



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO.: CC 23/2021

In the matter between:

THE STATE

and

DARRYN WENTZEL

RIAAAN BAARTMAN

JUDGMENT

GQAMANA J

Introduction

- [1] On 7 November 2019, at or near Lawler Street, Schauderville, Gqeberha, Mr *Leonardo Roberts* (hereinafter referred to as “the deceased”), was shot and killed by an unknown person(s). On the same day, approximately at 21h40, Sergeant *Daniels* saw a suspicious silver VW Polo, travelling in Helenvale and directed the driver thereof to pull over. However, the Polo sped off the police pursued it until, it came to a standstill at the end of the road at Chamois Street. Two male persons alighted from it and fired shots at the police. Constable *Njara* was shot in the forehead and had to be rushed to hospital for treatment. The State seeks to impute blame on both accused for the aforementioned incidents and it alleges that these two incidents were committed in contravention of the Prevention of Organised Crime Act 121 of 1998 (POCA).
- [2] The accused are now charged with 12 counts. Counts 1 and 2 are the contravention of section 9(1)(a) and 9(2)(a) of POCA. Count 3 is murder. Counts 4, 7-10 are for attempted murder. Counts 5, 6, 11 and 12 are for unlawful possession of firearms and unlawful possession of ammunition. Both accused pleaded not guilty on all the aforementioned charges and neither of them tendered a plea explanation. As the trial progressed, it became apparent that their defence is that of an *alibi*.
- [3] Although no plea explanation was tendered however, the accused made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977. The details of such admissions are set out in Exhibit A1 and A2. Further the cause of deceased’s death¹ as recorded in the post mortem report

¹ Multiple gunshot wounds to the head and body with blood aspiration.

(Exhibit B) was also admitted. In addition, photographs of the scene at Lawler Street and at Chamois Street were also admitted. Further, the tracker information and the report as to the movement of the Polo vehicle mentioned in paragraph 1 above were also admitted. Because of such admissions the proceedings were curtailed to a greater extent. The State called 10 witnesses to prove its case and I shall deal with the summary of their evidence as and when necessary, below.

Issues and summary of the State's evidence

- [4] The issue in dispute in this case is the identification of the perpetrators. The direct evidence that links the accused to the commission of counts 3-12 is that of Mr *Dimitri Guest* (“*Guest*”), *Daniels* and Sergeant *Manyati*.
- [5] In order to set out the overview of the State's case, I intend to deal with the evidence of *Guest* first. It is common cause that *Guest* knew both accused even prior to the date of the incidents herein. He knew both the accused as members of the Kakdallers/Boomshakas, a gang group operating in the area called “Die Gaat”. He was also a member of the Kakdallers/Boomshakas at some stage prior to this incident.
- [6] *Guest*'s evidence was that on the day in question, he was with both the accused as well as one *Elton Boo* alias “*The Bird*” at the park having some beers. During the course of such social gathering, accused no. 1 suggested that, they should visit his girlfriend *Nay* in Schauderville. They took a taxi to Schauderville. They were joined later by “*Tas*”. They remained at *Nay*'s house until it became dark. *Guest* asked for money from accused no. 1 because he wanted to go home. Accused no. 1 told him to wait as he would arrange a transport. Accused no. 1 contacted *Andrias Masimla* alias

“*Massie*” who then arrived driving a silver VW Polo. When *Massie* arrived, they immediately left *Nay*’s house. Accused no. 1 gave directions as to where “*Massie*” must drive to. His evidence is that accused no. 1 suggested that they must stop at a certain house to buy drugs. *Massie* drove up to a certain street where both accused alighted and proceeded towards house no. 127 Lawler Street. *Tas* warned the accused to be extra vigilant as they were in another gang’s territory. Shortly after the accused alighted from the Polo, *Guest* heard gun shots. Both accused came back and had firearms in their hands. Accused no. 1 jumped back to the car next to the driver in the front passenger seat and accused no. 2 took seat on the rear passenger side behind the driver.

- [7] *Guest* testified that accused no. 1 gave directions to *Massie* as to where to go. Inside the Polo, accused no. 1 mentioned that they had shot someone. It is then that accused no. 2 said that his gun gave him problems. From Lawler Street, they drove towards the direction of Helenvale and while they were driving, he saw a police car with blue lights on trying to stop them. Upon instructions of accused no. 1, *Massie*, did not stop and he proceeded driving following the directions given by accused no. 1. They drove up to the end of the road at Chamois Street where the Polo came to a standstill.
- [8] *Guest* saw that there were police cars behind them with their lights shining straight on the Polo. Again, both accused alighted from the Polo and they were carrying guns. Accused no. 1 alighted from the front passenger door while accused no. 2 got out from the rear passenger door behind the driver. *Guest*, *Massie*, *Tas* and *The Bird* remained inside the Polo. *Guest* also saw both the accused pointing the guns towards the direction of the police and

thereafter he heard gunshots. He was not certain who fired shots.² It is then that he took cover and laid flat down on the backseat for safety. When it became quiet, the police approached the Polo and instructed them to get out of the car. They were assaulted by the police and were later taken from the scene and detained at the police cells.

- [9] The following day or so, *Guest* made a statement to the police and disclosed all the information relevant herein. *Guest* was never charged for any of the offences herein and he was released from custody on Monday, without appearing in court.
- [10] Under cross-examination by Mr Schoonraad (counsel for accused no. 2 then), *Guest* mentioned that, while they were at the park, the accused left and came back and, on their return accused no. 1 mentioned that they now have protection, and they can then go to Schauderville. *Guest* understood him to mean that they had guns with them, although he did not see the guns. *Guest* also testified that accused no. 2 was wearing a black and bright green jacket on top. It was also put to *Guest* that he is falsely implicating the accused because of the sour gripe he had against them relating to drugs and guns that were allegedly stolen from his house and that he is hiding the real perpetrators who were gang members. *Guest* denied such proposition and maintained his version as given under evidence-in-chief. Importantly, for the first time, the accused *alibis* were raised under cross-examination of *Guest*.

² *Mr Guest*: “Puppet and Tikkie upon getting out of the car, I saw them with firearms and they did lift them. Witness was demonstrating, my Lord. But I do not know who among them fired shots or was it the police who fired shots or did they fire shots at each other. That I do not know.”

- [11] The second witness relevant for identification purposes is *Daniels*. He testified that he became suspicious when he saw the aforementioned Polo as they were patrolling in the Helenvale area. He decided to pull it over, but instead of stopping, the driver sped off. His blue lights and siren were activated, but the Polo did not stop. They followed the Polo until it came to a standstill at Chamois Street. When the Polo came to a standstill, two men jumped out and they pointed guns at them, and he froze for a very short period. He was together with Constable *Njara* in his police car and on the second car, it was *Manyati* and Sergeant *Mnqokoma*. The other police vehicle also stopped on the other side and both vehicles' lights were shining on the Polo with their blue lights on. *Daniels* managed to identify accused no. 2 for a few seconds as the person who shot at him. He also mentioned that accused no. 2 was wearing a bright green jacket. Although it was at night, but visibility was clear because the lights of both police cars were shining directly to where the Polo had stopped as depicted in the photo album. The accused fired shots at the police, and they also retaliated. The accused managed to flee down the slope into the area known as "*Die Gaat*".
- [12] Despite vigorous cross-examination, *Daniels* was unshaken. He gave details of his previous encounters with the accused where he searched them, few weeks before this incident. *Daniels* also testified that he knew that both accused were members of the Kakdallers gang. *Daniels* became aware that *Njara* was shot in the forehead, and he called for help. Because there was a delay for the ambulance to arrive, he decided to take *Njara* to hospital in his police vehicle. Later, he returned to the scene and spoke to the investigating officer Sgt *Peta* and reported to him that one of the perpetrators was accused

no. 2 known as “*Tikkie*”. *Daniels* also managed to identify accused no. 2 at a formal photograph identification parade.

- [13] The third witness for identification purposes was *Manyati*. His evidence on his observation from the moment they saw the Polo while they were patrolling in the Helenvale area until it got to a standstill at Chamois Street, corroborated the evidence of *Daniels*. He testified that *Daniels*' car stopped parallel slightly in front of his vehicle on the right and the Polo stopped approximately 12/13 meters in front of them. *Manyati* was able to identify accused no. 1 as the person who alighted from the front passenger side of the Polo carrying a gun in his hands. He further confirmed that the visibility in the area was clear. Accused no. 1 fired shots at them and he also saw that the second perpetrator was also shooting at them because he could see the muzzle flash. He also confirmed that both the perpetrators ran down the slope in the direction of “*Die Gaat*” and disappeared.
- [14] As indicated above the photo album, the car tracker information and report were admitted. The visibility of the area at Chamois Street where the Polo, *Daniels*' and *Manyati*'s vehicles were stationed can be seen from the photo album. In addition, the legal team of the State and the defence, accompanied by the accused attended the crime scene to conduct an inspection *in loco*. The report of such an inspection *in loco* was also placed on record and recorded their agreements on their observations on the visibility of the area. I must add that the parties attended the inspection *in loco* not because there was doubt over any of the evidence given by *Manyati* and *Daniels* but to satisfy themselves for purposes of their respective client's interests. Furthermore, the tracker information and report shows the movement of the

Polo during the relevant time herein. That information about the movement of the Polo corroborated the oral evidence of *Guest*.

- [15] There were other witnesses called by the State but, for purposes of identification, let me pause and consider the accused's alibi defence and their evidence therein.

The accused's alibis

- [16] Starting with accused no. 1, his evidence was that a period before this incident, *Guest* accused him and accused no. 2 of stealing drugs and guns at his house. He testified that *Guest* was a gang member with the allocated duties of hiding guns and drugs. Their conflict could not be resolved by *Bosbyl*. Because of this accusation, *Massie* suggested that they should approach certain individuals at St Albans Prison to intervene and one of them was "*Fresh*".
- [17] On 5 November 2019, both him and accused no. 2 together with *Massie* went to consult with the people at St Albans Prison. They were advised on how to resolve their conflict. From St Albans Prison, they went back to "*Die Gaat*" but they were dropped off at old Stanford Road. As they were proceeding to see *Bosbyl*, they met *Guest* and "*The Bird*". *Guest* threatened them with a firearm which he took out of his waist and pointed at them. They ran in different directions.
- [18] On arrival at his home he conveyed to his mother what had happened and told her that he will seek refuge at his girlfriend's home in Schauderville. He left his home the same day and went into hiding at Schauderville where

he remained in exile until 4 January 2020, when he handed himself over to the police.

- [19] On 7 November 2019, he contacted *Massie* to bring his clothing. When *Massie* came, he was with other people inside his car, and he fled through the backyard and hid himself in the neighbour's yard only to return after *Massie* had left. He did not call any *alibi* witness. He was arrested by Sergeant *Peta* on 4 January 2020 in the presence of his attorney Mr *Roelofse*. He did not give any *alibi* at the time of his arrest.
- [20] Accused no. 2 testified and confirmed the alleged incident that happened on 5 November 2019 on their return from St Albans Prison as per the evidence of accused no. 1. After the alleged incident he went to his uncle's house and slept over for the night. Arrangements were made for him to hide himself in Mossel Bay at *Ryan Wentzel's* house. He left for Mossel Bay on 6 November 2019 by taxi. He remained in Mossel Bay until 3 January 2020, when he returned to Gqeberha and met accused no. 1 at his girlfriend's house. He called his uncle *Ryan* as his *alibi* witness and also *Nicole Hendricks*. I deal in detail with their evidence at paragraphs 33-35 below.

Legal principles

- [21] As a point of departure, it is trite law that in criminal matters the onus rests upon the prosecution to prove its case beyond reasonable doubt. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, even if there are suspicions that the accused was indeed the perpetrator of the crime in question, the accused is entitled to an acquittal.³

³ See *S v T* 2005(2) SACR 318 (E) para 37.

[22] In *S v Van der Meyden*,⁴ Nugent J (then) said the following:

“A court does not base its conclusion, whether it be to convict or acquit, on only part of the evidence. A conclusion which is arrived at must come from all the evidence... . The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that, he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that, the conclusion which is reached (whether it be to convict or to acquit) must account for all evidence. Some of the evidence might be found to be false; some of it might found to be unreliable; and some of it might be found to be only possible false or unreliable; but none of it may simply be ignored.”

[23] Aligned to that, in evaluation of the evidence, the court must weigh up all the elements of the evidence which point to the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides. Once it has done that it must decide whether the balance weighs so heavily in favour of the State to exclude any reasonable doubt about the accused’s guilt.⁵

[24] As indicated above both the accused raised *alibi* defences. In *R v Hlongwane*,⁶ Holmes JA stated the following:

“The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted... . But it is important to point out that in applying this test, the *alibi* does not have to be considered in isolation.”

[25] Also in *S v Liebenberg*,⁷ it was said that:

⁴ 1991 (1) SACR 447 (W) at 449.

⁵ See in this regard: *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

⁶ 1995 (3) SA 377 (A) at 340H.

⁷ 2005 (2) SACR 355 (SCA) para 14.

“Once the trial court accepted that the *alibi* evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecutions had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution’s evidence could not, by itself alone, be sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality of the nature that proved alibi evidence to be false.”

[26] The identification of the accused is at the heart of the instant matter and because of that, the approach to be adopted is that which is set out in *S v Mthetwa*⁸ by *Holmes* JA namely, that:

“... It is not enough for the identifying witness to be honest. The reliability of his observations must also be tested. This depends on various factors such as lighting, visibility, eyesight, the proximity of the witnesses, his opportunity for observation both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused face, voice, built and dress, the result of identification parade, if any and of course the evidence by or on behalf of the accused. The list is not exhaustive. These factors or such of them as applicable in a particular case, are not individually decisive but must be weighed one against the other, in the light of the totality of the evidence and the probabilities.”

Evaluation and discussion

[27] The main witnesses that the State relied upon for purposes of identification are *Guest*, *Daniels* and *Manyati*. *Daniels* knew both the accused even before this incident. On the night in question, he managed to identify only accused no. 2. His evidence was that the visibility where the shooting occurred at Chamois Street was clear because the lights of both police cars were shining on the Polo. He saw accused no. 2 jumping out of the rear passenger door behind the driver. Accused no. 2 was wearing a bright green jacket. When accused no. 2 got out of the Polo, he turned back facing *Daniels* before he

⁸ 1972 (3) SA 766 (A) at 768.

fired shots at them. *Daniels* was at a close proximity to him and there was nothing between him and accused no. 2 that blocked his observation. Although he froze for a moment but that did not interrupt his subjective observations of accused no. 2. He was able to identify accused no. 2 again at the formal photograph identification parade. *Daniels* impressed me as an honest, credible, and reliable witness. He was able to narrate the sequence of events without hesitation. His evidence on the clothing and the shooting incident at Chamois Street was corroborated by *Guest*.

[28] Same with *Manyati*, he was calm and consistent when he gave his evidence. He narrated clearly how he identified accused no. 1, as the latter alighted from the Polo from the passenger's side on the front and when he fired shots at them, before *Manyati* took cover. Although the opportunity to observe accused no. 1 was very short, but because of the visibility in the area, he was able to identify him. When *Peta* arrived at the scene the same night, *Manyati* told him that, he would be able to identify the accused if he could see him again. Indeed, at the formal photograph identification parade, he managed to identify accused no. 1. He refuted the allegation that the accused' photos were circulating on the social media. *Manyati* also impressed me as a reliable, credible, and honest witness.

[29] With regard to *Guest*, he knew both accused very well from the area and they were friends. There is not a slight chance that he could have made a mistake about their identification. The attack against *Guest* was that, he is falsely implicating the accused in order to protect the actual perpetrators who were gang members. The fallacy to that contention is that, *Guest* had to leave the area where he was residing immediately after he made the statement to the police fearing for his life. *Guest* has not been residing in

that area since then and had to find refuge in Jansenville. Although *Guest* in his evidence-in-chief and under cross-examination by Mr *Van der Spuy* did not testify that the accused left the park and came back and, on their return accused no. 1 said that they had a protection, but that omission in my view does not warrant the rejection of his entire evidence. Besides that omission, *Guest* impressed me as an honest, credible and reliable witness. If he was falsely implicating the accused (who were in their version not gang members), it would have been unnecessary for him to leave his area and fear for his life. In addition, if his motive was to protect gang members, his life would not have been threatened.

[30] Coming to the *alibis* of the accused, the *alibis* were raised at a very late stage of the proceedings.

[31] In *S v Thebus*,⁹ *Moseneke J* (then) said the following:

“[67] Firstly the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi. The absence of a prior warning is, in my view, a matter which goes to the weight to be placed upon the late disclosure of the alibi. Where a prior warning that the late disclosure of an alibi may be taken into consideration is given, this may well justify greater weight being placed on the alibi than would be the case where there was no prior warning. ...

[68] The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by him for failing to disclose the alibi timeously within the factual context and the evidence as the whole.

⁹ 2003 (6) SA 505 (CC).

- [32] Starting with accused no. 1, he did not call any of his alibi witnesses although both were available. Both his girlfriend and her mother even attended the trial proceedings albeit not daily. No explanation was given why they were not called, and, in that regard, it would be fair to draw an adverse inference that he feared that those potential witnesses would not have corroborated his case.¹⁰ Accused no. 1 was a poor witness, he was evasive and he did not answer crucial questions under cross-examination. He denied that he was a member of the Kakdallers/Boomshakas or any gang group, but he had so much knowledge with gang leadership and their *modus operandi*. His knowledge of gangs is extremely surprising for a novice.
- [33] Coming to accused no. 2, his *alibi* was that he was at Mossel Bay on 7 November 2019. He also called *Ryan* as his alibi witness. There were several inconsistencies and contradictions between his evidence and that of *Ryan* when it comes to details. For instance, the version put to *Guest* was that, as a matter of fact he arrived at Mossel Bay on 6 November 2019. However, *Ryan* testified that accused no. 2 arrived on 5 November 2019 and he recall that specifically, because it was the day before their anniversary with his girlfriend. Confronted with this material contradiction under cross-examination, *Ryan* changed his version and aligned it with that of accused no. 2. Further contradictions were exposed. According to accused no. 2, he travelled to Mossel Bay on a Friday, but realizing the problem with that evidence, accused changed it and said it was a Wednesday. Taking his first answer to its logical conclusion if accused no. 2 had travelled to Mossel Bay on a Friday, it follows that it was the 8th of November 2019, i.e. the day after the incidents relevant herein, if one has regard to the calendar days in that

¹⁰ See *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 (A) at 749 to 750.

particular year. Accused no. 2 belatedly realised the danger imbedded in his initial answer, hence he had to make a quick somersault.

[34] There were other contradictions between accused no. 2 and *Ryan's* evidence regarding their activities the following day after his arrival at Mossel Bay. In his version, the following morning, he went with *Ryan* to meet *Ryan's* friends in the street. But *Ryan* testified that the following day, he went to work and accused no. 2 stayed at home with his girlfriend. *Ryan* further testified that he works from Monday to Friday, and he would have only visited his friends with accused no. 2 on a Saturday. The list of contradictions between their versions are too many to scribe. As a final straw exposing his lies, *Ryan* testified that his flat is on the ground floor. But accused no. 2 testified that it was on the first floor.

[35] The other witness called on behalf of accused no. 2 was Ms *Hendricks*. Her evidence was riddled with contradictions and improbabilities. She did not know when *Guest* left the area and moved to Jansenville, even though she was in a relationship with him at the time. She struggled to give details of the dates when she was allegedly stabbed by *Guest*. In the final analysis of her as a witness, she was poor and dishonest witness.

[36] Having regard to the totality of the evidence, the accused's *alibi* defences are rejected as false. Both accused were pathetic witnesses, they adapted their versions as the trial progresses. They were economical with the truth. Their *alibi* defence was a recent fabricated story. Because when *Peta* arrested them, he asked both of them in the presence of their attorney whether they have an *alibi* and neither of them disclose it. *Peta* only became aware of

their *alibi* during this trial. In the circumstances, I am satisfied that the State has proved that their *alibis* are false beyond reasonable doubt.

[37] However, that is not the end of the matter because the State relied on common purpose, it must still prove that as well.

[38] In *S v Mgedezi and Others*,¹¹ the Supreme Court of Appeal said that, where there is no prior agreement, for an accused to be held criminally responsible for the actions of another accused on common purpose, the following prerequisites must be satisfied:

“In the first place he [the accused] must have been present at the scene where the violence was committed. Secondly he must have been aware of the assault on the inmates. Thirdly he must have intended to make common purpose with those who were actually perpetrating the assault. Fourthly he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of other. Fifthly he must have had the requisite *mens rea*, as in respect of the killing of the deceased, he must have intended them to be killed or he must have foreseen the possibility of their being killed and perform his own act of association with reckless as to whether or not death was to ensue.”

[39] From the evidence of *Guest*, both accused alighted from the Polo at Lawler Street. Both accused proceeded towards the direction of house no. 127 Lawler Street. Shortly thereafter *Guest* heard gunshots in the direction that the accused went to and thereafter, both accused came back each one carrying a gun in his hands. When they got inside the Polo, accused no. 1 instructed *Massie* to drive off. Further accused no. 1 said that he shot someone in that house. Accused no. 2 said that his gun gave him problems. On the totality of the evidence, I am satisfied that the prerequisite set out in *Mgedezi (supra)* have been satisfied, even if it was only accused no. 1 who

¹¹ 1989 (1) SA 687 (A).

shot and killed the deceased, accused no. 2 must still attract liability based on common purpose.

[40] The State has however an insurmountable hurdle when it comes to count 4. The admissions made in terms section 220 regarding photographs 20-24 and the statement therein does not assist the State. In the circumstances, the State failed to prove count 4 beyond reasonable doubt.

[41] Furthermore, regarding counts 11 and 12 the State conceded correctly so, that those charges were a duplication. The evidence of Warrant Officer *Africa* from ballistic unit was that the spent cartridges found at the crime scene at Lawler Street and Chamois Street were fired from the same firearm(s). The shooting incident at Chamois Street happened approximately eight minutes later from the first incident at Lawler Street. The firearms that the accused were in possession of at Lawler Street must be the same firearms that they had at Chamois Street. Therefore, they were in continuous uninterrupted possession from the first scene until they disappeared at the second scene. Under such circumstances, the accused cannot be convicted on counts 11 and 12.

[42] Lastly, counts 1 and 2 are the contravention of POCA legislation. Count 1 relates to contravention of section 9(1)(a) of POCA which reads:

“Any person who actively participates in or is a member of a criminal gang and who willfully aids and abets any criminal activity for the benefit of, or in association with any criminal gang activity shall be guilty of an offence.”

[43] Count 2 refers to the contravention of section 9(2)(a) of POCA which reads:

“Any person who performs any act which is aimed at causing, bringing about, promoting, or contributing towards a pattern of criminal gang activity shall be guilty of an offence.”

- [44] I accept the evidence of the State that both accused were members of the Kakdallers/Boomshaka gang. Further I accept fully the evidence of Sergeant *Piet, Daniels* and *Guest*. In addition, I accept that “*Fresh*” one of the persons that the accused visited at St Albans Prison is on all probability “*Deillon Makopha*”. However, there is no evidence that the accused’s motive when they committed these offences was aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity. The deceased in count 3 was not a member of a rival gang group nor was he a witness against the accused or any other member of the gang.
- [45] The two unreported judgments (*S v Thomas* and *Maxwell Muller CC01/2021* and *S v Walter Williams CC22/2019*) which counsel for the State referred to are distinguishable on facts. For instance, in the *Williams* case, the allegation by the State was that the accused therein was a member of a gang called the Nice Time Bozzas (NTBs) and that he pursued *Bernito Bosch* who was a witness in a murder charge against a gang member affiliated to the NTBs.
- [46] And in *Marshall Thomas* case, the motive of the shooting although it was not gang related, but the handing of the firearm to accused to shoot *Guest* was a gang related activity for the benefit of a gang, the *Dondolozz*, which was a rival gang to the *Kakdallers*.

[47] In the instant matter, I align myself with the principle articulated in *S v Davids*,¹² that:

“An aider and abettor usually means an accomplice. In its technical sense perpetrators, or co-perpetrators, that is persons who comply in all respects with the definition of the crime, are not included in the definition of the concept accomplice. To be an accomplice, someone else must have been committed the crime. The liability of the accomplice is dependent on someone else’s liability as a perpetrator. This implies that a person cannot be an accomplice of his or her own crime, that is, in respect of a crime committed by him or her as a perpetrator. Apart from an accomplice’s own act and culpability, there must have been an unlawful act by someone else.

In order for the court to determine whether any of the accused have committed the offence as defined in section 9 (1)(a), it must first determine the role each accused played in the commission of the offence.”

[48] In this case, the accused were the principal actors and not accomplices. The expression “*to aid and abet*” in section 9(1)(a) of POCA means to assist in or facilitate in doing something.

[49] Regarding count 2, i.e. the contravention of section 9(2)(a) of POCA, *Binns-Ward J* in *S v Peters*¹³ said the following regarding the meaning of a pattern of criminal activity:

“It is clear that an offence in terms of section 9(2)(a) of POCA is established only if it is proven that the act performed by the accused is performed by him with the intention of causing, bringing about, promoting or contributing towards a pattern of criminal gang activity. The test is a subjective one and not an objective. The fact that the conduct might objectively be recognised as conduct that caused, brought about, contributed to or promoted a pattern of criminal gang activity does not mean that it was necessary undertaken by the accused with the intention that it should have such effect. While there was evidence suggesting that the Mongrels gang was engaged on an on-going basis in what might in ordinary language be described as a pattern of criminal activity, there was no evidence that the acts performed by either of the accused were performed with the requisite ... intention. It was not apparent on the evidence that either of the accused did

¹² (CC103/2019) [2022] ZAWCHC 216 [31 October 2022].

¹³ [2013] ZAWCHC 218 (4 November 2013)

anything with a conscious view towards the effect thereof within the broader picture of gang related activity in the area.” [My emphasis is underlined]

[50] Similarly in the instant matter, there is no evidence that shows subjectively the motive of the accused were to bring about, cause, promote or contribute towards a pattern of criminal gang activity, when they committed the offences herein. Even on *Guest’s* evidence there was no discussion that crimes would be committed. Their purpose of going to Schauderville was visit accused no. 1’s girlfriend. At Schauderville, they continued drinking alcohol. Even at that stage there was no discussion about committing any offence.

[51] In the circumstances, I am satisfied that the State has proved its case beyond reasonable doubt against both accused on the following charges: Counts 3 (Murder), Count 5 (Unlawful possession of firearm), Count 6 (Unlawful possession of ammunition), and Counts 7-10 (Attempted murder). The accused are accordingly found guilty on the aforementioned counts. However, the State failed to prove its case beyond reasonable doubt in respect of counts 1, 2, 4, 11 and 12. Both accused are accordingly acquitted and discharged on those counts.

N GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the State : *Adv R Ahmed*

Instructed by : Director of Public Prosecutions
Gqeberha

Counsel Accused 1 : *Adv J van der Spuy*

Instructed by : Legal Aid South Africa
Gqeberha

Counsel Accused 2 : *Adv Vandayar*

Instructed by : Legal Aid South Africa
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Judgment Delivered on : 7 March 2024

