

SOUTH AFRICA / JUDGMENT

S v Basson and Another (CC 67/2020) [2025] ZAWCHC 31 (10 February 2025)

[2025] ZAWCHC 31

COURT

Western Cape High Court, Cape Town

BEFORE

Da Silva Salie

CASE / FILE NUMBER

CC 67/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: CC 67/2020

In the matter between:

THE STATE

versus

EBEN BASSON

Accused 1

CHIVARGO FREDERICKS

Accused 2

Coram

:

Da Silva Salie, J

Date of Closing Arguments

:

30 January 2025

Written Judgment delivered

:

10 February 2025

Counsel for the State

:

Adv. J Ryneveld

Counsel for Accused 1

:

Adv. C Viljoen

Counsel for Accused 2

:

Adv. M Sebueng

JUDGMENT DELIVERED ON MONDAY, 10 FEBRUARY 2025

DA SILVA SALIE, J

Introduction:

1] On Tuesday, 25 February 2020, 7-year-old E[...] S[...] (“E[...]”)

joined her playmates in what was routinely her after school ball game in the cul de sac area outside her family home in Libra Road (“Libra”), Ocean View. Whilst the children’s play area is situated within a residential road, it is a reasonably safe place for the children to play, being an enclave of neighboring homes. Residents of the immediate area went about their daily activities. As per norm and given that it is a dead-end street, with Libra enclosed by a nearby field, no passing vehicles travelled through this road. The children were playing and some of the grown-ups of the neighboring home, Messrs Marco Simon, Michael and Oscar Daniels engaged in talks whilst seated in or around a nearby stationary vehicle. By all accounts, it was an ordinary day, with the children laughing and playing and the adults going about their usual affairs.

2] This peaceful residential scene was starkly disturbed by the penetrating sound of gunshots, with one Mr Anees Davis (“Anees”) running from the nearby park area. The children and adults started fleeing in different directions for safety. So too did E[...] make her way to the safe haven of her family home. It

was, however, in her front garden where she collapsed, just metres away from her front door. Her mother found her child lying

wounded. E[...] was shot in her back with the bullet exiting through her chest and another wound to her left hand. E[...] was rushed to a nearby hospital, however she succumbed to her injuries and was pronounced dead by attending medics.

3] The Ocean View area is plagued by gang activities and gang related warfare. The Junky Funky Kids (“JFK”) and Taylor gang (“TG”) are gangs in the area which have been embroiled in a turf war for primarily drug and related trade territory for several years. Eyewitnesses pointed to two shooters at the scene, both

JFK gang members, with each of the accused placed at the opposite ends of Libra Way. They were shooting at Anees, a member of the TG.

4] This is the judgment of the trial which followed in respect of which Mr Eben Basson (accused 1) and Mr Chivargo Fredericks (accused 2) stood trial on a number of charges relating to this shooting incident.

Charges:

5] The Accused are respectively charged with the following counts:

5.1] Count 1: Contravention of S 9(1)(a) of Act 121 of 1998: Aiding and Abetting with Criminal Gang Activity (“POCA charge”)

5.2] Count 2: Contravention of S 9(2)(a) of Act 121 of 1998: Causing or Contributing to a Pattern of Criminal Gang Activity (“POCA charge”)

5.3] Count 3: Murder

5.4] Count 4: Attempted Murder

5.5] Count 5: Attempted Murder

5.6] Count 6: Attempted Murder

5.7] Count 7: Attempted Murder

5.8] Count 8: Discharge of a Firearm in a Built-Up Area or any Public Place

5.9] Count 9: Possession of an unlicensed firearm

5.10] Count 10: Unlawful possession of ammunition

6] Both accused respectively pleaded not guilty to all the charges preferred against them and exercised their right to remain silent. They were both legally represented throughout the trial. Adv. Viljoen appeared on behalf of Accused 1 and Adv Sebueng appeared for Accused 2. Neither of them tendered a plea explanation in terms

of Section 115. Formal Admissions in terms of Section 220 were made at the commencement of the trial and various exhibits were handed up by agreement. An inspection in loco by the Court was conducted at the commencement of the trial and a minute was handed in as an exhibit. In short, the common cause facts which relate to the charges herein are as follows:

6.1] On 25 February 2020, between 17h00 and 18h00 the afternoon, the deceased, a young female child, E[...] S[...] was shot and killed by a stray bullet, whilst playing in Libra with her friends.

6.2] The cause of death is concluded as a result of a perforating gunshot wound, penetrating the chest with injuries to the heart and liver complicated by haemorrhages into the chest cavities and heart sac. There were no projectiles retained within the body. The deceased also sustained a superficial gunshot wound to the left hand.

6.3] The target of the shooting, which led to the death of the deceased, was Anees Davis, who was a member of the TG at the time of the shooting.

6.4] The TG and the JFK gangs were involved in a turf war at the time of the shooting.

6.5] The three state eyewitnesses were familiar with Accused 1 and Accused 2

7] Issues To Be Determined

The trial hinged on two material aspects:

7.1] Whether the State has proven that the two shooters at the scene, identified as Accused 1 and Accused 2, are beyond reasonable doubt guilty of the charges preferred against them herein;

7.2] Whether the versions of Accused 1 and Accused 2 which denied their presence at the scene, supported by two alibi witnesses for Accused 1, are both reasonably possibly true.

8.1] I pause to mention that during closing arguments, State's counsel, Mr Ryneveld, conceded that the accused ought not to be convicted of the charges relating to contraventions of the POCA Act, considering the State's case. In other words it would not be competent if convicted on the charges of murder and attempted murder. This is so because the two accused were charged as the principal offenders and co-perpetrators of the shootings, stemming from one single event.

8.2] After questions raised by the Court regarding Count 8, the State also conceded that this charge - Discharge of a Firearm in a Built-Up Area or any Public Place - amounts to a splitting of charges arising from a single act and based upon the same evidence.

8.3] The concessions are in my view correctly made and this judgment proceeds on the remaining charges of Murder, four charges of Attempted Murder and the charges relating to the Possession of an Unlicensed Firearm and Unlaw Possession of Ammunition. I will deal with this in more detail later herein.

State's Case

9] To prove its case, the State called nine witnesses. I set out a succinct summary of the testimonies of the evidence relevant to the determination of this matter.

9.1] ANEES DAVIS (“Anees”) testified that he was a member of the (TG), and that this gang’s turf was based in the Libra area of Ocean View. This witness was cautioned by the Court in terms of Section 204. His gang traded in drugs from 5[...] Libra which is the residence of Giovanni Alexander as well as from the play park in Libra (“the park”).

9.2] He knows Eben, from the age of 13 years old but they had no formal relationship. He knows Chivargo from their primary school days and they were also at the same juvenile facility, (BOSASA) in the years thereafter. Eben and Chivargo are members of the JFK’s. He testified that Chivargo has various tattoos, in particular a JFK tattoo on his right wrist. A series of shootings between the JFK’s and TG’S started around 2012 and is still ongoing primarily for turf control. Differently put it is an ongoing gang rivalry and drug trade war.

9.3] On the day of incident, he was smoking dagga in the park with two friends. One of his friends cautioned that there are “Funky’s” that arrived at the back of the park and sighted by the bridge. He got up and ran along the wall to the edge of the park, where he could see the bridge. He saw Eben (Accused 1) and Chivargo (Accused

2). This witness who was present at the inspection in loco, pointed out various locations which would be contained in his testimony. The distance between where he would testify as to where he was standing at the end of the park and where he had seen the two accused at the bridge on the day was measured to be a distance of 42.3 meters.

9.4] When he saw Eben and Chivargo he took out a gas gun and brandished it to them from this distance to ward them off that he was armed. Given that this area is the TG turf, their approach towards this area meant trouble as rival gangsters do not enter another gang’s territory save for attempting an occupation by force. He did not see them having any firearms. The two accused gestured verbally that they will be back shortly at which point they turned around and headed back towards the nearby creche in Scorpio Road. His eyes were fixed on them until they disappeared around the bend in Scorpio

Road. It is evident that he played the role as a look-out to protect the TG turf. Thereafter he returned to the smoking area with his two friends.

9.5] As Anees and his two friends were still sitting in the park, he heard a gunshot going off. He could not see the face of the shooter as the wall of the park was obstructing his view but appreciating that he is being shot at, he contemplated running to his fellow gang member’s house, that being the residence of Giovanni situated in Libra. A few seconds later he saw Chivargo shooting at him from behind. When he got to the middle of Libra, he saw Eben shooting up in the road at him from the other side of the cul-de-sac. Other than Eben (Accused 1) shooting in his direction from the field, he also

saw Giovanni's son and E[...] playing in the road. There were about six children who were playing in the road and running in different directions at this point. The children all reside in Libra and the immediate houses. He testified further that he recalled seeing three adults on the in or close to a vehicle on the parked on the side of Libra at the time of the shooting. The adults were not in the street but in a vehicle parked on the pavement and none of them were obstructing his view of the shooter whom he recognised as Eben.

9.6] Assessing the position of both shooters, he changed direction and ran up in Aquarius Way, and in that way escaped from both shooters. In short, he was entrapped by one shooter behind him and one in front of him. He ran through the nearby church premises and jumped over a wall to get into his house. When he heard more shots, he exited his house and went down Fornax Road, which is the road behind Libra. As he approached the field, he saw Giovanni and Marvin running onto the

field. They saw Eben who had at that point advanced to the corner of Alpha and Aries Way, which is the JFK territory. They

confronted him for shooting on their turf. At this stage, Eben lifted his t-shirt illustrating to them that he was not armed with ammunition. As they moved closer to approach Eben, Chivargo came running around the corner from Alpha Way, crossing over to Aries Way whilst firing shots into their direction on the field. Anees realised that this was an ambush attack on him and indeed a continuation of their earlier shooting at him. To get away from the shooting attack, himself as well as Giovanni and Marvin ran back to Libra when they noticed a large crowd gathering outside E[...]’s house. He later learnt that E[...] was shot and had collapsed outside her house.

9.7] He testified that as it was daylight, he had clear sight of the two accused and recognised them as persons who he was well familiar with. When he saw the shooter at the field, he immediately recognised him as Eben (Accused 1). Although he was scared and feared for his life, he looked at Eben for several seconds, in what he estimates to be for about 5 to 7 seconds.

9.8] When he saw Chivargo running behind him in the park, wearing all black clothes with the hood of the top of his head, he estimated that he saw him for about 3 to 4 seconds. There was no obstruction between him and Chivargo at this stage. He also testified that Chivargo was moving forward and closer to him in the shooting pursuit, which gave him a closer look at Chivargo.

9.9] Anees further testified that he went through his statement before he came to testify, and he is not entirely satisfied with the content. This he said is in fact so because in his statement he had not set out the whole truth. He was afraid that the family will blame him for E[...]’s death because he was the reason that Eben and Chivargo came to shoot there on that specific day. He is of the view that since he was the target and had he not been there on that day, as a rival gang member, the shooting would not have taken place, and E[...] would still be alive.

9.10] During cross examination by counsel for Accused 1, Adv. Viljoen, confronted him with shortcomings in his statement made to the police shortly after the incident had taken place to his testimony in Court. The witness explained that he never testified in chief that he had lied in his

police statement but instead that he did not disclose everything to the police. This is because he feared that should he set out the details relating to himself to the police shortly after the incident, then the civic organisation called PAGAD (People Against Gangsterism and Drugs) would burn his house down and place his family's lives in danger. His testimony to the effect that he had identified Eben as the shooter was not however subjected to cross examination nor challenged on behalf of accused 1 to this witness.

9.11] During cross examination by Counsel for Accused 2, Adv. Sebueng, it was put to him that in the chaotic moments of the shootings it would be impossible for him to be able to look behind him at the person that is shooting at him for 3 to 4 seconds while at the same time fearful and running for cover. The witness denied that it was impossible. He explained that he had to look to the shooters' movements to strategize his escape and to ensure he got away unscathed.

9.12] The witness testified, even though Accused 2 was wearing a hooded top and that the hood was on his head, it did not cover his face, and he could clearly see that it was him.

9.13] During re-examination the witness testified that he was vigilant and aware that the JFK's could be coming back, after their earlier encounter because they cautioned him that they would do so.

10.1] GIOVANNI ALEXANDER ("Giovanni") testified that he was a member of the TG and gave a background of the origins of the gang as he recalls. This witness was cautioned by the Court in terms of Section 204.

10.2] He knows Accused 1 as Eben Basson since they had been smoking together since the age of 16. They often frequented each other's homes. However, in the years thereafter Accused 1 went his own way.

10.3] He knows Accused 2 as Chivargo Fredericks for many years prior to the shooting incident. Chivargo had frequented his home and particularly when Chivargo's mother evicted him. During this time, he would come to the witness' home where they would smoke together. The witness' mother, Ms Sonja Alexander, would often provide food for himself and Chivargo whilst he was visiting there. They were good friends at that stage. However, in the subsequent years their friendship had waned. At the time of the incident Chivargo was a member of the JFK gang.

10.4] As at February 2020 there were ongoing turf wars between the JFK's and the TG's. There were incidents where the JFK's would have shootouts at the witness's drug dealing residence in Libra. Some of his friends had died in the course thereof. In retaliation his gang would also shoot at the JFK's and kill them. The aim of the JFK'S was to occupy the turf of the TG including Llibra and the adjacent play park. This was a thriving hub of drug activity for the TG's. He testified that Anees was his friend and a fellow TG member.

10.5] He has two children who were aged 4 and 8 years old at the time of the incident. The 8-year-old would regularly play in Libra which is the cul-de-sac where E[...] and other children were playing. The games would include the four squares painted in the road. He knew the deceased as E[...] and she lived with her family at No.4[...] Libra Way which was across from his home.

10.6] On 25 February 2020 between 5 and 6 in the afternoon he was busy in the back yard of his home when he heard gunshots outside. He knew that his son was playing outside with the other children. He immediately reacted by going to look for his child. As he reached the front yard, he saw his mother in the front garden. She was standing on the inside of the front garden wall, looking up in the direction of the shop to her left.

10.7] He then put half his body over the fence to look down the road (to his right) where the kids had been playing. At that point he saw Eben. He illustrated that the ground of the front yard was elevated in comparison to the level of the road. While the enclosing wall was low, he had a bird's eye view onto the road and at the activities happening in the road. He added that the enclosing wall was low.

10.8] He saw Eben to his right, standing on the far-left hand side of the cul-de-sac. Eben was running across Libra, in the direction of the residence of No. 5[...]. Whilst moving, Eben continued shooting in the direction of the shop situate on the corner of Libra and Aquarius Road.

10.9] The children who had been playing in the cul-de-sac ran into different directions with the sound of gun shots. He could not see his son but also focused on Eben shooting down into the road. He observed Eben hiding behind the wall at 5[...] Libra and the witness ran into that direction. He still did not see his son but saw Eben turning his back and running into the direction of the taxi rank, situated in the vicinity of Alpha and Aries Way which is the JFK territory.

10.10] The witness testified that when he exited his front yard to look for his son, he also ran towards the direction of Eben to see where he was going. As the witness reached the field area, he saw Chivargo (Accused 2) emerging from Fornax Road, which is at the back of Libra wielding a black firearm in his hand. When he saw this he stepped back and observed that Chivargo was wearing all black clothes with lime green stripes on the arms, right down to the legs. Both Chivargo and Eben ran into the same direction towards Alpha Way.

10.11] He is familiar with 6[...] Alpha Way as the house belongs to a Detective Smithie and whose sons are both JFKs. He then saw Eben who lifted his top after he handed something over to a small boy. The witness thought he was showing them that he had nothing underneath his top. An action to show he is not armed. The small boy refilled the firearm and shot two shots in the direction of the witness. The witness turned around and ran back home. He testified that he also saw Anees coming from Fornax Close, with a black firearm which he understood to be a gas gun. Anees looked like he was chasing Chivargo. When the witness approached his home, he went to look for his son and saw people were gathering outside 4[...] Libra. It is at that stage when he saw that E[...] was shot.

10.12] During cross examination by counsel for accused 1 it was put to the witness, that according to his police statement, there was already a person waiting for Eben at Alpha Way, with a firearm in his hand. In his oral evidence the witness said that he saw Eben handing over the firearm to this unknown person. The witness explained that Eben ran over the field and in a quick successive move made an exchange or handover of the firearm to the boy. It was thereafter when Eben lifted up his t-shirt to show the witness that he is unarmed.

10.13] Whilst the witness was cross examined regarding certain discrepancies between his evidence and his police statement, as to how well he knew Eben as well as his evidence that he had seen Eben in the vicinity of the field, he maintained his version of events as he had testified to in chief, in particular that he recognised Eben during the series of events. The witness explained that when he ran after Eben, it was aimed at confronting him for shooting in the TG territory and to threaten them with retaliation

10.14] During cross examination by counsel for Accused 2 the witness explained that he first saw Chivargo emerging from Fornax Road, and thereafter he saw Anees coming from that same direction.

10.15] It was further put to the witness that Chivargo admits that he used to smoke with the witness, but he only came to the house of the witness because he was not allowed to smoke at his mother's house. The witness commented that yes, it is true, his father was at work normally and his mother intoxicated. Then they would smoke in the yard of Chivargo or at his friend's place that lived across from him.

10.16] It was further put to the witness that Chivargo will say that on the morning of 25 February 2020 he was at Smartie Town, Ocean View. He slept at his friend's place the evening of 24 February 2020. He then went to his girlfriend's house, who lived a street away. He spent the whole day there watching movies with his girlfriend. Late, the evening, that is after the incident, accused 2 would testify that he went to his mother's house at 1[...] Botha's Close. To this the witness replied that Chivargo is lying to this Court. The witness reiterated that he is well familiar with Chivargo having known him for his entire life. The witness recognised him at the shooting on the field and he could not have mistaken someone else to be Chivargo given his familiarity with him and his close proximity to accused 2 at that stage.

10.17] It was put to the witness, that he never testified during his examination in chief that his mother pulled him back when he wanted to run out of the front yard and that she told him that there was someone with a firearm standing on the left corner, in the direction of the shop. To this the witness answered that it must have slipped his mind as he was nervous during his testimony in Court. He did not look to his left when he came out of his house as he knew his son was playing towards his right and that it was at that stage that he saw Eben.

11.1] SONJA ALEXANDER ("Sonja") testified that she resides at 5[...] Libra with her son Giovanni (the previous witness) and grandchildren. She testified further that both her son and her Anees belong to the TG and that her son sold drugs.

11.2] She knows Accused 1, since she was in the crayfish industry with his mother, and he was friends with Giovanni. Accused 1 would also come and visit at her home. She also knows Accused 2 and that he has been in and out her house since young, having also been friends with Giovanni some years back.

11.3] On Tuesday 25 February 2020 at about 5 the afternoon she was inside her kitchen busy preparing food. Shots went off. Then it was quiet. She exited her house and went to her front yard because her grandchildren were playing in the Close. She looked up in the road (to her left) in the direction of the shop/park and saw Chivargo emerging from the park with a firearm attached to a sling over his shoulder, running until he was opposite the shop, and he stood at the stop street. He then fired shots down Libra.

11.4] She then looked down the road in the direction of the field and saw Eben on the pavement of the last house across from her house. At that stage Eben and Chivargo were firing shots from two opposite sides of the road. The children were playing in Libra and as the shots were being fired the children ran in different directions.

11.5] She called Giovanni who was busy in the backyard, and he came running to the front yard. She cautioned him that Chivargo and Eben are shooting up and down the road. Giovanni wanted to run out when she grabbed him at his sweater to stop him but he replied: "Mammie, my child is also playing in the road." He loosened himself and went down the road to the right in the direction of the field. The children were running to their houses. E[...] ran in the direction towards her house, and she stumbled over the slab of the garden. She remained lying there.

11.6] E[...] and her parents are her neighbours residing right opposite from her at 4[...] Libra. She called out frantically to E[...]’s mother who also ran out to see to E[...]. That is when the witness discovered that E[...] was hit. At the time when E[...] landed in their yard, Eben was still standing on the left corner of the Libra cul-de-sac, situate to her right.

11.7] Eben then moved to the opposite corner from where he was standing, in other words to the corner of the last house on her side of the road. At that stage Giovanni ran down the road in the direction of Eben. They both disappeared from her sight after running behind the last house in the cul-de-sac and onto the field.

11.8] Chivargo also disappeared after she saw him at the stop street. He was standing not exactly on the corner but further up at the stop street when she saw him shooting. He was wearing all black clothes. She looked at him for about 5 seconds and his face was not covered at the time of her observation. There was no obstruction blocking her view when she identified Chivargo.

11.9] She looked at Eben for about 10 to 15 seconds before he disappeared. There was no obstruction blocking her view when she saw and recognised Eben. The only other people that she saw in Libra at the time of the shooting were the opposite neighbour Warren Daniel’s son and his friends. They were sitting in the vicinity of the corner, closer to the park, on the opposite side of the road. When the first shot went off, they jumped up and ran in the direction of their garage. Giovanni returned after about half an hour later. Anees and Giovanni came back to the house at

the same time.

11.10] It was put to the witness that accused 1 will testify that he does not know the witness. However, later in cross examination counsel conceded that even though the witness knows his client, it had been some years prior when they had last been engaging each other.

11.11] It was further put to the witness that she is not on a friendly basis with accused 1. The witness responded that the gang shootings started in 2016 in Ocean View, and they were in good communication until then. She never had a conversation with him, since he was her son's friend. He used to come into her house and went in and out of her son's bedroom. Since he is not her age, she did not converse with him, but she certainly knew him from the area and when he had visited at her house in previous years.

11.12] She testified that when she saw accused 1 shooting from the cul de sac, he was wearing a grey/white hoody and blue pants. He did not have the hoody on his head.

11.13] It was put to the witness that accused 1 will say that he was standing across the field when he heard the shooting but that he was not the shooter. He just stepped in to the area to see what was going on when he heard the shots like the others. The witness responded, as a rival gang member, accused 1 would not come and see what was happening on the TG turf. She did see him on that day, with a firearm and he was shooting. She knows him and will not blame someone incorrectly.

11.14] During cross examination by counsel for Accused 2 she testified that it is possible that Anees was in her street, but she did not see Anees when she entered the scene and watched the commotion from her front garden wall. She was asked how she determined that it was 5 seconds that she looked at accused 2. She testified that at the very least it was 5 seconds given all the things which he did before he fired the gun.

11.15] It was put to her that accused 2 would testify that he only started to visit the house of the witness from the age of 15 years when he started to smoke. Chivargo will say the witness is mistaking him with someone else and deny that was he involved in the shooting. The witness testified that she is not mistaken since he was at her house daily and well familiar with him. It was put to the witness that Chivargo will say that he was at his girlfriend's place in Smartie Town the whole of 25 February

2020. He only went to his mother's house later the evening, after 19hpm. The witness replied, he might have been at his girlfriend's house but between 17h00 and 18h00 that afternoon she saw him in Libra as being the shooter running with a gun on a sling from the park and shooting down Libra.

12.1] OSCAR DANIELS (“Oscar”) testified that he resides at 4[...] Libra and that they are neighbours of E[...]. On the day and time of the incident he arrived at his house. Marco Daniels’ vehicle was parked in front of his house facing towards the direction of the cul-de-sac, with two wheels on the pavement and two in the road. His father (Warren Daniels) and Marco Simon were standing next to the car and Michael Daniels was sitting inside the car. They were talking about the work that needs to be done on the vehicle.

12.2] At that point he heard a loud gunshot. He saw Anees coming around the corner from the park side. He came running into their direction and that is when the witness saw another guy dressed in a black tracksuit, and a firearm in his hand. This unknown male pointed a firearm in the direction of Anees which was also in their direction. Within moments they ran for safety into the house, and they heard two more shots being fired. The unknown male was dressed in a black tracksuit with a hooded top. The hood of the top was on his head and covered his ears and head until his hairline. However, his face was not covered.

12.3] The witness saw E[...] as well as other children playing in the four white blocks, in Libra before the shooting. After the shooting he heard people screaming and when he went next door, and he discovered that E[...] was lying in her front yard.

13.1] MICHAEL DANIELS (“Michael”) testified that he resides at 4[...] Scorpio Road. He witnessed the encounter between Anees and

three unknown males on that afternoon. The three males appeared when Anees screamed something to them, which he could not hear. Anees also showed them a firearm. The three males then turned back and walked pass the home of the witness and disappeared around the corner in Scorpio Road where the creche is situated. He testified further that he and Marco thereafter drove to his uncle’s home where they parked in front of 4[...] Libra. They sat outside in the car and waited for Oscar to arrive. After Oscar arrived, the witness and Marco Simon were seated inside the car, with Warren Daniels and Oscar Daniels standing next to the car.

13.2] The witness then heard a loud gunshot. He looked into the direction of the playpark, since it sounded as if the shot was coming from the side of the playpark. He then saw Anees running around the corner of the playpark into the middle of Libra. He did not see Anees having anything in his hands.

13.3] After he saw Anees, he saw another unknown male emerging from around the corner of the playpark with a firearm in his hand. By the time when the witness saw this unknown male, he thinks two shots went off but at that time that he was running into the house. They all ran into the house to get away and fell on top of each other. None of them were injured.

13.4] He heard screaming and crying and they went outside to the neighbour’s house. He saw that the deceased was lying in the front yard. The last time he saw the deceased; her two friends came to call her, and they were playing in Libra in the four blocks which is painted in Libra where the children would normally be playing.

13.5] MARCO SIMON (“Marco”) testified that he resides in Ocean View. He is not a member of a gang. He was visiting at 4[...] Scorpio Road with his cousin Michael Daniels on the afternoon of the 25th of February 2020. He knew Anees as a local resident who had become involved in gangsterism. This witness corroborates the evidence of Michael Daniels in various material respects both where Anees was seen being confronted by accused 1 and 2 and a third person at the back of the park and bridge and later when he visited with Michael at the home in Libra. He also saw Anees running from the park at the time when a gunshot was fired, and they were seated in the car outside. He too did not

see the face of the shooter, save for the fact that the shooter had had worn black clothes with a hood on his head. He corroborated

the evidence of Michael and Oscar in material respects. He also confirmed that that none of them were shot and that they had run into the home as soon as they could to escape the gunshots around them.

14.1] WARRANT OFFICER RAPHALA (“Raphala”) testified that he is a Warrant Officer in the South African Police Service with 22 years of service and is stationed at Ocean View Police Station. On 25 February 2020 he attended to a crime scene in Libra Close after he received a call roundabout 19h00 pm. He arrived at the crime scene approximately 20h00.

14.2] Upon his arrival there were many people on the crime scene, including members of SAPS and community members. He noticed that SAPS members were struggling to control the crowd. He was also informed that a child was shot during a gang related shooting in Libra. The deceased was already taken to False Bay hospital when he arrived. It was very difficult to process the crime scene because of the amount of people on the scene.

14.3] They searched the area, and he discovered a damaged fired bullet (projectile) in front of 4[...] Libra, in the curb, where the pavement ends. He pointed out the projectile to Sergeant Jezile who collected and sealed it in a forensic evidence bag. There were no other exhibits found on the crime scene. He then handed the crime scene over to Constable Meintjies from the AGU, who was the Investigating Officer.

15.1] SERGEANT MEINTJIES (“Meintjies”) testified that he is currently a Sergeant at the Anti-Gang Unit (AGU) with a total of 14 years of experience in SAPS. Their mandate as the Anti-Gang Unit is to focus on gang related activities. On 25 February 2020 he arrived at the crime scene between 20h00 pm and 21h00 pm. He was informed that the victim was already taken to False Bay hospital. Upon attendance at the hospital, he was informed by the hospital staff that the victim was declared dead on arrival. The victim was E[...] S[...], a 7-year-old female and a resident of Libra.

15.2] They arrested accused 1 on 26 February 2020 at 09h30. Accused 2 was arrested at midnight, the evening of 25 February

2020. Anees Davis was also arrested with accused 2. Both accused appeared in Court on 28 February 2020. They could not link Anees with this case, and he was released on 28 February 2020.

15.3] They recovered one of the firearms, a Smith and Wesson Revolver, at No. 6[...] Apha Way, Ocean View, after they received information and conducted a search at the address. The address was known as a Junky Funky house, and was used to channel(store) armoury, like firearms. The serial number on the firearm is N[...].

15.4] The firearm was sent for ballistic comparison with the fired bullet which was recovered from the crime scene, and the ballistic report concludes that the damaged fired bullet was fired by this Smith and Wesson revolver with serial number N[...].

15.5] He explained that he conducted interviews with both accused 1 and accused 2. The purpose of the interviews and the warning statements were to inform the accused of the charge/s against them and that it relates to this shooting incident.

15.6] He warned them of the charge of murder and their constitutional rights were duly explained. After he had warned them, he asked them if they wanted to say anything. Accused 1 told him that he was at the Pakistani shop in Alpha Way, Ocean View with Peppie, Donnay and Vargo at the time of the incident.

15.7] Accused 2 told him that he wants to speak in Court. It was put to the witness that Accused 2 will testify that he was at his girlfriend's place in Smarty Town the whole day and went to his mother's house after 19h00 pm. Meintjies testified that if that had in fact been told to him, which was not the case, he would have followed it up and took statements from them both. If someone provides an alibi, he will follow it up to verify it and that is the fundamental purpose of the interview and investigation process.

16.1] WARRANT OFFICER BENEDICT TERENCE HILL ("Hill") testified that he is stationed at the Forensic Science Laboratory at Platteklouf and attached to the Ballistic Unit. To date he has examined more than 5800 cases. On 16 October 2024 he compared the 1.44 Magnum calibre Smith & Wesson model revolver with serial number N[...] with the fired bullet (projectile) which was recovered from the crime scene and sealed in forensic evidence bag P2B000084666. He concluded that the fired bullet at the scene was fired from this Smith and Wesson model revolver with serial number N[...].

16.2] He further explained that the cylinder of a revolver consist of six holes and a maximum of six bullets can be loaded. After the shot was discharged the bullet would have left the barrel through the barrel of the pistol. The cartridge of the bullet will not be ejected in the case of a pistol but will instead be retained in the cylinder of the pistol.

16.3] He examined the fired bullet(projectile) that was recovered from the crime scene and noticed that it had some damage on it. He cannot conclusively say what may have caused the damage to the fired bullet, but it resulted from impact on a hard surface including any target that is in line with the fired bullet's trajectory. This could include the bones of a person who was hit by the bullet or any similar hard surface.

Post Mortem Report

17.1] The postmortem report was admitted into evidence. The postmortem concludes the cause of death to be a perforating gunshot wound to the chest with injuries to the heart and liver and the consequences thereof. It concluded that the entrance wound is positioned on the back of the body of the deceased, more to the right lower back. The gunshot track exited the left chest through a fracture of the left fifth rib, and then finally exited the body through an almost square shape wound. The pathologist also observed a superficial injury of the left hand.

17.2] The postmortem photos depict the entrance wound at the back of the deceased with the exit wound at the front of the chest as well as a further superficial injury to the hand.

17.3] That concluded the State's case.

Defence Case

18.1] Counsel for accused 1 indicated that his client had elected not to testify in his own case, however he would call 3 alibi witnesses. His counsel placed on record that he is aware of the risks of not testifying in his own defence and that procedurally he was required to testify first should he elect to testify in his own defence. Mr. Lorenzo Kriel, Ms Tamryn Mostert and Ms. Anushka Daniels testified on behalf of Accused 1, all of whom were called as alibi witnesses for accused 1.

18.2] LORENZO KRIEL ("Lorenzo") testified that he was outside of his home in Aquarius Road, Ocean View in the late afternoon of the day of the incident. Accused 1 resides in the same road. He recalls seeing accused 1 passing by him who mentioned to him that he was heading to the nearby shop, commonly referred to as the Pakistani shop. When he was inside his home, he heard shots go off. He emerged from his house only after the shooting and he saw the community members swearing at accused 1. Under cross examination, he added more details to his evidence, however, his testimony did not assist the case as an alibi of accused 1 as he was inside his home at the time of the incident and in particular when he heard the gunshots.

18.3] TAMRYN MOSTERT ("Tammy") came to testify that she was in a relationship with accused 1 at the time of the shooting for 11 years and pregnant with their daughter, now aged 4 years. She does not know whether Accused 1 was a member of a gang at the time of the shooting. On 25 February 2020 at about 5h45 pm she saw Accused 1 at the Pakistani shop in Alpha Way. She was on her way by car to the home of accused 1 to let him know that she was going to do a client's hair, when she saw him at the Pakistani shop where she briefly stopped and told him her plans. She thereafter left to attend to her client. As at the time of the shooting she was not in that vicinity and was not aware of the shooting. She only heard of it later when her father phoned her and told her about it. She did not see Accused 1 again since she left the shop that day and only

visited him in prison during 2021 the following year. Under cross examination she confirmed that accused 1 and Lorenzo, the previous witness for accused 1, were friends and that she knew Lorenzo to be a JFK member. She had concerns that accused 1 was also a JFK gang member, an issue which she had raised during their relationship. This witness did not assist the case of accused 1 as an alibi as she was not present at the time of the shooting. She conceded that she cannot assist the court since she bears no knowledge as to where accused 1 was at the time of the shooting.

18.4] ANUSHKA DANIELS (“Anushka”) testified that on the day of the incident she had gone to school and after she returned home, she spent the afternoon with friends at a nearby shop in Alpha Way, the ABC shop, where she was hanging out with a few of her friends.

She could see the Pakistani Shop from where she was as it is a few houses away. During these passing hours, which she describes as before and after the shooting, she had kept her sight on both accused 1 and 2. Counsel for accused 2 put it to her that he would testify that he was not at the shop and in the company of accused 1 as he was in Smarty Town at the time, which is situated about 30 to 40 minutes from the vicinity which the witness refers to in her evidence. Under cross examination, she testified that she would have arrived at the shop around 15h45 and remained there till after 18h00. She was not friends with either accused 1 and 2 but she knew them by occasionally greeting them. It was put to her by illustration of an aerial photograph of the vicinity of Alpha Way, that from the position where she was standing, she could not have seen the Pakistani shop. She conceded that she cannot remember many aspects around the time, she however maintained that she had seen both accused at the shop for the entire 3 hours because she has had “flashbacks” of the day. She could not however explain why, given she did not tell anyone that she had seen the accused at the shop at the time of the shooting. This included telling this to the police, or her family or those of the accused in that that they were thus wrongly implicated and arrested. She also maintained that even though the area became chaotic with the shooting and the public were running in different directions, she had her eyes fixed on both accused at all times. The witness was

not forthcoming as to how it is that she had come to testify as to the whereabouts of the accused at the time of the incident. She indicated that she had been attending the trial proceedings and that by fluke she was at court when she felt compelled to testify as to the whereabouts of the accused at the time of the shooting

18.5] After the three alibi witnesses for accused 1 testified, his Counsel brought an application for his client to testify on the basis that he had changed his mind and had now elected to testify in his own defence instead. The State did not object to the application and leave from the Court was granted as being in the interests of justice and trial fairness. ACCUSED 1 testified that he is 32 years old and lived in the Ocean View area. On the date and time of the incident, he was at the Pakistani shop with three friends, Peppe, Donay and Whiz when he heard the shooting in the distance. The Pakistani shop is on the corner of Alpha Way and Apollo Way. He denied that he was a member of the JFK member at the time of the shooting, although he was a member until 2018. At the time of the shooting, he could hear gunshots from where he was at the Pakistani shop

whereafter everyone moved to the corner to see as more shots were fired. He testified that he was going to buy a PlayStation from one of his friends at this time. Whilst standing on the corner of Alpha Way he saw three JFK members by the names, Jessie, Muggels and Dampa running across the field close to Libra and Forex Close followed closely by Anees with a gun in his hand. The 3 JFK members disappeared, but Anees pointed at him, and he thus lifted his shirt to illustrate that he was unarmed and that he had nothing to do with the shooting. The nearby ladies told him to run away as Anees had a firearm, and he walked up his street to his car parked in the street in order to go to his girlfriend, Tammy's house. As she was not there, he drove down the road, when his friend approached him with the PlayStation, which he then purchased. He left to the home of his cousin who lives in Milky Way, Ocean View. He tested the PlayStation and stayed for a while. When he tried to leave sometime later, he had car problems, and his aunt insisted that he sleep over given that the area would not be safe for him to walk home. When he returned home the next morning, his mother told him that the police had been there on two occasions to look for him and that he ought to report to the police station. He was taken into custody at the police station and held in custody along with others who had been arrested, which included accused 2, Anees, Muggels and Dampa. After he had been detained for a day, he was assaulted by the police. The investigating officer, Detective Meintjies and his squad team assaulted him as well as the others who had been held in custody in relation to this shooting incident. He testified that even though he and the other detainees gave Detective Meintjies an account of events as to who were responsible for the shooting, the detective never followed it up with investigation and he was charged with the shooting incident. He denied that he was at the shop with accused 2 and that if anyone had seen him at the shop in the company of Zhivargo it was clearly a mistake as he was with Whiz who is the older brother of Zhivargo and

who looks just like him.

18.6] During cross examination by the State, it was put to him that he testified in chief that he was at the Pakistani shop in the presence of Whiz and Donay, however, the witness, Anushka, testified that she had seen him with Accused 2 at the Pakistani shop at the time of the shooting. He testified that he did not call her to testify, and he believes it is one of his family members who contacted her to testify. He maintained that she is correct about seeing him at the Pakistani Shop before and after the shooting, but she is mistaken about seeing accused 2 at the shop with him before and during the shooting. He testified that she is mistaking accused 2 with accused 2's brother Whiz, who looks like his identical twin. However, it was not put to Anushka that she had been mistaken in that regard. He also conceded that a photo (Exhibit R) handed up of Whiz depicts that accused 2 does not look like his brother Whiz. As to material contradictions between his evidence and that of his other alibi witness, Lorenzo, he explained that Lorenzo had been fabricating evidence during his testimony however that he did not inform his legal representative. Whilst he called 3 alibi witnesses, he did not call the two persons (Donay and Peppie) whom he claimed was with him at the shop at the time of the shooting. It was put to him that whilst he now testifies that the Investigating Officer Meintjies had sought to implicate him at all costs including tearing up an exculpatory statement by Anees, this was not put to either

Meintjies or Anees. He also testified that Sonja Alexander is lying when she claims that he was one of the shooters on the day.

19] ACCUSED 2 (“Chivargo”) testified that he is 24 years old and resides at 1[...] Botes Close, Ocean View, with his parents. During the incident he resided with his girlfriend, Dulynn Staggie in Neptune Street, Smarty Town, Ocean View. The relationship ended in 2021. He confirmed that he used to smoke with Giovanni and at the back of Giovanni’s house. On the day of the incident, he was nowhere close to the vicinity of the shooting, as the shop where he was smoking with friends are situate far away from Libra. They just sat there on the corner and continued to smoke. Friends of his girlfriend joined them later on the corner

and they were all smoking. As darkness fell, he was on route to his mother’s house when he was arrested by members of the anti-gang unit in Apollo Way.

19.1] He testified that he never told Sergeant Meintjies, when he was interviewed, that he was at the shop at the time of the shooting. He maintained that on the day of the shooting he was wearing a yellow t-shirt, a navy-blue windbreaker with short sleeves and grey pants. He denied that he ran to the corner and fired shots down Libra. He testified that Sonja Alexander is not telling the truth. He never ran after Anees on the day of the incident and fired shots upon him. He is not friends with Anees but admit that they attended the same primary school however there was no interaction between them.

19.2] During cross examination he was referred to Exhibit P, annexure B, where Detective Meintjies noted him to state that he was at the shop on the day. He denied that he said that to the police. He maintained during his testimony that he told the police that he would speak in Court as to his whereabouts on the day.

19.3] It was put to him that Anushka Daniels, the alibi witness of accused 1, also testified that she saw him with accused 1 at the Pakistani shop at the time of the shooting. He maintained that she was mistaken when she says that it is him. He conceded that Sonja, the state witness, would have regularly seen him at her home and would consequently have been well familiar with him. He also conceded that Anees was familiar and acquainted with him, however, that that Anees was under duress by the investigating officer to implicate him otherwise Anees would also be charged. He testified that he did not tell the Investigating Officer to interview his girlfriend to confirm his alibi as he was barred from doing so. This was however not put to the investigating officer when he testified earlier.

19.4] Counsel for Accused 2 placed on record that the witnesses whom his client sought to call in his defence refused to testify, and he closed his case.

Evaluation Of the Evidence

20.1] The 3 state witnesses, Anees, Giovanni and Sonja, in my view testified in a logic and coherent manner and corroborated their evidence in various material aspects. They refrained from embellishing their evidence. In this regard I point out the following. Anees made the concession that after the first gunshot, he did not see the shooter as the length of the wall

obstructed his sight as to who had fired the first shot. It was only after he started running and looked back to assess his escape and as the shooter ran closer towards him that he got a look at the shooter and recognised him to be Zhivargo in black clothes. Adv Sebueng argued that under these chaotic and life-threatening circumstances, in addition to taking flight from attack, Anees could not recognise his client as the shooter behind him, let alone see the shooter's face or identifying features at all. He compared Anees's position to that of the three witnesses who stood at the vehicle, Oscar, Marco and Michael, who saw Anees seconds after the first shot and then could not identify the shooter behind him as they were running for cover. Adv. Viljoen

similarly argued that the circumstances of the shooting, with it being a mobile scene with shooters from both sides of Libra would

have caused such a commotion and chaos that no one could identify the shooters or had the capacity to observe the shooter's face or recognise him. It is significant that the events relayed by Anees and Sonja as Anees was running out of the park, was also substantially corroborated in material respects by the other State witnesses, Oscar, Marco and Michael.

20.2] A further important aspect to the test the honesty and reliability of Giovanni's evidence is that he resisted any temptation to implicate accused 2 as and when he came out of his home to look for his son playing to his right. It follows logically that he did not look to the park as he only focused on the actions on his right as that is where his son was playing. He only saw the shooter to his right given that his sight was in that direction looking for his son and in so doing recognised that shooter as someone that he is well familiar with, Eben Basson. It is apparent that since Accused 1 was a rival gang member launching attack on this turf area, Giovanni had a particular interest to observe the identity of the shooter in addition to looking for his son. In fact, he testifies when he did not find his son, as the children had run out of the way, he pursued accused 1 to confront him for shooting in this area and to threaten him with retaliatory action and consequence. It is clear that he would have done so because he indeed recognised accused

1. Upon pursuit onto the field, he gets ambushed by none other

than accused 1. A scene in the sequence of events which is not challenged by accused 1, save for the fact that accused 1 testified that he happened to be there to see what had transpired.

20.3] The third eyewitness Sonja refrains from embellishing her evidence in an attempt to corroborate the version of Anees. She does not testify that she saw Anees running from the park in pursuit of a shooter. She only testified as to what she saw at the moment when she came out of her house, that being that she saw accused 1 already standing within the cul de sac shooting down the road and accused 2 at the stop street c/o Libra and Aquarius Way.

20.4] Both defence counsel argued that it would be most unreasonable for a person caught up in this potentially deadly fracas to stop to look at the shooters. I agree that it is human nature that the primary instinct to self-preserve one's life and limb would be to take protective action to run out of the way into a direction for safety from the sound of the deadly force. I would agree that it is certainly on point that passersby or occupants of the area ceased with a gunfire attack would

be taking tremendous risks if they attempt to look for the shooter in order to learn his or her location or movements all the while experiencing tremendous stress in such a life-and-death situation. This argument equally applies to the remaining eyewitness for the State, Giovanni and Sonja, who places both accused at the scene as the shooters firing shots at various angles and scenes as per their respective testimonies.

20.5] However, in my view, the facts of this matter clearly indicates that these 3 eyewitnesses are distinguishable from the general crowd reaction. Anees is a 'fighter' in a vicious and ongoing drug war. He is vigilant and alive to a possible attack akin to that of a soldier guarding his territory under attack. Anees was controlling his gang turf. He testified that he saw the two accused 3 occasions on the afternoon of the shooting and within a close period. The first time was when he was cautioned as to the JFK's entering their turf and he called out to them that he was armed and alive to their presence. The distance from where he was at the corner of the wall was measured at 42.3 meters to where the accused were standing at the bridge. He could clearly see the two accused and there was nothing that obstructed his view when he made his observation, so much so that they exchanged threatening comments to each other. The accused were looking in his direction when he pointed them with his gas pistol, since he thought, they were coming to shoot at him. This caused the accused to leave, and he watched how they walked along Scorpio Way, until they disappeared around the bend of Scorpio Road in the vicinity of the creche. This

incident is corroborated by both Marco and Michaels. They both confirmed that Anees was sitting in the park on the day of the shooting, and they saw him talking with a group of men and pointed them with a firearm after which they walked down Scorpio way and disappeared around the corner in the vicinity of the creche. Oscar was an independent witnesses, and nothing suggest to me they were untruthful in their testimonies about this incident.

20.6] As I see it, it was clear that the threat to Anees that the rival gangsters they were coming back after he had brandished a firearm, and this would have placed him on guard. He was expecting them to possibly return. In other words, he was psychologically prepared for a potential onslaught and when he heard this gunshot, he was not caught off guard like the other occupants of the area. After he heard a gunshot, he got up and ran to what he would have considered a safe space, being the home of Giovanni diagonally opposite the park. He testified however that he looked to see where the shooter was placed and that he specifically focussed attention on the movements of the shooter to plan his safe escape and get away. His observation of accused 2 was at a reasonably close distance of 45 metres, decreasing over the passing seconds as the shooter moved in closer onto him. Whilst Anees was running away from the shooter in the park, he however paused when he saw another shooter firing

shots at him from the other side of Libra which caused him to change direction. There was no obstruction between him and the second shooter (accused 1) other than the children who were playing in the cul de sac. This is when he recognises the shooter shooting from the cul de sac area as Eben Basson.

20.7] As he changed direction, from Giovannis house to the Church in Aquarius way, he turned his head and looked to his back and saw accused 2 with a firearm running after him. He looked at him for about 3 seconds to ascertain what his next move would be. This distance was measured as 28 meters. He conceded that he was fearing for his life, but he managed to look at accused 2. This Court accepts his evidence that he specifically had to look to the shooter as he appreciated that he was the target. In the course thereof, he would have had to look at the movements and tactics of the shooter behind him so as to strategize his escape. In fact, it is not without significance

that he manages to escape the gunshots fired at him. This he manages to do unscathed from both shooters in the road as he changed direction when he realised, he is running into a trap. I would add that his capacity to have escaped this deadly attack on him supports his identification as he had to have been focused on his attackers and in so doing, recognised them. His remarkable escape illustrates well that indeed he made a vigilant assessment of the shooters in order to protect himself. There is no evidence that he had the protection of a functional firearm to retaliate other than a gas gun. It follows that the only and best way to escape the gunshots directed at him was to move himself physically out of harm's way through a strategic plan of escape and acute observation to enhance his probabilities of survival.

20.8 Sonja Alexander testified that she made her observation of Eben, accused 1 from the front of her house at a relatively short distance measured as 41 meters. There was nothing that obstructed her view. The distance between Sonja and accused 2 when she identified him from her front yard was a short distance of 25 meters. She looked at him for at least 5 seconds. In both instances she recognised the shooters as persons whom she knew very well and pointed them out by their names immediately and in the midst of the attacks, when she engaged with her son about the gunshots in the road outside. She expressed her concern for the safety of the children and her son who had rushed to look for her grandson by being acutely aware of the presence of both shooters and being familiar with the fact that they were rival gangsters of the area.

20.9] Giovanni also identified accused 1 from a relatively short distance of 41 meters. There was nothing obstructing his view at the time. Though it was a chaotic and mobile scene, he sees accused 1 for a continuous period from the time that he shoots from the cul de sac until he sees him on the field where he lifted his t-shirt to show that he was unarmed. This incident is not challenged by accused 1 who testified that he had in fact lifted his shirt to show him being unarmed to the TG members who had approached him on the field.

20.10] Giovanni also identified accused 2 as he was running from Fornax Close at the back of Libra into the direction of the field and ran in same direction of Accused 1. He could clearly see him with no obstructions.

20.11] It is trite that an accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court found on credible evidence that the explanation or version is indeed false.

20.12] In deciding the guilt or innocence of an accused person, a trial court must, when a prima facie case has been made out against the accused, and even if the Court believes the witnesses for the State, consider the version of the defence and see whether they provide a reasonably possibly true alternative to the version of the State.

21] .In *In S v Kubeka* 1982 (1) SA 534 (W) at 537 F - H the Court holds that:

“Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State.”

22] In respect of identification evidence, it was held in *S v Mthetwa* 1972(3) SA 766 at 768 A:

“Because of the fallibility of human observation, evidence of identification is approached by courts with some caution. It is not enough for the identifying witness to be honest: reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness; 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.....” (emphasis own)

23] In *R v Dladla* 1962(1) SA 3017 (A) at 310 C-E, the Full Court held:

‘ one of the factors which in our view is of greatest importance in a case of identification, is the witness ‘ previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased...In the case where the witness has known the person previously, questions of identification...facial

characteristics and of clothing are in our view of much less importance than in cases where there was no previous acquaintance

with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.” (emphasis own)

24] In *S v Willemse & Abdullah* SS93 2019 [2020] ZAWCHC 105 the conviction was upheld on appeal to the SCA in *S v Abdulla* 2022 JDR 0615 (SCA). The court a quo accepted the evidence of a single eyewitness who had recognised the two shooters as the two accused charged with the murder of his father. The witness was running towards his father and over a period of 2 to 4 seconds recognised the shooters as persons familiar to him in the area. Although he was scared, running and observing various factors, the Court found this to be sufficient to have recognised familiar faces as opposed to seeing strange or unknown to the witness. At paragraph 74 of the judgment a quo the Court held in respect of the single eyewitness running over to the shooting where the deceased had been shot to the ground on the street corner follows, which rationale equally applies to the facts of this matter:

“ [the witness] conceded that the period for recognising the faces of the shooters as the persons whom he knew as [nickname] and [nickname] was very fleeting in circumstances where everything happened in moments, he was running as he approached a horrific scene. However, notwithstanding the concession, he reiterated that the momentary opportunity to recognise the shooters as the accused was enough in circumstances where he had known their faces for a considerable period of years.” (emphasis added)

25] In Waylin & Abdullah supra the Court evaluates the evidence of the single eyewitness in the judgment a quo as referred to above and who (similar to this case) had just a few seconds to identify the shooters, by stating at paragraph 75:

“...the shooters were not strangers. His focus [the witness] was on the fact that he had positively identified who they were, he knew their nicknames and other details relating to them.”

26] On appeal in respect of the conviction of the judgment a quo, the SCA held in Abdulla supra, at paragraph 13, that the process of identifying a known person as opposed to a stranger as follows:

“Much was made of the fact that [witness] only had between 2 – 4 seconds in which to observe the appellant. Had the appellant

been a stranger to him, this could have been a significant factor. However, when seeing a person who is known to you, it is not a process of observation that takes place but rather one of recognition. This is a different cognitive process which plays a vital role in our everyday social interaction. The time necessary to recognise a known face as opposed to identifying a person for the first time, is very different. It has been recognised by our courts that where a witness known the person sought to be identified, or has seen him frequently, the identification is likely to be accurate.”

27]. The State argued that none of the two accused disputed the fact that they were known to the three eyewitnesses. In fact, it is only the length of the familiarity which was disputed. Accused 2 admitted during cross examination that he used to smoke with Giovanni from the age of 15. He also admitted that these sessions took place on the premises of Giovanni and resulted in him frequenting his residence. He conceded that this ultimately meant that he had contact with Giovanni’s mother, Sonja (the second eyewitness) and thus she was well familiar with him too. He also agreed that he was familiar with Anees, since Anees and Giovanni were very close.

28] Accused 1 admitted that he knew Giovanni for at least 4 years before the incident. Sonja Alexander knew he was Esther’s son, and she used to see him in the playpark from at least 2017. He knew who Anees was and Anees probably knew his name for at least a year before the shooting incident on 25 February 2020.

29] As far as the opportunity for a correct identification is concerned all three witnesses agreed that the incident took place during broad daylight with good visibility notwithstanding that it was a mobile scene.

30] On the issue of identification I conclude that it is trite law that the State bears the onus to prove the identity of the accused and to dispel their alibi defence beyond reasonable doubt. In this circumstances it is not sufficient for the three eyewitnesses to be honest, as the reliability of their observation must also be tested against the opportunity of observation, lighting, visibility and the witness's proximity to the accused. It is significant to this Court that Sonja and Giovanni are also eyewitnesses who unlike others like Oscar, Michael and Marco who ran out of the way for safety, were altruistic in their running towards the shots as they had a protective interest greater than their own self-preservation.

I am satisfied that they had a selfless concern for the well-being of the children outside. In the case of Sonja, she was concerned not only for the children of her neighbourhood in general but moreover in that her 2 or 3 grandchildren were amongst the children whom playing outside where the gunshots were hailing. For Giovanni, whilst appreciating that the children had been caught up in the rain of gunshots, he expressed his worry for his son and ran into the shooting scene. For both Sonja and Giovanni, their altruistic instinct included the fact they were looking out and protecting their children and grandchildren respectively by observing the attackers, the amount of attackers, the area from which the gunshots hailed in relation to their protective interests who were their children and in so doing would have observed the manner and angle of attack as well as recognising the shooters well known to them.

31] On the aspects of the identification evidence I am satisfied that the evidence of the eyewitnesses was not only honest as to their pointing out of the accused as the shooters but that it can only be safely relied upon by this Court.

32] This brings me to deal with the alibi defences raised by accused 1. The only witness whom testified that accused 1 was at the shop at the time of the shooting and thus could not be the shooter at Libra is Anushka Daniels. This evidence must be considered with other evidence in totality, together with this Court's impression of

the witnesses. In *S v Liebenberg* [2005] ZASCA 56; 2005(2) SACR 355 (SCA) para 14 it was held that:

"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 prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecutions

evidence could not by itself alone, be a 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 the alibi evidence to be false..."

33] Anushka testified that she saw accused 1 with accused 2 at the Pakistani shop, before and after the shooting. She attempted to persuade the Court that she remembered these events of almost five years ago, in circumstances where she never made a statement to anyone at the time, is because of certain "flashbacks" which she experienced from after that day. She claimed that she saw accused 1 and accused 2 at that shop, in other words at a location other than where the shooting had occurred. However, accused 2 made it abundantly clear that he was not at the shop

before or after the shooting. In fact, he was in an area some 40 minutes away from the vicinity where Anushka claimed to have seen him with accused

1. According to accused 1 he was not with accused 2 on the said day at this shop. Anushka's evidence did not hold water. I found her to be an untruthful witness. As and when the proverbial shoe pinched, she added more details to her evidence to attempt to cover the contradictions and strengthen her as an alibi. Under cross examination she became belligerent and argumentative when confronted with contradiction and inherent improbabilities. She failed dismally in an endeavor to provide an alibi to the accused. In short, she messed up.

34] An eyewitness is a person who attests under oath they he or she saw one somewhere else when the crime occurred. It was very evident to this Court that Anushka came armed to exculpate both the accused, having been approached by families of the accused. To put it mildly, she went beyond the pale to paint herself as someone who can vouch for both accused innocence by completely bungling up on the case for both accused in several respects. This Court found her to be a dishonest witness whose evidence is false beyond reasonable doubt, and it follows that it falls to be rejected.

35] When the alibi witnesses for accused 1 did not assist his case at all, it warranted him, to apply for leave to testify, to fill the gaps of his alibi witnesses. His evidence was riddled with contradictions and with testimony which had not been put to previous witnesses including his version that he was with one Whiz (Robyn Fredericks) the older brother of Accused 2, and that they look like twins. I believe that this explanation was intended to explain why his own alibi witness, Anushka, had mistaken him to have been at the shop in the presence of accused 2. This attempt to confuse the

identity of accused 2 with his older brother fell apart during cross-examination when he acknowledged that Whiz (Robyn) does not

look like accused 2 and in any event this Court rejects the evidence of Anushka as being patently false.

36] The testimony by accused 1 was largely aimed at covering the material contradictions of the three witnesses called to testify in his defence. When cornered about material aspects not put to his own witnesses, he responded that they fabricated evidence or were mistaken or that the Investigating Officer had conspired against him with the State witness (Anees Davis) to implicate him. These aspects were not put to either Anees or the investigating officer (Meintjies) when they testified.

37] Accused 1 confirmed that when Anees and Giovanni testified that they saw him again after the initial shooting, he indeed lifted his t-shirt to show them that he was unarmed. It is inherently improbable that amongst the crowd on the street corner as he testified, it is only him who is confronted by Anees and Giovanni as having been involved in the shooting to which he responded by showing them that he is unarmed. There is no indication that any of the other individuals at the corner were similarly confronted.

38] The version that he left his home just to get cigarettes and biltong whilst leaving his front door open given that he would return, seems highly improbable that this quick stop at a corner shop turned into an overnight stay away from home without further ado or communication with his mother at home. This is so as he tries to explain why he had not returned home that evening in the wake of a shooting incident in the area to distance himself of the shooting. Thus,

he explained that he had turned the quick cigarette stop into a Playstation purchase, then a testing at a relative's home and sleeping over. The picture which the accused attempts to create is to distance himself from the shooting incident and that he played no role as a shooter as alleged. I am satisfied that his version of events is not in totality of all other evidence reasonably possibly true and falls to be rejected. Stated differently, improbabilities apart, the evidence of the accused is irreconcilable with other established facts and accordingly rejected as not being reasonably possibly true.

39] Accused 2 testified that he was with his girlfriend on 25 February 2020, in Smartie Town, Ocean View and they were sitting on the street corner, smoking and selling dagga the whole day until it got dark. He only left for his mother's house after 19h00 pm. On the totality of the evidence, in particular: the identification of the accused by the three eyewitnesses, the fact that they were all acquainted with each other before the incident, the length and good visibility under which the identification took place together with the inherent improbabilities of his version; it follows that his version is not reasonably possibly true and falls to be rejected.

40] The only conclusion on a conspectus of all the evidence is that the two accused were the shooters on the day in question. The question that remains is who of the two are liable for the shooting and killing of E[...] S[...] and whether they could both be held liable.

Common purpose:

41] The accused were charged for the murders and attempted murders on the basis common purpose by way of active association, in that the accused acted with a person, group of persons or syndicate, in furtherance of a common purpose. To secure a conviction, this Court must be satisfied beyond reasonable doubt that the accused acted in a common purpose with each other. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the [victims]. Thirdly, he must have intended to make common cause with those who were 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 the others. Fifthly, he must have had the requisite means rea; so, 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 performed his own act of association with recklessness as to whether death was to ensue.

42] The evidence in this case clearly points to active association. Based on the accepted evidence, accused 1 was shooting from the field side upwards into Libra, in the direction of the shop. Accused 2 was shooting from the side of the shop/park downwards into Libra in the direction of the field, with the children playing in the middle between the two shooters.

43] The postmortem concludes that the death of E[...] S[...] was as a result of a perforating gunshot wound to the chest with injuries to the heart and liver and the consequences thereof. The perforating gunshot wound is one in which there is both an entry and exit wound. The postmortem report concludes that the entrance wound is positioned on the back of the body of the deceased more to the right lower back. The gunshot tracks then exits the left chest through a fracture of

the left fifth rib, and then finally exits the body through an almost square shape wound.

44] It is common cause that E[...] S[...] was playing in the white blocks closer to the field side, when the shots were fired. Her house 4[...] Libra is in the opposite direction, closer to the shop/park side. This means that when she was running to get to safety to her parental home, she clearly ran with her back towards the field and her front facing the shop/park, before she had to turn to her right to enter her front yard.

45] Given the entry position of the perforating gunshot wound on the body of E[...] S[...], the inference is inescapable that the shooter who was shooting from the field behind her, inflicted the perforating gunshot wound that caused her to be fatally wounded. This shooter was accepted by this Court as being Eben Basson, accused 1 and as per the identification by Anees, Sonja and Giovanni as Eben Basson.

46] The shooter who was shooting from the shop/park side (accused 2) can only be convicted if the Court finds that he acted in common purpose with accused 1. The Court must find beyond reasonable doubt that Accused 2 actively associated himself with accused 1 when E[...] was shot and killed. In any event the State has proven that accused 1 and accused 2 were both present at the crime scene where E[...] was shot and killed. Accused 1 and 2 were both aiming at Anees, chasing after

him. They were both aware of the shooting which was directed at Anees by each other. They both made common cause with the assault on Anees, in that they both had firearms, chasing and firing in his direction and they both saw and became aware of the presence of children in Libra, when they executed their assault on Anees. The attack was orchestrated by the accused as an ambush, with each shooter taking aim at Anees, blocking him from either side. Fourthly both of accused 1 and accused 2 fired shots in the direction of Anees after they became aware of the presence of the children in the street, and foresaw the possibility that they might shoot and kill one of the children to get through to the intended target but reconciled themselves with this possibility. Fifthly it is common cause that the intended target of their shooting was Anees

however they both saw the children in playing in the road and both foresaw the possibility of one of the children being killed. Notwithstanding foreseeing this possibility, they went ahead and fired shots in the direction of the intended target. They clearly had foreseen that that they would have to fire the gunshots through the children to execute the intended target, with recklessness as to whether death would ensue. In fact, they wanted to murder Anees and given E[...]’s position playing in the middle, she was struck and fatally injured in a hail of gunshots.

47] In conclusion the Court finds that accused 1 and accused 2 actively associated themselves with each other, and they are therefore both liable for the death of E[...] S[...] as co-perpetrators on the basis that they acted in common purpose with each other.

Joint Possession of the unlicensed fire-arms:

48] On the question whether these charges had been proven by State beyond reasonable doubt, it must be found that the accused possessed the firearms, jointly each other, which they physically possessed (actual detentors) during the shooting. In this regard the state must prove that the accused had the necessary mental intention (animus) to possess the firearms.

49] The fact that the accused 1 and accused 2 acted in the furtherance of a common purpose to shoot and kill Anees Davis, does not lead to the inference that they possessed such firearms jointly with each other. It is established in our law (See *S v Nkosi* 1998 (1) SACR 284 (W) at 286, that such an inference is only justified where the State had established facts from which it can properly be inferred by a Court that:

- (a) the group had the intention(animus) to exercise possession of the guns through the actual detentor; and
- (b) the actual detentors had the intention to hold the guns on behalf of the group.

50] I am satisfied that on the analysis of all the evidence that accused 1 and accused 2 were each in possession of a firearm on the day of the shooting. One of the two accused was necessarily in physical possession of the 44 Magnum caliber Smith and Wesson revolver on the day of the shooting, since the ballistic expert concluded that the damaged fired bullet which was recovered from the crime scene was fired by this weapon.

51] In light of the fact that one of the accused was in physical possession of this firearm on the day of the shooting, it follows that they possessed the mental element (animus) to jointly possess this firearm.

52] Turning to the whether the accused could be convicted of the counts 1 and 2 which relates to the POCA charges, the question remains whether the shooting and killing of the deceased amount to the aiding and abetting of criminal gang activity committed for the benefit of, at the direction of, or in association with a criminal gang or caused, brought about, promoted or contributed to a pattern of criminal gang activity.

53] Both accused were the principal perpetrators based on common purpose and it is trite that a principal perpetrator cannot aid and abet a crime to which they were principal perpetrators. In order to convict a person for the contravention of section 9(2)(a) of the POCA Act a Court must find that the accused performed an act which is aimed at causing, bringing about or contributing towards a pattern of criminal gang activity as defined in Section 1 of the Act.

“A pattern of criminal gang activity” includes the commission of two or more criminal offences referred to in Schedule 1:

Provided that at least one of those offences occurred after the date of the commencement of Chapter 4, and the last of those offences

occurred within three years after a prior offence and the offences were committed –

- (a) On separate occasions; or
- (b) On the same occasion, by two or more persons who are members of, or belong to the same criminal gang.

Submits that a conviction on section 9(2)(a) can only follow when all the statutory requirements are met and the court is satisfied that the offences with which the Accused are charged constitute a pattern of criminal gang activity. Submit that the facts of this particular matter do not constitute a pattern of criminal gang activity.

Counts 1 and 2: (Contraventions in respect of the POCA Act)

54] For the reasons to which this Court had come to its conclusion that the murder and attempted murder charges emanated from a single incident, it follows that the accused ought to be acquitted on counts 1 and 2 in that the evidence does not support that the offences were committed as contemplated by the POCA Act as set out above.

Counts 3 – 7: (Murder and attempted murder)

55] In respect of Accused 1 and Accused 2 on the charge of murder and four of attempted murder acting in the furtherance of a common purpose, when you both, actively associated yourselves with the shooting and killing of the deceased E[...] S[...] and the attempted murders of the four victims Oscar Daniels, Michael Daniels, Marco Simon and Anees Davis, and for the reasons aforesaid, it follows that you ought to be convicted as charged.

Count 8: (Discharge of a firearm in a public place)

56] For the reasons set out earlier in this judgment, it follows that this count amounts to a duplication of the above charges and accordingly the accused ought to be acquitted in respect thereof.

Counts 9-10: (Contravention of the Firearms Control Act)

57] In respect of counts 9 and 10 this Court is satisfied that the State had discharged the onus which rested upon it and it follows that the accused must accordingly be convicted in respect thereof.

58] Wherefore this Court makes the following order:

Order:

For the reasons set out above, taking into account all the evidence in this matter, This Court finds as follows:

“(i) Counts 1 and 2 in respect of the contravention of POCA charges you are acquitted;

(ii) Count 3 in respect of the charge of murder of Miss E[...] Solomon, this Court finds you guilty as charged;

(iii) Counts 4 – 7 in respect of attempted murder in respect of Marco Simon, Michael Daniels, Oscar Daniels and Anees Davis this Court finds you guilty;

(iv) Count 8 in respect of the charge of discharge of a firearm in a public place you are acquitted;

(v) Count 9 in respect of possession of an unlicensed firearm this Court finds you guilty as charged;

(vi) Count 10 in respect of unlawful possession of ammunition, this Court finds you guilty as charged.

59] This Court further declares both accused to be unfit to possess firearms in terms of the Firearms Control Act 60 of 2000.

60] This Court finds that the witnesses Anees Davis and Giovanni Alexander testified in a frank, open and honest manner and is indemnified from prosecution in respect of the charges in respect of which they had been cautioned.

DA SILVA SALIE, J

JUDGE OF THE HIGH COURT

WESTERN CAPE

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