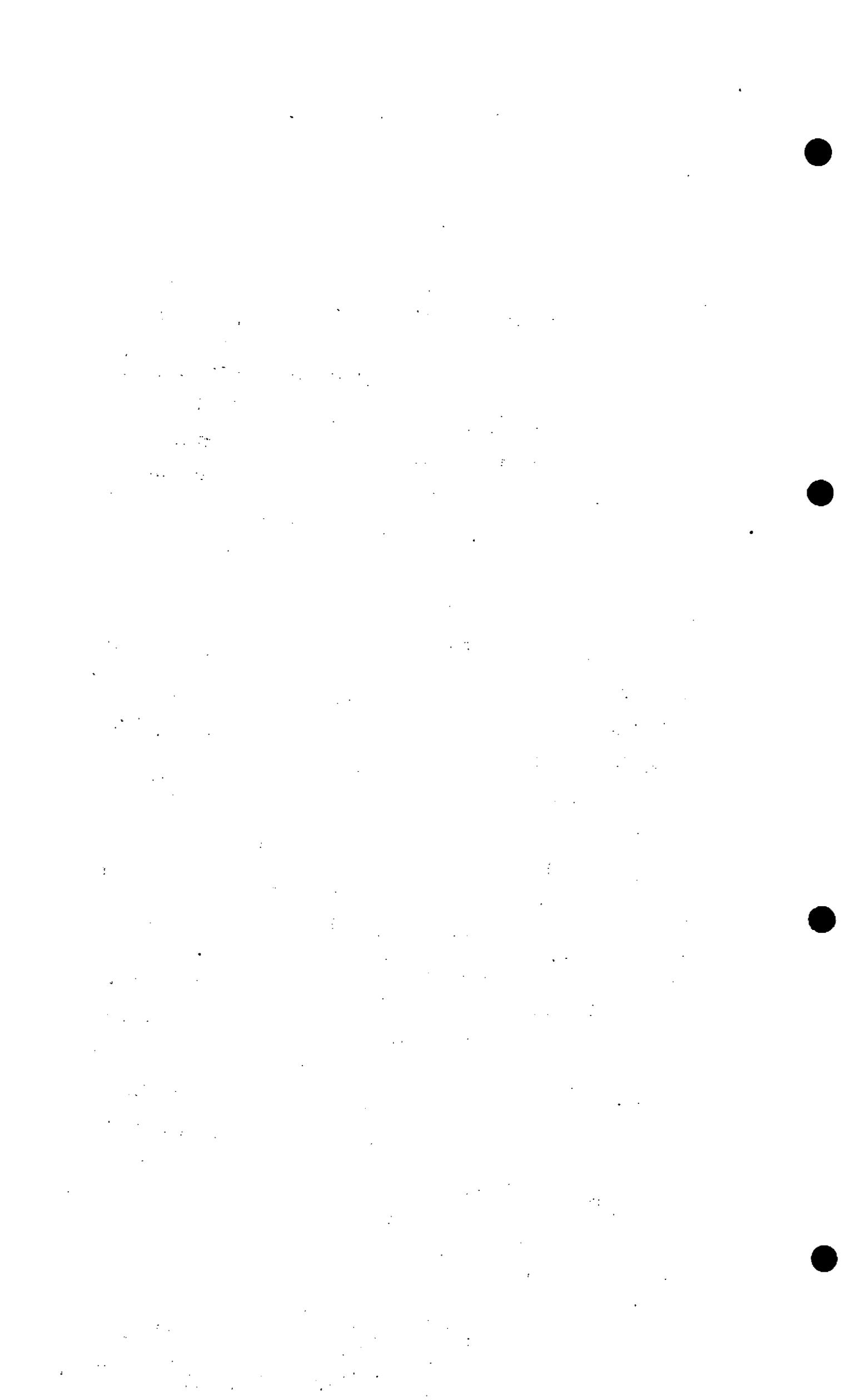
The district surgeon of Johannesburg, Dr. Crause who held the post-mortem examination on the body on the 4th of July 1955 found that death was caused by a gunshot wound penetrating into the heart. The bullet which entered the body in the front of the left upper chest was found under the skin in the back of the body. Another bullet entrance wound of about $\frac{1}{8}$ " in diameter was found above the left eye and the spent bullet was recovered from the cranial contents of the brain. Dr. Crause expressed an opinion that the deceased was shot in the head after death or just at the final stages of life. He also found a $1\frac{1}{2}$ " long oblique laceration on the left of the forehead which, he said, would have caused profuse bleeding. The deceased was last seen alive on Friday the 3rd of June 1955. He was employed by a firm of Produce dealers in Bree street, Johannesburg. He left his place of work at about 5 p.m. and it is common cause that he was in the company of the accused and some other persons later that day. It is also common cause that the accused quarrelled with the deceased and that he seriously assaulted the deceased at about 6 o'clock that same afternoon. The accused who lived in Newcastle and carried on business as a herbalist was the owner of several shops in Natal and two in Johannesburg; the one at 7a Von Weilligh

/ street ...



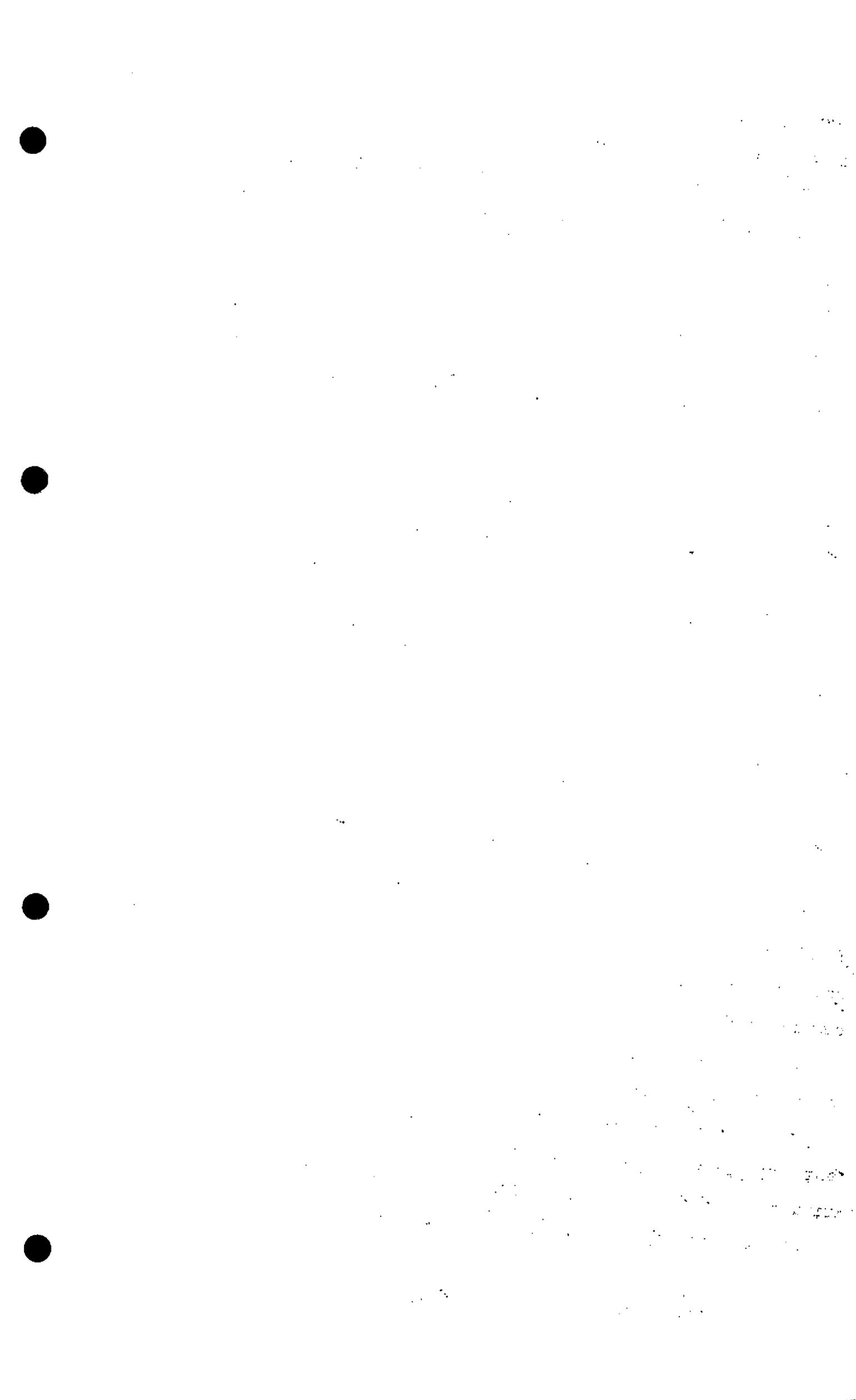
street and the other in Diagonal street. The shop in Von Weilligh street was managed by one Michael Tommy, a brother in law of the accused, and certain Billy Francis a nephew of the accused's wife was employed as an assistant. On the 2nd of June 1955 the accused accompanied by his wife, a European van Staden, one Nari Govender and a coloured family left Newcastle for Johannesburg in a station wagon belonging to the accused. The party arrived at the accused's shop in
10 Von Weilligh street between 5.30 and 6 o'clock in the afternoon shortly before the closing time of the shop. The accused, his wife, van Staden and Nari Govender went into the shop but after a short while van Staden returned to the car and from under the seat removed a .22 rifle which was broken into two parts, which could very easily be assembled by putting the barrel into the slot and fastening it with a thumb screw. He carried the rifle and also two sacks containing herbs into the shop and placed the rifle behind the counter.
20 At the request of the accused Francis and the European van Staden drove the coloured family to a house in Ophirton. Van Staden says that he did not know that the parcel which he removed from the car was a gun and he denied ever having seen the gun before. The accused and Francis, however, say that the gun was not wrapped up. On the other hand Michael Tommy told the court that it was partly wrapped up but when van Staden was asked what he was doing with the gun he replied that he was having it repaired. That night van Staden and Billy Francis slept in the same room at the house
30 of Francis' sister in Fordsburg. On Friday the 3rd of June 1955 Michael and Nari Govender were at the von

/Weilligh ...



Weilligh street shop from 7 o'clock in the morning until shortly after closing time at 6 p.m. The native employee Johannes Martiens was there most of the time. When Billy arrived at the shop at about 11.30 van Staden was already there and the accused who had been there for about 15 minutes earlier in the morning returned again between 1 and 2 o'clock in the afternoon. Later that afternoon between 4 and 5 o'clock the accused, his wife, Billy Francis, and van Staden left the shop
10 in the station wagon driven by the accused, and the party returned at about 5.30 p.m. with the deceased as an additional passenger. Although conflicting versions are given by the accused, van Staden and Francis, as to the purpose of the trip and the manner in which the deceased was induced to get into the accused's car they all agree that they first went to the accused's Diagonal street shop, from there to a place in Fordsburg and then to Bree street where the deceased was found standing on the pavement. The
20 accused stopped his vehicle close to the deceased, then went up to him and after a short conversation both got into the car which was then driven by Billy Francis back to the Von Weilligh street shop on the accused's instructions. The deceased sat between the accused and van Staden in the back while the accused's wife occupied the front seat next to Billy. The accused admits that the excursion was made to find the deceased and that it was his intention to give the deceased a sound thrashing for interfering in his
30 domestic, personal and business affairs, and he says that van Staden and Francis were fully aware of that

/ purpose ...



purpose . The accused's story is that he was living happily with his wife from the time of their marriage according to Indianrights in 1945 until August 1954 when he discovered his wife had illicit relations with the deceased. This led to frequent quarrels and continued unhappiness. On more than one occasion he assaulted his wife on account of her associations with the deceased. He spoke to the deceased but despite his undertaking to discontinue the friendship they continued to arrange secret meetings. He says further that ~~part~~ from estranging his wife's affections the deceased kept the police informed of his unlawful visits to the Transvaal as a prohibited immigrant in the Province, and that as a result of frequent warnings of prosecution from the police and Immigration authorities he has had to curtail his visits much to the detriment of his business in Johannesburg. The accused says/^{that} between 3 and 4 o'clock in the afternoon on the 3rd of June 1955 when he returned to the shop from the lavatory at the back of the premises he heard his wife speaking on the telephone. Becoming suspicious he tip-toed towards her, grabbed the telephone and while threatening her with clenched fist he made signs to her to carry on with the conversation. He then overheard the appointment made by the deceased to meet his wife at a place in Fordsburg or in Bree street. According to his evidence it was this conversation which was the immediate cause of the steps taken to get the deceased into the shop. He ordered his wife to show him the appointed places and van Staden and Francis were taken along to assist him should it become necessary

to resort to violence. To some extent the accused's evidence of his domestic trouble is corroborated by Billy Francis and Michael Tommy. Billy says that he had heard that the accused had trouble with his wife and Michael says that the accused has spoken of such troubles, but neither will admit that any mention was made of the deceased as being the cause of the trouble.

The deceased's wife told the court that she has no knowledge of any relationship between her husband and the accused's wife. The evidence as to what happened to the deceased in the shop premises in Von Weilligh street is very unsatisfactory. It is however, clear that he was seriously assaulted by the accused. According to the accused he and his wife and the deceased went into a store room which is separated from the shop by a passage leading into Grahamstown street. At that time Michael and Nari Govender were in the front of the shop and van Staden was asked to remain in the back portion in case his assistance would be required. The accused says that he taxed the deceased on that afternoon with having illicit relations with his wife and then gave the deceased a severe beating with a hippopotamus hide sjambok and his fists. He says that his wife endeavoured to prevent him from assaulting the deceased and afterwards attempted to commit suicide by taking poison. He however, snatched it from her hand before she could drink it. As a result of the assault the deceased was bleeding profusely from his nose and a cut in the head. The accused says that the deceased first wiped off the blood with a handkerchief which he gave to him and afterwards with newspapers. Billy

/ Francis...

Francis who denies all knowledge of the actual assault says that he saw the deceased at a tap behind the shop wiping his face with newspapers. At the accused's request he brought more newspapers and the newspapers so used by the deceased were later burnt by van Staden on the accused's instructions. Van Staden says that he could hear the accused and the deceased talking to each other and the discussion appeared to be calm and friendly. He left the shop from the back door and did not hear or see anything untoward between the accused and the deceased. It may here be mentioned that van Staden left the impression that he is a completely dishonest witness. He is a person of low moral and social standing, a loafer living rent free in the house belonging to the accused and receiving poor relief contribution from the Magistrate of Newcastle for himself and his family. His evidence throughout is calculated to exculpate himself from anything which might implicate him with the murder.

20 Nari Govender says that he heard the deceased say "why do you hit me I have not done anything." On taking a glass of water to the accused at the latter's request he saw the deceased sitting on a settee in the back portion of the shop with a fresh cut in his head and the accused standing nearby with a half broken stick resembling a broomstick in his hand. The native Martiens says that he could hear blows being struck and the deceased saying "please don't hit me." He looked through the window of the storeroom and saw the accused's wife taking the sjambok from the accused and she in turn then struck the deceased many blows across the head. The accused, according to Martiens, asked

/ his...

- his wife to leave the deceased alone but on leaving the store-room she again struck the deceased in the face with the open hand, saying to him "do you want me to lose everything, my husband, my children, my estate." Thereafter van Staden struck the deceased two blows on the back with the stick which he found behind the settee.

The evidence of Martiens in regard to the part played by the accused's wife in the assault is wholly in conflict with that of the accused's story who says
10 that his wife attempted to prevent him from assaulting the deceased, and the woman's conduct according to Martiens would also be totally inconsistent with any friendly relationship which might have existed between her and the deceased. Martiens who is a person awaiting trial on a charge of housebreaking and theft has been in contact with the accused in prison and the Crown suggests that for that reason, apart from inherent improbabilities in his story, little credence could be given to his evidence. It is indeed difficult to say whose narrative
20 of the events in the shop should be accepted, as it would seem that every one of the Crown witnesses who was in the shop at the time of the assault was at pains to eliminate himself as a party to the assault. The accused says in view of the serious injuries suffered by the deceased he proposed that the deceased should be taken to hospital. Van Staden, according to the evidence of the accused, expressed the view that in that case they would all get into trouble and suggested that the deceased be removed to the Orange Free State or some other
30 place where he could be detained until he recovered. After that he further suggested that the deceased write a
/ letter ...

letter to his wife to put her mind at ease about his absence. The accused says that he agreed to this course and a letter dictated by the European was thereupon written by the deceased. The letter reads as follows:-

"Dear Vertha,

I am quite O.K. and I am leaving on a holiday which I badly need and deserve because I have over worked myself and I am going far away.

Don't worry about the credits I have worked
10 day and night for you and kids. Don't worry to go to the Police when I am missing.

Concluding with best love to yourself and children.

I remain, Yours faithfully, Ken."

There is no doubt that the deceased was forced to write the letter by means of an assault and threats of further assaults. Judging by the standard of van Staden's knowledge of English as disclosed in his evidence, it is clear that he could not have dictated the letter and it
20 is highly probable that the wording emanated from the mind of the accused. The suggestion that the letter was written to allay suspicion for a period of two or three days while the deceased recuperated is a fatuous one. No reasonable person, and the accused is by no means unintelligent - would only in order to escape immediate prosecution for an assault committed under provocation unlawfully imprison a man thereby creating a much more serious offence without mitigating the crime of assault. In the light of the circumstances of
30 the assault and the subsequent events we have come to the conclusion that the writing of the letter was part of a pre-arranged plan to murder the deceased and to

/ avoid ...

avoid immediate police investigation into the circumstances of his disappearance. After the letter had been written the deceased was taken in the station wagon to the farm Bronkhorst near Jacksonsdrift about 18 miles from Johannesburg. The deceased was given a place between the accused and van Staden on the seat in the back, and the accused's wife sat in front next to Billy Francis who was the driver. Although van Staden and Francis say that there was no conversation between the occupants
10 of the vehicle on the way to Jacksonsdrift, the accused told us that he and the deceased apologised to each other for what had happened and that the relationship between them was then quite friendly. The deceased according to him asked him where he was being taken to and was told by the accused that he was afraid that he would report him to the police and for that reason he would be kept on a farm for a few days until he recovered from his injuries. Why the accused should be afraid of a
20 complaint being made to the police after the exchange of apologies and assist to unlawfully detain the deceased merely to avoid a possible charge of assault, is completely incomprehensible. His story is so inherently improbable that it is not worthy of any credence at all. Van Staden and Billy Francis say when they arrived at the farm the accused told them to get off at a spot close to where the road to Samuel's house branches off from the Grasmere road about 800 yards from the house, and that the accused, his wife and the deceased continued on their journey to Samuel's house. Some time later they
30 heard a shot in the direction in which the accused had gone. Van Staden denies all knowledge of the presence of the rifle in the car and Francis says he was surprised

/ when ...

when he heard the shot. He asked van Staden what it could be and van Staden said "hier word ons vanaand ver-moor." The accused on the other hand told the court that van Staden and Francis accompanied him all the way to the house of Samuel and that they remained with the deceased while he and his wife went to interview Samuel. Samuel's evidence that he saw several people leaving the car confirms the accused's statement. As to what happened that night on the farm we have, apart from the 10 different versions given by the accused, van Staden and Francis' evidence, and the evidence of Samuel, his wife Emily a native woman and Francina.

The accused's case is that he told Samuel that he had assaulted a man who was causing him a great deal of trouble and asked Samuel to keep that man on the farm for about 3 or 4 days until he recovered from his injuries. He says that after some persuasion Samuel agreed and he then gave Samuel the rifle and cartridges merely for the purpose of frightening the deceased should he 20 endeavour to escape. The accused, deceased and Samuel thereupon walked to the lower end of the mealie land towards a hut and when they reached the fence, Samuel took charge of the deceased and the accused left in the station wagon which had followed them and drove to Newcastle. At Vereeniging the letter addressed to the deceased's wife was posted by van Staden.

Samuel denies that the accused asked him to take care of the deceased. He says that the accused told him that he had killed a man who had been worrying him and asked him to show him a place where he could bury 30 the corpse. He at first refused but was eventually persuaded to accede to the accused's request. The

/ accused ...

accused and the accused's wife went with him to the store-room next to his house where he gave a spade to the accused and then he went with the accused to the land where he pointed out an area where the body could be buried. The accused's wife left him at the store-room and went in the direction where the car was parked. While in the mealie land Samuel's attention was attracted by noises coming from the native woman and two children who were driving two donkeys towards his house. It was
10 Francina, a neighbour, who told him that she found two donkeys straying in his land. He thanked her and took charge of the donkeys. On his way to the kraal he saw several persons leaving the accused's car and on passing the car saw that it was being reversed towards some stones. He warned the driver but the driver managed to get into the road and drove to the mealie land. Samuel went to bed and after he had been asleep for an hour or more was awakened by the accused knocking on the door. It was then that the accused told him that he had a
20 rifle in two parts which was wrapped in paper and asked him to keep it for him as he was afraid to pass through Volksrust in possession of the rifle. Samuel took the gun and the match box with the cartridges and these were placed in a money box which he kept in his room.

On the 30th of June 1955 the body of the deceased was found by the police buried in the mealie land under about 2ft. of soil. Counsel for the defence submitted that there is no evidence to prove that the accused shot the deceased and that the possibility that the deceased
30 was shot by Samuel cannot be excluded. Samuel was convicted as an accessory after the fact to the murder of the deceased, and sentenced to six months imprisonment

/ suspended ...

suspended for a period of 3 years. He had a strong motive for exculpating himself and for that reason his evidence was scrutinized by this Court with the care that should be taken when considering the evidence of an accomplice. There are some unsatisfactory features in his evidence. He told the Court that he placed the rifle which was wrapped in paper in his box on the 3rd of June 1955 and the rifle had not been touched by him since that date, yet the newspaper covering the rifle
10 when found by the police bore the date the 5th of June 1955. It is therefore clear that someone must have handled the rifle since the day when it was given to Samuel. Samuel explained that he occasionally left the box unlocked and that his wife and children could have interfered with the rifle. His wife denied that she handled the rifle but the possibility remains that it did not escape the curiosity of the children. Another aspect of his evidence which calls for criticism is that he told the court that he had fallen asleep after the
20 accused's first visit and that he was awakened by the accused on the second visit whereas it appears that he stated at the Preparatory Examination and also at his trial that he was awake when the accused knocked at his door. The discrepancy is not of any material importance and little value can be attached to it. Samuel was obviously very frightened in the witness box and this could account for the discrepancies in his evidence.

Counsel for the defence placed great reliance on the evidence of Francina where she says when she saw
30 Samuel coming out of the mealie land it was dusk. He urged that in the light of this evidence the burial of the deceased could not have taken place on the 3rd of

/ June ...

June but on a subsequent date as all the evidence for the Crown as well as the evidence of the accused clearly shows that the accused arrived on the farm well after dark. On reference to the evidence it appears however, that the witness said in chief that it was after dark when she took the donkeys to Samuel's house and in cross examination the following appeared:-

"Do you remember you told the Magistrate when you saw these donkeys it was dusk? Yes I still say so no.

10 Does that mean you had not gone to bed yet? That is so. Your grandchildren were not in bed? They had not gone to bed either." Recalled today, the witness says that when she drove the donkeys to Samuel's house the stars were shining and that one could not identify a person some distance away. She also says that it was a Friday and in this respect corroborates Samuel's evidence and destroys the defence argument that the burial took place on a day subsequent to the 3rd June, which was a Friday. Samuel's huts are fully occupied by

20 members of his family and he says he had no accommodation for any stranger either at his house or elsewhere. His wife Emily states that there was no stranger on the farm the day following the accused's visit. It is indeed difficult to conceive how Samuel could without leaving his own children guard a person who was a prisoner in any place away from his house, and that he should kill the deceased without any motive whatever is equally difficult to understand. If it could be suggested that he killed the deceased when attempting to escape

30 one would expect a shot from behind and not a shot in front of the chest and another in the forehead. We have come to the conclusion that there is no reasonable

/ possibility ...

possibility that the deceased was murdered by Samuel or anyone else, after the 3rd of June. The deceased was in the company and under the control of the accused from the time he was taken to the shop until arrival on the farm. The accused had a grievance against the deceased, he severely assaulted him and forced him to write a letter to his wife for the purpose of allaying suspicion as to his disappearance and with the rifle in the car removed the deceased to the farm after
10 darkness had set in. The spent bullets recovered from the body of the deceased were fired from a rifle of the same calibre as that which the accused had in his possession. The destination was a farm occupied by Samuel with whom he was on friendly terms and who was indebted to him for past favours. The persons whom he had in the car on that journey were all under his authority. Billy Francis a comparative youth was a relative and employee of the accused and van Staden who was an intimate friend and much indebted to the accused
20 admits that he carried out various instructions given to him by the accused earlier that day and the previous day. The accused admitted that when he set out to find the deceased he took Francis and van Staden with him to assist him in case physical violence should become necessary. We have no doubt that both van Staden and Francis had full knowledge of the accused's intention to kill the deceased and that they were taken to the farm to assist him in the commission of the crime. All the circumstances of the case lead to one conclusion,
30 a conclusion which leaves no doubt in our minds, that the accused himself, who was throughout master of the situation, shot the deceased on the way to the farm or

/ at ...

at the farm or that he directed one or other of his party to shoot the deceased. In either case the accused must be held responsible for the death of the deceased. It may also be mentioned that the accused's conduct after the 3rd of June is consistent with that of a person who had committed a major crime. Soon after he was informed by Nari Govender that rumour connected him with the disappearance of the deceased he left Newcastle to stay on a farm at Winterton and
10 from there went to Basutoland where he was found by the police living alone with his wife in a non-European hut in an isolated place high up in the mountains. The accused admitted that he left Newcastle because he feared being implicated with the crime.

On the evidence as a whole we have no reasonable doubt that the accused caused the death of the deceased and we accordingly find him guilty of the crime of murder as alleged.

COURT ADJOURNS FOR 15 minutes.

20

ON RESUMING AT 12.15 p.m.

COUNSEL ADDRESSES THE COURT/

HILL, J:-

In his address to the Court on the question of whether there are circumstances which could reduce the moral guilt of the accused, Mr. Hanson submitted that the accused was provoked to commit the crime by the deceased's persistent interference in his business and domestic affairs and particularly by reason of his belief in the infidelity of the wife with which the
30 deceased was associated. We have a serious doubt as to the truthfulness of the accused's evidence in that

/ respect, ...

respect, but even if it be accepted in favour of the accused it cannot serve as a mitigating circumstance as the crime was planned beforehand and not the result of a sudden impulse in the heat of passion. We therefore find that there are no mitigating circumstances.

REGISTRAR: RADA KRISTNASAMY NAIDOO know you or have you anything to say why sentence of death shall not be passed upon you according to law?

ACCUSED: I would like to be examined by a doctor.

10 HIS LORDSHIP: That can be done.

- SILENCE IS CALLED FOR -

- S E N T E N C E -

HILL, J:-

Rada Kristnasamy Naidoo you have been found guilty of a callous cold blooded and brutal murder, and the only penalty that I can impose is the sentence of death. You will be returned to custody and hanged by the neck until you are dead.

Counsel for Accused applies for leave to appeal.

20 Crown Prosecutor opposes application.

HILL, J: -

Leave is granted to Appeal on the ground that the conviction is against the evidence and the weight of evidence.