

SOUTH AFRICA / JUDGMENT

S v Camphor and Another - On Merits (CC02/2022) [2023] ZAECQBHC 44 (30 June 2023) [2023] ZAECQBHC 44

COURT

Eastern Cape High Court, Gqeberha

BEFORE

M Makaula

CASE / FILE NUMBER

CC02/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION - GQEBERHA

Case

No: CC 02/2022

In

the matter between:

THE
STATE
and
ASHLYN
CAMPHOR
ACCUSED
1
DUWAYNE
WILLIAMS
ACCUSED
2

JUDGMENT**ON MERITS****MAKAULA ADJP**

A.

Introduction

[1] Mr Camphor, herein after referred to is Accused 1, and Mr Williams, herein after referred to as Accused 2, are both charged with the following offences.

1.1 Contravention of the Prevention of Organized Crime Act (POCA) in that they willfully aided and abated criminal activity for the benefit of, at the direction of or in association with criminal gang activity.

1.2 Performed an act which is aimed at causing, bringing about, promoting, or contributing towards a pattern of criminal gang activity in contravention of POCA.

1.3 Two counts of murder.

1.4 Attempted murder.

1.5 Unlawful possession of a firearm and ammunition.

[2] Accused 1 is also facing the following charges:

2.1 Unlawful possession of drugs.

2.2 Two counts of unlawful possession of explosives.

2.3 Unlawful possession of tear gas

2.4 Unlawful possession of ammunition

Both pleaded not guilty to all the charges.

[3] The State alleges that the offences referred to in paragraphs 1.1 to 1.5 above were committed on or about the 26th January 2021 at or near 2[...]5 Harrington Street, Arcadia, in Gqeberha.

[4] The offences relating to POCA are alleged to have been committed by the Accused as members of or due to their participation in the gang activities of a criminal gang named the Hondekoppe. The State contends that on the day in question, in furtherance of a common purpose and gang activities the Accused killed Jason Petersen (Jason) and Zhane Peters (Zhane) by shooting at them. (I shall cumulatively refer to them as the deceased). Referring to the deceased and parties by their first. I show no disrespect to the parties by referring to them by their first names.

- [5] In respect of the counts relating to Accused 1, the state evidence is to the effect that on 24 February 2021, when members of the police were executing search and arrest warrants at Accused 1's home, they found drugs, explosives, teargas, and ammunition in his room.
- [6] The circumstances and the facts surrounding the death of the deceased are common cause. The issue is the identity of the people who killed them. The only witness in this regard is Winston Simon (Simon). He is a single witness regarding the events of the day. However, the state called numerous witnesses to establish various aspects of the matter. I shall in a summary form deal with their evidence at this stage. The state called the neutral evidence of two witnesses. Warrant Officer Phillip Bekker and Officer Bekker who reconstructed the scene as testified to by Simon regarding how he identified the Accused while they were inside the van and him leaning on the passenger door from outside the van. The upshot of his evidence is to the effect that Simon would have been able to identify a person seated behind the passenger at the back seat. He demonstrated that by taking pictures of Sergeant Peta seated at the back seat of a vehicle, the make of which was confirmed by Mr Corne Pommeral. The latter testified about Exhibit "U" which talks to the make of the van. He described the van to be a Ford Transit, Tourneo Custom.
- [7] Warrant Officer Davian Piedt compiled Exhibit "J" which had pictures of Insignia, hand signals and photographs of the Accused and other persons he identified as gang members which he copied from Facebook. He testified that his duties include photographing of arrested persons, profiling, gathering information, and is working hand in glove with crime intelligence. He stated that he would get information from informants. Having received the information, he would verify it by conducting his own investigation. He testified about his knowledge of the gangsters that are operating in the northern areas and that he also grew up in the same area. Among the gang groups operating in the area, he mentioned G-Stars which are associated with Spotbouwers against Hondekoppe. The gangsters would fight over turf and if there's a gang member who has been killed by a rival group, they would retaliate that death by attacking that group. He stated that during 2019 there were back and forth shootings and killings between the rival groups. In May 2019, the cousin of Accused 2, Rivaldo Klaas was arrested on murder and attempted murder charges. After his arrest on the following Monday evening, his mother who I believe is the grandmother of Accused 2 was shot and killed. The suspects were Zhane and his group who belonged to the G-Stars, a rival of the aforesaid Hondekoppe. He surmised that the killing of the deceased was a revenge attack by the latter gang.
- [8] Warrant Officer Piedt testified that one gets to know that a person is a gang member by constantly seeing him in the company of that group which would always congregate at a particular place. A person is a gang member when he participates in the duties of the gang, adopts their lifestyle, uses their unique language, hand signal and live in the same street and area. He testified that it is common to have a rival member live in an area which belongs to a rival group. Based on the photos he compiled, Accused 1 in some of them is posing with Brandon Booysen alias Tonnos who is well-known gang member, Davian Felix alias Pow, a

hitman for the Hondekoppe, Aswin Plaaityies and, Romano Prinsloo who are members of the PSB gang, Justin Briesies who is a hitman for the Hondekoppe. He stated that Accused 1 has been profiled as a gang member and has been seen in the company of Tonnos on various occasions and that information has been verified by informers and the crime intelligence unit.

- [9] Lieutenant Colonel Rio Buchner Kriel (Lt Col. Kriel) confirmed that he, Sergeant Xolani Lolo Peta (Sgt Peta), Constable Vilani, Sergeant Sokhanyile, Sergeant Klassen, Constable Hanse, and Constable Kok executed search and arrest warrants at Accused 1's home. Lieutenant Colonel Kriel testified that he went to Accused 1's home as a senior officer to assist Sergeant Peta since that was a gang infested area. Accused 1's father opened the door. Sergeant Peta explained to him the reason for their visit. Accused 1's father and his mother led them to a flatlet that is behind the main house. They knocked and Accused 1 opened for them. Sergeant Peta and Sergeant Sokhanyile introduced themselves and the former placed him under arrest. He explained his constitutional rights. Sergeant Peta explained to Accused 1 about the search warrant. He remained outside whilst the two of them were inside the flatlet. After a while Sergeant Peta called him and informed him that

he found drugs and explosives inside Accused 1's room. He advised Sergeant Peta that he should call Captain Franks and inquire

whether Accused 1 had a permit to possess such. He gave him his cellular number. He remained outside with other officers and Accused 1's parents until he was called to execute other tasks. He denied that other officers entered the room other than Sergeant Peta and Sergeant Sokhanyile.

- [10] Captain Paul Franks (Capt. Franks) is the commander of Accused 1 in the South African Police Service (SAPS). He testified that he was phoned by Sergeant Peta regarding drugs, ammunition, stun grenades and tear gas found at Accused 1's house. He informed Sergeant Peta that Accused 1 had no permission to possess those items from him. He was even not allowed to remove them from the office.
- [11] Warrant Officer Laurens Marthinus Potgieter recognized and identified a permit, which was contained in Exhibit "Z". He testified that the permit was issued to members of the narcotic unit. It allows members of the unit to possess drugs while in training. Such permits would be issued by him as an instructor or unit commander or operational commander. The originals of such permits would be kept by him in a safe in his office while the permit would be filed and attached to the training register which would be kept in a duty room where all books are kept. The permit is not allowed to be taken outside the premises by a member to whom it has been issued. The reason for such is that it should be available at any given time for inspection. Therefore, no member was allowed to have the permit removed from the premises. He testified that the narcotic and explosive dogs are trained once a week. The narcotics would be kept in a tube, which is sealed. All they were required to do was to open the cube so that the scent of the drug could be sniffed by the dog. They were not allowed to take the drugs out of the tube. In the morning, he would contact the unit commander who

would supply him with a narcotic box, which they would inspect together and make an entry in that regard on the occurrence book. Once the training of the dogs was over, he and the unit commander would again check the narcotics and put them back on the occurrence book referenced with the initial entry and would thereafter place back the narcotic box in the exhibit room. He testified that on 24 February 2021 according to the register there was no shortage of samples. He denied that he granted Accused 1 permission to possess the drugs, tear gas and ammunition.

- [12] Warrant Officer Conrad Goosen (Warrant Officer Goosen) obtained a statement from Accused 2 i.e., Exhibit “HH”. He testified that he is the one who arrested Accused 2 at his home. On 25 February 2021 he obtained a warning statement from him after he had explained his constitutional rights. Accused 2 was willing to give him a statement. He wrote the statement in a question-and-answer form meaning that he would ask a question and Accused 2 would answer that question and he would make a follow up and record everything.
- [13] Warrant Officer Karen Africa’s evidence is of a formal nature in that she is a ballistic expert. She testified that she received exhibits from Sergeant Peta regarding cartridges, which were found at the scene and a bullet which was found in the body of one of the deceased. She further concluded that two firearms were used at the scene. She concluded that the bullet collected during the postmortem and some of the cartridges were fired from the same firearm.

B. Simon’s evidence

- [14] Simon testified that he resides at number 2[...]1 Harrington Street. On the 26 January 2021, he was at 2[...]5 Harrington Street, with the deceased and Lionel. Zhane was sleeping in the house whilst he and Jason were standing at the front gate. It was after 14h00. As they were standing at the front gate, a Grey Ford panel van (the van) with dark tinted windows drove past them. Its front windows were rolled down. The occupants of the van looked at them as they were driving past. It had GP registration letters and numbers. Having driven past them, it turned into Yellowwood Street and drove up straight. It again came down Harrington Street. It stopped next to them. The person who was a passenger in the passenger seat called him to come closer. He was wearing a mask. Indeed, he went to the van, leaned on the door as the window was down. The passenger asked him where they could

purchase beers. He told him that he could get them at 2[...] Yellowwood Street, and it cost R40 00 each.

- [15] As he was talking to the passenger, he looked at the other two occupants in the vehicle and identified the driver as Accused 1 and the passenger seated at the back as Accused 2. It took him two seconds to identify them. He knew Accused 1 for a period of 1 to 2 years. He would see him about twice a day. He further would see him at Accused 2's home at number [...] Niekerk Street. He further knew him as a police officer. He would see him driving in a police vehicle with a dog at the back. Accused 1 stayed at Jenniker Street and he knew his alias to

be OE as his friends would call him. He never spoke to Accused 1 as a result he never quarreled with him. However, he would see Accused 1 drinking alcohol with the Hondekoppe gang members almost daily when he was not at work. They would be standing at the corner of Harrington Street.

- [16] He testified that he knew Accused 2 for a long time as the latter grew up in front of him. He would see him daily and occasionally visited his home. He would see Accused 2 at various places in his area. There was no bad blood between them. He knew him as a member of the Hondekoppe gang and you would always be in the company of members belonging to that gang group. That is how he identified the Accused as on that day.
- [17] Simon testified that having spoken to the passenger of the van, he turned back to go to where he was standing. At that junction, the unidentified passenger alighted from the vehicle holding a grey pistol in his hand. He pointed the gun in his direction and that of Jason who was still standing at the gate. A gunshot went off. Simon fell in a crouching position. He stood up and ran down the Street past 2[...]9 Harrington's house. He heard further gunshots being fired. He ran as far as a container which was pointed out on the exhibits. The container was 11 paces away from the scene as paced in court according to the illustration by the witness. He stood there trying to catch his breath looking at number 2[...]5 Harrington Street. The van was still standing there idling. The sliding door was opened and Accused 2 and the passenger went inside 2[...]5 Harrington Street. Further gunshots were fired inside the house. He ran into the house at [...] Esterhuizen Street which is the home of Lee-Roy. He remained there for a while until things were quiet. He proceeded back to 2[...]5 Harrington Street and found many community members having gathered there. He went inside the house and in the kitchen area he found the deceased lying in a pool of blood as depicted in the photo album. He testified that upon arrival he saw some of the police officers. He could not tell them that he had seen who shot at the deceased because there were other Hondekoppe members present keeping an eye as to who was talking to the police.
- [18] Simon testified that 2[...]5 Harrington Street was a house where drugs were smoked. However, he is a teetotaller and non-smoker. He knew Zhane to be a gang member of a group called G-Stars. Jason did not belong to any gangster group. He testified that he was called "Papa Bouw". He belonged to a gangster group called Spotbouers and his role in the group was to be on the lookout for the police. On seeing a police van, all police for that matter he would have to alarm his gang members about their presence shouting "Police". He testified that the G-Stars were friends with Spotbouers but both enemies of the Hondekoppe. The three-gang groups operated in the same area and the same Street.
- [19] Simon testified that on 5 February 20/21 he attended a photo identification parade wherein he pointed Accused 1 and 2 as the people who shot at the deceased. He testified that on the evening of 28 January 2021 on his return home he got a message that some of the gangsters were looking for him. Fearing for his life he decided to go and sleep at his sister's place,

which is in the same street. The following morning, he contacted Sergeant Peta and informed him accordingly. As a result, he was placed in witness protection program. He stated that he was nervous, shocked and was shivering at the time the shooting occurred.

[20] He was subjected to strenuous cross-examination by the legal representatives of the Accused. He testified about his health. He stated that he could read without wearing spectacles and at times forgetful. He admitted that he was not friends with the police because they as gang members regarded the police to be their enemy. He would always be on the lookout for the police and the members of the Hondekoppe. At some stage he was selling drugs. He denied that he was implicating Accused 1 merely because he was a police officer and was at some stage involved in a search at his home. He was not aware that Accused 1 was a gang member. All he knew was that he would be with the members of the Hondekoppe group each time he was off duty. However, he knew that Accused 2 was a gang member belonging to the Hondekoppe. He was adamant throughout cross-examination that although the incident took about 2 minutes, he was able to identify Accused 1 and 2 as part of the people who committed the offences. He admitted that he did not see Accused 1 alighting from the vehicle and shooting at the deceased. However, Accused 1 was the driver of the van that transported Accused 2 and the passenger. The passenger was carrying a firearm. He said he did not see Accused 2 carrying a firearm nor shooting at the deceased. However, he saw them enter the house where the deceased were killed. He testified that he did not shout 'police' because he knew Accused 1 and did not think that he was to shoot at them. Simon remained adamant that he did not mistake Accused 1 and 2 as he knew them very well. He denied that he was falsely implicating Accused 2 and stated categorically that he knew Accused 2 and his family well. Accused 2 grew up in front of him.

[21] Sergeant Peta testified that on 26 January 2021, which was on a Tuesday, he attended the crime scene. He visited a house which had CCTV footage at Harrington Street. The video footage depicted a clear picture of what occurred prior to and post the incident. The video footage was played in court and reflected the following as interpreted by Sergeant Peta. We noticed the following on the video footage at:

16:48:54 the van is seen coming out from Esterhuizen Street turning left into Harrington Street. 16:49:24 the van is seen turning from Harrington Street to Yellowwood Street. 16:50:57 the van stops opposite house 2[...]5 Harrington Street (the crime scene). 16:51:33 the van is still standing at the crime scene and a woman is leaving a yard walking in the direction of the crime scene. 16:51:38 the van is still standing at the crime scene whilst another vehicle is driving down the road and we see a woman walking towards the crime scene. 16:51:45 the woman that was previously moving towards the crime scene, suddenly runs back to the yard while the van remains standing at the crime scene. 16:51:54 and the motor vehicle that is driving up Harrington Street suddenly stops, and the van remains at the crime scene. 16:51:59 people are seen running down Harrington Street, the vehicle which was driving up is reversing, and the van moves away from the crime scene and drives down Harrington Street. 16:53:07 there is movement of people going towards the crime scene.

The time that the van took at the scene is approximately one minute in duration.

[22] Sergeant Peta testified that he attended the scene on the 26 January 2021 after the incident. He was advised of a potential witness. However, he did not approach the witness for safety reasons because the situation was still volatile. He was given the address of the witness, which was not far from the crime scene. The next day he visited the witness, but he found that he was not at home at the time. He left his phone number with the witness's sister. On the same day, he got a call back from his sister. He phoned back and

spoke to the witness who happened to be Simon. Simon wanted to see him. He informed Sergeant Peta to come in an unmarked vehicle so that he should not be identified by those who were on the lookout and fearing that one of the suspects was a police officer. Indeed, he used his vehicle to fetch Simon from his home. He took Simon to the police station and arranged for Warrant Officer Goosen who is Afrikaans speaking to obtain a statement from him. Pursuant thereof, Simon informed him that he had information that the friends of the suspects were looking for him. They wanted to kill him. Indeed, on 5 February 2021, he arranged for Simon to be placed under witness protection program.

[23] Sergeant Peta was recalled as a witness. He testified that he became aware of the suspects on the day of the incident. He decided to apply for search and seizure warrants in respect of both homesteads of the Accused. He obtained the search warrants on 24 February 2021. Having received them he informed his commander Lieutenant Colonel Kriel. He met with his commander at Betheldorp Police Station. They decided to form two groups. One group was to search Accused 1's home and the other Accused 2's home. The searches were to be conducted simultaneously. He, Lieutenant Colonel Kriel, and other members mentioned by Lieutenant Colonel Kriel in his testimony, proceeded to Accused 1's home. I shall not repeat the evidence of Sergeant. Peta insofar as it relates to what happened upon arrival at Accused 2's home. Suffice to say that it is in all fours with that of Lieutenant Colonel Kriel regarding what happened upon their arrival at his home and up to the time they found Accused 1 in his room. Upon meeting the Accused 1 he introduced himself as a police officer and informed him of the reason they were at his house. He explained to him that he was a suspect in two murder cases. He explained his constitutional rights and inquired whether he had anything to say to, which he replied No. He placed him under arrest and showed him the search warrant. He requested Accused 1 to sign the original search warrant. Accused 1 signed it. He told Accused 1 that he was going to confiscate his phones and the DVR machine for the cameras. He requested to search the room. Accused 1 consented to him doing so.

[24] He and Constable Vilani got inside his room while Lieutenant Colonel Kriel and other members remained outside guarding them as they were conducting the search. As he was in the main room, on the table, he saw a green Nike bag. Protruding from the Nike bag was an exhibit bag. He pulled the exhibit bag and found 2 packets of suspected Tik; 4 x quarter suspected Mandrax tablets; 2 x half suspected Mandrax tablets. On the corner of the table, he found 3 bombies of dagga, a camel container with half a tablet suspected to be Mandrax and a Tik pipe. He also found 25 different kinds of knives. In the corner of the room as you

enter the door just behind a bag that was placed there, he found 2 explosives. Not far from the bed, in a basin, he found 2 empty cartridge casings, 1 bullet point, a small empty Tik plastic with 9 big others. On the floor, he found 2 Tik scales. He asked for his cellular phones which he handed over to him. However, he refused to give the password to one of the phones. He proceeded to the second room where there was a wardrobe. He found a safe, which had 7 live rounds, 1 cartridge casing and a training bullet. On the floor he found 1 live round and a shotgun bullet which was damaged, a hard drive, a pepper-spray and 1 fire arm magazine. Accused 1 and Constable Vilani were always together when he found the items. Whenever he found the Mandrax and Tik tablets, Accused 1 would say

they were for training his dog. It is worth mentioning at this stage that Accused 1 is a member of the SAPS and attached to the dog unit. When asking further about the possession of drugs and the explosives, Accused 1 showed him a permit, which he alleged was given to him by his commander for purposes of carrying the drugs. He noticed that the permit had expired on 23 February 2021. He asked for Captain Frank's phone number from Lt Col. Kriel. He phoned and inquired from him about the permit. Captain Franks denied that he issued the permit for Accused 1 to possess drugs and had allowed him to possess same. He placed Accused 1 under arrest for unlawfully possessing drugs and explosives. However, he did not arrest him for possession of ammunition because he was a member of the SAPS. He confiscated from Accused 1 a bulletproof vest, police radio and its charger, 2 police reflector jackets, and a cigarette roller.

[25] He testified that he contacted Warrant Officer Benjiwe, who is a photographer, to come and take photos of the exhibits. Indeed, photographs were taken of the exhibits, and all were placed in exhibit bags, which were sealed in the presence of Accused 1. He took the exhibits to the police station where he entered them in the SAP 13 register. He agreed under cross-examination that he took other items which were not covered by the search warrant. He stated that as a responsible police officer he would not have left explosive and drugs because they were not covered by the search warrant. He testified about cases where Accused 2 was a complainant. He also included two instances where Accused 2 was shot at on his way from a shop. During his evidence in court, he pointed out the mothers of the two Accused in court. He further pointed at a gentleman who was seated in the gallery and identified him as Ashwin Platjies who is a gang member belonging to Preston Boys which operated from Schauderville. Nothing much turns on his cross-examination.

C. Defence Case

Accused 1.

[26] Accused 1 started his testimony by highlighting his personal life. He was 30 years old, unmarried, with a child who was 7 years old. He had a steady relationship with his girlfriend which was, at the time of his evidence, 11 years. He resided at 2[...] Jenneker Street, Arcadia, Bethelsdorp. He lived with his parents and his brother. He left school in Grade 12. He worked on a part-time basis with SAPS as a radio technician. He was subsequently employed on a permanent basis. He is attached to the dog unit as a dog handler. His duties entailed

search and seizure of drugs and any contraband using his dog.

- [27] He testified that he knew Simon as they lived close to one another. He has been to his house about three times. They were conducting searches for drugs. They discovered drugs on one occasion. Other than these encounters, he did not know him personally apart from seeing him walking in the street. He denied that he was ever involved in a shooting at 2[...]5 Harrington Street on 26 January 2021. He gave a detailed account of where he was, with whom and what he was doing on the day.
- [28] He stated that on the day, he was fetched at his home after 9:00 by Accused 2 who was in the company of his friend and colleague Anthony Hendricks (Anthony). Anthony asked him to drive his vehicle which was a white Audi as he was feeling tired from drinking the previous night. He got into the driver's seat, and they drove to Extension 27 in Bethelsdorp to a place that was closer to the police station. They had planned to have a braai that day. They started off by dropping Accused 2 in Dolph Place, Bloemendal before they proceeded to pick up a friend, Nathan Oliphant. He and Nathan attended the same college and played soccer together. They thereafter drove to Extension 24 Spar Supermarket. They bought snoek, spices and alcohol. They then proceeded to Extension 7 where they had a braai at the house of Jean Pierre Gallant. He knew the latter because they attended the same High School and played soccer together. At all material times he was with Anthony. They arrived at the house before 12:00. Present at the braai, was Accused 1, Anthony, Nathan, Jean Pierre, the latter's brother, and another old friend who they grew up with, attended the same Primary and High School, and played soccer together named, Chop. Accused 2 was not present. They ate snoek, drank alcohol, and conversed. They remained there until between 15:15 and 15:30.
- [29] Chop requested him to drop him at his place in Kariega (formerly known as Uitenhage). Indeed, they proceeded to Kariega where they dropped him off at his place. In the vehicle, he was with Anthony, Chop and Nathan. They were traveling in a white Audi. They left him at about 16:30 and proceeded to drop Nathan in Gelvandale at approximately 17:50 to 18:00. On the way from Kariega, Accused 2 telephoned and requested to be fetched. They proceeded to Dolph Place where they had left Accused 2 and picked up him at about 18:00. They left Accused 2 at his house and proceeded to his home where Anthony left him at about 19:15. He never left his house until the following day. Accused 1 denied that he was ever involved in a shooting on 26 January 2021. He did not see Simon on that day. He saw him the following and subsequent days in Harrington Street standing opposite Snakes Tavern. He never saw him again after 29 January 2021. He was neither a gangster nor any of his friends were.
- [30] Regarding the signs and insignia in Exhibit "J", Accused 1 stated that the sign allegedly attributed to the Hondekoppe, is a sign, which they use as goalkeepers which means 'keep on the good work.' He denied that he is a member of the Hondekoppe nor being associated

with them. He testified that he knew Davian as they grew up together and attended the same school. He is not friends with him and does not know whether he is a gang member or not. Rivaldo Klass used to live with Accused 2 when he was still young, and he is not friends with him. He however, heard about his arrest. Rimano Prinsloo is known to him as they grew up together and he is used to drinking and smoking with him on occasions. He is unaware that he is a gang member. He testified that he wore Adidas and Nike clothes because they are worn by anybody who affords them. He testified that he knew Brendon Booysen. Referring to photo J5 in Exhibit "J", he stated that it was taken at the first beach in Summerstrand. He knew him as he had a construction company and used to assist with electrical drawings because he struggled with them. Accused1

testified that he was a qualified mechatronics but did not write the trade test. He had known him for a period of five years. He did not know him as a gang member. Regarding the photos, he testified that the finger sign made by Brendon depicts the number 7. Davian demonstrated the head of a goat using a hand signal. He did not know what the sign meant in terms of gangsterism. He knew Juvaïne Gallant as a friend and they grew up together, attended High School and used to play soccer, drink, and socialize together. He was not aware whether he was affiliated to any of the gangster groups. He knew Ashwell Plaatjies as they used to play soccer against each other. He played for Saints and Accused 1 played for Black Pool. They were not friends, and he was also not aware that he was an affiliate of any gangster group. Justin Breisies was his friend and they attended High School together. They drink and smoke together. He did not know whether he belonged to a gangster group. He referred to a photo where he posed with Robin Williams, a Bafana Bafana goalkeeper. He stated they grew up together and were both goalkeepers. He stated that the pose by Robin Williams was for goalkeepers as he alluded before and did not suggest that he was a member of Hondekoppe.

[31] Pertaining to the events of 24 February 2021 that is the day a search was conducted at his home. He testified that he was from hospital as he had been involved in an accident. He testified that he did not sign the pocketbook of Sergeant Peta. The signature, which appeared there was that of his mother. He only signed for his rights at the police station. He testified that as he was sleeping, he heard his father calling him. He opened the door. His father told him to tie the dog as there were people who wanted to see him. The dog ran towards Sergeant Peta and others. They were seven in number. Sergeant Peta drew his firearm and said he was going to shoot the dog. He told him that he must shoot it and he would see. He instructed the dog to seat, and he took it to its enclosure. They came to his flatlet. He sat on a chair that was next to the bed. The rest of the police officers got inside his room while Sergeant Peta remained standing at the doorway. Sergeant Peta told him that they had come to arrest him for a double murder. He inquired from him as to what

murder was he talking about and where did that happen. He did not respond instead he requested him to stand up so that he may handcuff

him. He requested him not to use handcuffs but a cable because his shoulder was sore, as he had been involved in an accident that morning.

- [32] Accused 1 testified that he did not partake in the search and seizure of the items allegedly found in his room. When they conducted the search, he was seated in his room. He would hear them say that they found this and that. He did not know where the items were found. He denied that he possessed all the items allegedly found at his place. He was further not present when the items were found by the police. All that belonged to him were the knives and the gun lighter. He alleged that the pepper spray, the scale, cigarette roller and the black cell phone belonged to his father. The camera belonged to his mother and the two-iPhones belonged to him. He admitted that the permit was found in his work bag. He was prejudiced by the fact that the footage in the DVR was erased because that is where the events of 26 January 2021 and 24 February 2022 would have been reflected. The DVR footage would have cast light regarding how the search and seizure was conducted and how he was arrested and taken away from his home. He denied all the charges that were preferred against him.
- [33] When cross-examined by Accused 2, he remained adamant that he had accurately reflected on the events of 26 January 2021. He insisted that he dropped Accused 2 at his place at 19:00 and never returned contrary to what Accused 2 was saying. Accused 2 mentioned in his statement that he parted ways with Accused 1 at about 24h00 that night/morning. He was cross-examined at length by the State. He stated that he had given proper instructions to his legal representative. He, however, remembered that he did not mention in his evidence in chief that at some stage they went to a garage to fill up petrol. He confirmed that he did not inform Sergeant Peta about the detail of his alibi. He was mentioning his whereabouts on the day for the first time in court as he was testifying. He stated that by electing to remain silent he was exercising his constitutional rights.
- [34] He testified that he was not allowed to carry his service firearm if he was going to a party or drink alcohol. However, on that day he did carry it because he did not plan to drink too much. He further testified that he was found with the permit because it was contained in his file. He took the file with him even though he was not allowed to remove it from the premises because he was busy working on his schedule when he was called to go out to work. However, he agreed that he was not supposed to have removed it from the K9 premises. He was asked as to why the version he now proffered was not put to his commander. He retorted by saying he knew that he would get an opportunity to come and testify and put his version forth. He remained steadfast even though it was put to him that had his version been put to Sergeant Peta and his commander, the issue of the permit and the register would have been resolved. Accused 1 was asked about the reason why certain evidence was not challenged when the witnesses for the State were testifying about them, for example, the issue of Colonel Kriel having been inside the room when all the items were found and the issue of him having not challenged Sergeant Peta when he said Accused 1 refused to give him the pin to the phone. His answer regarding all that was characterized by

the statement that he wanted the police to bring the DVR which contained all the information and the fact that he was going to state those facts himself when he testifies. This is less convincing in the sense that throughout the cross examination of witnesses there were intermittent consultations between him and his legal representative. He consistently gave instructions to him and cross-examination of each witness would never be finalized without his legal representative approaching him to verify if there are further instructions. He, however demanded photos which would show the items that were found in his room. He could not explain how it was that he admitted all the lawful items found in his room but did not in respect of those which

were illegal. Instead of an answer, he demanded to be told where the illegal items came from. He conceded that the permit belonged to the unit and not him. He denied that he was asked about the phone number of his Commander Captain Franks. He further denied that his commander was phoned in his presence. He, nevertheless, admitted that such evidence was not challenged. He further stated that he only found in court that the register was not supposed to be removed from K9 offices.

- [35] Anthony was called as Accused 1's witness. He testified that he is a member of the SAPS and was stationed at Mount Road and performed duties at New Law Courts. He knew both Accused as they used to visit his cousin in Niekerk Street. He confirmed that he did Commission an affidavit a month or two after the incident and confirmed its correctness. He testified that on 26 January 2021 he woke up after 6:00. He was still 'tipsy' because of the previous night's drinking. His wife left at 8:30. He decided to go to Accused
2. He was carrying a half-full bottle of whiskey from the previous night. He informed Accused 2 to wash so that they could leave. He waited for him in his car outside. Accused 2 came and suggested that they should go, fetch Accused 1. Accused 2 telephoned Accused 1 and informed him to be ready as they were on their way to fetch him. They drove to his house. It was now 9:00. He hooted and Accused 1 came out. He climbed out of the driver's seat and went to seat at the back. He asked Accused 1 to drive. They drove to

Bloemendal, then to Extension 27 and thereafter to, [...] Arcadia Road in Gelvandale. From there they proceeded to the engine

garage for fuel. The time then was between 10:00 and 11:00. When they left Gelvandale, it was still the three of them and a friend of theirs who they picked up in Bloemendal in the vehicle. On their way back they stopped at Extension 24 Spar to buy spices for the fish. He remained in the vehicle with the friend they picked up. At that time, he was not sure where Accused 2 was as they had dropped him somewhere before they went to Spar. They left Spar at 12:00 and proceeded to Extension 27. They arrived there between 12:15 and 12:20. Upon their arrival, he asked the fish from Accused 1. Accused 1 said he was going to fetch it from his place. He remained behind Accused 1 drove off to fetch the fish. He remained inside the house and slept. He woke up at about 14:00 when he was informed that the fish was ready. There were a lot of people present. He did not know whether Accused 1 left the house when he was asleep. Having partaken in the fish,

one of their friends (later known to be Chop) asked to be taken to Kariega. He and Accused1 took him to Kariega. They left at about 15:00. They proceeded to a garage in Kwa-Dwesi Mall where they filled in petrol after which they proceeded to drop off Chop between 16:00 and 17:00. They drove off to Bloemendal where they picked up Accused

2. It was after 18:00. It was now Accused 1, 2, himself and the friend from Gelvandale in the car. They proceeded to Gelvandale where they dropped the friend. It was after 18:00 at that time. Thereafter, they proceeded to Arcadia. He was driving at the time they were traveling in Stanford Road. He proceeded to Accused 2's house where he left him. He continued and left Accused 1 at his house and went home. The time was then between 18:30 to 19:00. He never left his house again.

[36] He testified that he did not know if Accused 1 and 2 came together again after he had left them at their places. He denied that they went home just before midnight on that day. He stated that his affidavit was not detailed. He was sure about what he was stating in court as being the truth. On their way to the Accused 2's home, they drove past 2[...]5 Harrington Street. It was cordoned off with a police tape reflecting that it was a crime scene. He asked Accused 1 to go and check what was happening, but the reply was that it was dark. He testified that before 15:00 Accused 2 informed him that his mother told him about the shooting that had occurred in Harrington Street. Anthony did not know how Accused 2's mother could have known about the shooting before it occurred. He denied that he had a braai with Accused 1 and 2 at Dolph Place. He further stated that it is impossible for a person to live in the northern areas without knowing of the gangs operating in the area like the Hondekoppe. His statement was admitted as Exhibit "JJ". In it he made mention of the fact that they stopped twice at different petrol stations to fill in petrol. He further did not mention that Accused 1 and he, left Accused 2 at his home just before 18:30. Furthermore, in his statement he stated that as they were passing the crime scene Accused 1 told them about the shooting that had occurred earlier on in the afternoon.

D. Accused 2

[37] He testified that he was 30 years of age. He is unmarried but has 3 children aged 13, 9 and 2 years respectively. He was unemployed at the time of his arrest on 24 February 2021. He resided at [...] Niekerk Street in Arcadia with his family. He denied that he was a gang member. However, he stated that there are many gang groups operating in the area, for example, the G-Stars, the Spotbouers and the Hondekoppe. He said that G-Stars and the Sportbouers operate in Harrington Street, but none that operated in his Street.

[38] He grew up with Accused 1. They attended the same Primary and High Schools and played soccer together. They lived closer to one another and would meet frequently. He knew Jason well as they grew up together in the same area. His elder brother was also a friend of his father. He also knew Zhane as he grew up in front of him in the same area. He testified that on the day of the incident he was at his home when Anthony arrived. Anthony was still drunk from the previous night's drinking. He asked what they were going to do for the day. It

was between 8:00 and 9:00. He told him that he was going to call Accused 1. Which he did. They drove and picked up Accused 1 from his house. Anthony was driving his white Audi. They visited friends at Extension 27. After that, he suggested that he would be visiting his nephew in Bloemendal. As they were driving around, Anthony pulled over and requested Accused 1 to drive. Accused 2 was in the back seat and proceeded to Extension 27 to Jean Pierre. They got inside the house, and he remained in the vehicle. It must have been 10:00 when they came back and informed him that they were planning to have a braai to spend the day. He asked them to go and drop him at his nephew's place at [...] Dolph Place. They left him there after 11:00 o'clock. The latter was preparing fire for a braai. He remained with his nephew, cousin a friend Billy his nephew's his father, and his aunt. Billy and his cousin had already consumed alcohol. After 5 to 10 minutes Anthony and Accused 1 decided to leave. He remained with his cousins for the whole day until he phoned Accused 1 and Anthony in the afternoon to pick him up.

- [39] The reason he phoned Accused 1 and Anthony to come and pick him up is because he had received a call from his mother. His mother informed him that there was a shooting at Harrington Street, and she heard that Zhane and Jason had been shot dead. Each time there was a shooting in area, his mother insisted that they should come home. Upon arrival Anthony and Accused 1 got inside and socialized with them for a while. He told Accused 1 about what his mother said and requested that they should go to his mother. He and Accused 1 drove to his house to meet his mother. Anthony remained behind with his cousins. On their way home, they did not drive in Harrington Street. On arrival at home, he confirmed the rumors with his mother. After a while, he told his mother that he was still going to go and socialize with his family. They left and drove to the engine garage for petrol and drove back to Dolph Place. They remained up until after 12 midnight after which they drove back home. It was him Accused 1 and Anthony. They dropped him at his place and left.
- [40] He stated that he knew Simon as he used to see him. He knew him as a member of the Spotbouers gangsters. He knew the house, which is the crime scene. Members of the Spotbouers and G-Stars used the house as a drug smoking place. He was surprised why Simon was falsely implicating him in the commission of the offenses.
- [41] He knew the people he was posing with in the photos contained in Exhibit "J". He knew Tonnos since 2006 when he started his plumbing construction business. He did not know him as a gang member. He knew Felix as they attended school together and did not know him as a gang member. Goliath and Felix were friends and had been playing soccer together since
2019. He did not know him as a gang member before he died. Prinsloo stayed opposite his house for many years and neither did he know him to be a gang member. He had been friends with Gallant since they were young. Cheslin grew up in front of him and they lived diagonally opposite his house and did not know him to be a gang member. He denied that he spent time with gangsters, nor was he part of any gangster group. They played soccer together and he had known him for 10 years. He confirmed that he was arrested on the 24

February 2021 at his home. He co-operated with the police, especially Warrant Officer Goosen who obtained a statement

from him. He confirmed the contents of his statement as being correct and a true reflection of what occurred on that day. He denied that he, Accused 1 and Anthony parted ways at 19:30. He remained resolute that he drove to his place after 17:00 with Accused 1 only. Anthony remained with his cousins at his cousin's house.

[42] In a nutshell he denied under-cross examination that the area where his house is situated is a Hondekoppe area. He denied further that he was shot at while at his home as testified to by Sergeant Piedt. He further denied the version of Accused 1 insofar as it related to the events that occurred after 17:00 on the day of the incident. Where he contradicted Accused 1 and Anthony, he insisted that his version is correct.

E. Royston Bramwell

[43] He testified that he is the cousin brother of Accused 2. He knew Accused 1 as he grew up in Arcadia. He testified that on the day in question Accused 1, 2 and Anthony arrived at his home. He was preparing fire to make a braai. Accused 1 and Anthony did not remain there for a long time as they left after 10 minutes of their arrival. He remained with Accused 2, his siblings, mother and his friends enjoying meat and alcohol. After 18:00, Accused 1 arrived to fetch Accused 2 as the latter had received a call from his mother. Anthony remained behind with them. They returned after 19:00 and continued to drink until they left after 23:00. He admitted that on the day he had a lot to drink. He remembered the events because he was reminded by Accused 2's mother. He did not know Accused 2 to be belonging to any gang group. He denied the version of Accused 1 as put to him regarding their movements on the day in question. He admitted that he was approached by Sergeant Peta regarding him making a statement about the events of that day. He told him that he did not remember anything because it happened a long time ago and he was intoxicated.

He stated that though he did not have an independent recollection of what occurred, he suddenly recalled after he was reminded by Accused 2's mother.

F.

Analysis.

[44] The evidence that connects the accused to the Commission of the offense is that of a single witness, Simon. As foresaid he is a single witness in respect of counts 3 to 7. His evidence therefore must be treated with caution. Section 208 of the Criminal Procedure Act 51 of 1977, provides that an accused may be convicted on any offence on the single evidence of any competent witness. Nothing suggests that Simon is not a competent witness.

[45] Dealing with a similar provision, the court in *R v Mokoena*[1] De Villiers JP stated that the provision should only be applied when the single witness is clear and satisfactory in every material respect, has no interest or prejudice, did not contradict himself, does not have

previous convictions for dishonesty, had a proper opportunity for observation and so on. However, Fagan JA remarked in *R v Mokoena*[2] that Broome JP would have been justified if the first Mokoena case had to be read as laying down a requirement of the law that must be strictly complied with: but it was improbable that had been intended. In short, the dictum in the first Mokoena judgment does not state that as the requirement of the law. The matter also came before the Appellate Division (now the Supreme Court of appeals) in *S v Sauls*[3] where Diemont JA said the following:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness (see the remarks of Rumpff JA in S v Webber). The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [the first Mokoena case] may be a guide to a right decision but it does not mean “that the appeal must succeed if any criticism, however slander, of the witnesses” evidence were well founded “per Schreiner JA in R v Nhlapho (AD 10 November 1952) quoted in R v Bellingham. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common-sense”.

[46] I agree with the following reasoning enunciated in the South African law of Evidence; 3rd Edition; DZ Zeffertt and AP Paizes 2017 at 1083. “The above dictum, constitutes a useful corrective to courts that have occasionally shown a tendency to tick off the various factors mentioned by De Villiers JP as casting doubt upon a witness reliability and then, finding none to be applicable, to conclude that there are no reasons for rejecting the prosecution evidence. This is not a permissible form of reasoning because it is not necessary to reject the prosecution evidence in order that the accused should be entitled to an acquittal. The essential question is whether on all the evidence there a reasonable possibility of the defence story is being substantially true.”

[47] Regarding the motive of Simon implicating Accused 1, the latter referred me to a Western Cape judgment which relied (in a disjointed, manner in that the excerpt I was referred to is not accurate and does not refer to the decision in *S v Webber*.) on the decision in *S v M*[4] where Cameroon JA said the following in his dissenting judgment:

“The absence of any suggested or plausible motive here must in my view contribute to the weight of the state’s evidence in this case.”

The headnote in *S v Webber*[5] reads thus;

“The evidence of a single witness ought not necessarily be regarded as not credible merely because he has “an interest or bias adverse to the accused”. It is necessary to assess the intensity of the bias and to determine the importance thereof in the light of the evidence as a whole.”

[48] The principles annunciated apply equally in the matter before me. What is common cause is that two firearms were used at the scene as the evidence of Warrant Officer Africa informs us. The evidence of Simon is that Accused 2 and the passenger entered the house at 2[...]⁵

Harrington Street. He was at the container which was 11 paces away. It was daylight. Therefore, all that suggests is that those who entered the house were both carrying firearms, as I cannot phantom a situation where one person would be at the same time using two different firearms while shooting at the deceased. Be that as it may, Simon's evidence that two people entered the house finds corroboration from the finding of Warrant Officer Africa.

- [49] It has been argued by Accused 2 that Simon lied about the time of the incident. It may be so, that he was wrong as to what time the incident took place. However, what is true is that he was at the scene at the time the incident occurred. He stated that the attack on them took a very short time. Indeed, the video footage bears him out. The van took less than two minutes at the scene. The events are not in dispute, but the issue of identity is. It is correct that the deceased were killed inside 2 minutes. That is the period the perpetrators took to look, find, and kill the deceased. What is it that would have prevented Simon identifying the assailants in that time period? The uncontroverted evidence is that he was in close proximity, leaning on the door at the time he was talking to the passenger. What must be borne in mind is that there was nothing sinister about them. They did not display any disposition of violence at the time. The atmosphere was calm, relaxed and there was no cause for concern. It was daylight and nothing obscured his view. Under the circumstances, it cannot be argued that Simon could have been distracted by anything that would lead him to miss-identify the persons he saw at the time. His demeanor of even leaning on the door tells the story. He testified as follows, regarding how he identified them;

"I saw OE and Duwayne. The former was the driver. I saw the left side of his face. He turned around and I saw his entire face. OE did not say anything to me. OE is Accused 1. He was wearing a blue colored shirt. I looked at him for about two seconds. Duwayne was sitting behind the passenger. I saw his full face. I looked at him for two seconds. He said nothing to me. He was wearing black clothes. Duwayne is accused

2. Both did not have headgear they had not covered their faces."

- [50] Furthermore, the facts of the matter are different from other matters, especially those referred to by the Accused, in the sense that at the time of identification nothing was happening. Simon did not say that he identified the Accused amid gunfire. Therefore, the issue of identification stands alone, distinct from the actual shooting of the deceased. Nothing therefore influenced his observations especially of the people he knew before in the manner he has described how. His knowledge of the accused is not disputed and in fact, they themselves admit to have known him prior to the occasion and have met him on numerous occasions. Whether the actual shooting occurred very fast or not had nothing to do with whether he was able to identify them at the time alleged.
- [51] Simon was a good witness who gave his evidence in a satisfactory manner. His responses were remarkably candid. He admitted things, which ordinarily a less satisfactory witness would not admit. He admitted that he was a gang member, whose work was to be on the

lookout for the police, police were not his friends and that he spent most of his time at 2[...]5 Harrington Street which was a place where drugs were smoked by the gangsters who belonged to the G-Stars. This fact was conceded to by Accused 2 in his argument when he asked “the question one is left to ask is does this make him a bad witness? Not necessarily, if one considers his demeanor, he was not a bad performing witness. He was honest enough to admit to being a self-confessed gangster. He was clear that he was from the opposing gang (enemy gang) in that area”.

- [52] It has been urged of me to have regard to the fact that Simon belongs to a group which is rival to that which it is alleged Accused belonged to. Furthermore, it has been suggested that Simon is forgetful and make mistakes at times. It was insinuated by accused 1 that Simon might implicate him because he was once involved in searching his place and on one occasion drugs were found. However, no basis has been laid for such an assumption. Therefore, I need not surmise that could the motive if there was a motive at all for the implication of the Accused. What I referred to above as having been stated in the case of S v Webber is telling in the circumstances of this matter. That Simon may have “an interest or bias adverse to the Accused” is not reason enough for me to find that his evidence is not credible. Nothing in his evidence suggests that he was hell-bent to falsely implicate the Accused. There is no semblance of evidence, other than his admission to being a gangster, leads to the fact that he was out and out to falsely implicate them and none has been pointed out to me either. If one were to accept that reasoning, no evidence of a person admitting on their own to being a gangster, would ever be believed in any court of law. Evidence by self-confessed gangsters would never be accepted in a court of law if one were to follow that reasoning. That would lead to a miscarriage of justice. Simon's evidence is not exaggerated in that he did not say he saw the Accused carrying firearms or shooting at the deceased. He did not even say Accused 1 alighted from the vehicle as would be expected of a person who wanted to falsely implicate them nor falsely implicate Accused 1 by saying he is a gang member. All he said was that he always socialized with members of the Hondekoppe.
- [53] The evidence of Simon further finds corroboration in the evidence of Warrant Officer Bekker who demonstrated in Exhibit “U” that Simon would have been able to see inside the van as depicted by the photos. His evidence was not challenged in this regard. I shall not regurgitate the evidence of Warrant Officer Piedt regarding the people he identified in the photo album, which he compiled and that they belonged to various gangster groups. He explained the reasons why he concluded that they were gangsters and I have dealt with that above. Suffice for me to state that his evidence in that regard remains unchallenged. Even the accused themselves did not deny that they were in association with those people as the photos speak for themselves. They appeared in the photos with the alleged gangster members. What remains to be determined is whether they themselves belong to Hondekoppe as alleged. There is no direct evidence, which establishes that. All that will depend on the circumstances as told by the witnesses. All that need to be stated from his evidence is that they as police, when they were profiling the Accused found that they were gangsters belonging to the Hondekoppe.

[54] The search and seizure warrant that is Exhibit “R” was handed up by agreement between the parties. Belatedly Accused 1 argued that the search warrant was not supposed to have been issued because the affidavit of Sergeant Peta, which accompanied the application was commissioned by Constable Mbangi who was also a member of the group. One must appreciate that Constable Mbangi was not part of the group that searched the home of accused 1. According to Sergeant Peta she was in the group which searched the home of Accused 2. Be that as it may, it was within the rights of Accused 1 to have asked that the state case be opened to deal with the aspect of the search warrant. That did not occur, and the search warrant remained admitted. It cannot avail Accused 1, to at that late, simply to argue the issue of the validity of the warrant. There is no prejudice suffered by Accused 1 because of such failure. I say so because Sergeant Peta testified that Accused 1 granted him permission to search his room and was cooperative throughout the process. That was not disputed. A proper foundation should have been laid and the

reasons

stated up front as to why its validity was challenged. That would have enabled the State to produce evidence and argument to counteract that application. Therefore, this contention or argument does not hold water and stands to be rejected.

[55] The evidence of Sergeant Peta as to what occurred in Accused 1's room has not been meaningfully criticized if it was criticized at all. His evidence is straightforward, and not contradictory. His evidence points to how he found the items referred counts 8 to 12. The crisp issue is whether they were found in Accused 1's room or not. In other words, I must decide who of the two is telling the truth and why I believe him. I shall not restate their evidence for purposes thereof. All I need to state is that Sergeant Peta's evidence is corroborated by Lieutenant Colonel Kriel, Captain Franks and partially by Accused 1 himself. It is common cause that Accused 1 was attached to the dog unit and was using drugs to train his dog. He also had to be given a permit for him to possess drugs albeit that he would keep the permit at the dog unit in his offices. It is evident that he was not supposed to take either the drugs or the permit from the dog unit. Sergeant Peta did not know the procedure that was followed at that unit hence upon receiving such information from Accused 1 he had to verify it with his Commander Captain Franks. It boggles the mind why would Sergeant Peta phone to verify the information from his commander if he did not get it from and the drugs found in the room of Accused 1. The only plausible answer is that the drugs and the illegal items were found in Accused 1's room and he gave an explanation which led to Sergeant Peta to phone his Commander.

[56] The evidence of Accused 1, as reflected above, is at variance with the evidence of Anthony, Royston and Accused 2 regarding the events of the day. I wish to make one observation, which has not been explained by the Accused. Simon testified that the Accused were together at the time of the commission of the offence on that day. How would Simon have known that Accused 1 and 2 were for the better part of that day together? This should be

viewed in the backdrop of the evidence in its totality. At no stage was it stated that Simon ever saw the Accused together prior to the day of the incident and even on that day.

- [57] It cannot be viewed as a coincidence therefore that Simon said he saw them together and it turned out that indeed they were. It is always desirable that the version of an accused person be put to witnesses to enable them to comment thereto. That averts a situation, like the present, where his evidence is viewed as an afterthought. What is strange in this matter is that the version of Accused 1 was never put to the witnesses. The witnesses for the State were never allowed a chance to comment on the alibi of the Accused and their whereabouts on the day of the incident. This should also be viewed in the backdrop of the fact that Accused 1 did not make a statement to the police nor did he inform Sergeant Peta of his alibi. Such a failure did not do justice to his cause. As aforesaid, whenever quizzed about his failure to put his version to the witnesses, his answers were punctuated by him saying that he knew he would come and testify and set the record straight and that he wanted

the video footage which was contained in the DVR. It should be noted that the latter aspect of the DVR only surfaced when it transpired

that there was no footage contained in it. It was never an issue before that, for example, putting to the witnesses that the DVR

footage would bear him out.

- [58] Accused 1 testified that he had never heard of the Hondekoppe his entire life, they operate in his area. Such is inconceivable having in mind the evidence of all the other witnesses who grew up and lived in the Northern Areas, particularly where Accused 1 lived, an area which has been identified by Sergeant Piedt as the hub of the Hondekoppe. Anthony, who is a colleague and friend of the Accused, stated categorically that it is impossible for one not to know the existence of the Hondekoppe, who lived in that area. Simon and Sergeant Piedt corroborated each other that Accused 1 constantly socialized with members of the Hondekoppe. The pictures compiled by Sergeant Piedt confirm this further. Simon testified that he could not talk to the police on the day because members of the Hondekoppe were milling around the crime scene checking who was talking to the police. Such a denial is telling coming from a person who is a police officer in the drug unit and who has conducted numerous searches in the area notably at the home of Simon who lives not far from him.

- [59] The contradictions between the Accused and the defence witnesses has a revealing effect. It is inconceivable that they contradict each other in material aspects of their alibi especially in instances where they were allegedly together. The inevitable conclusion is that they are untruthful about what occurred and their whereabouts on the day. This therefore gives credence to the evidence of Simon that he saw the Accused at the scene of crime partaking in the commission of the offenses albeit in different ways. The Accused, on the analysis of their evidence did not come up as good witnesses. Their evidence is contradictory. They were not good witnesses in the instances highlighted and generally. Their evidence stands to be rejected as false. They were not credible witnesses at all as demonstrated by the manner

in which they contradicted themselves. To refer to a few, Accused 1 said they left Accused 2 at Dolph place before they proceeded to Spar. Accused 2 denies that. He said he went with them. The issue of Accused having gone back to fetch fish from his home, the time they parted ways that day, are but some of the contradictions. The Accused were not honest and truthful.

[60] The locus classicus in the doctrine of common purpose is *S v Mgedezi* [6] where Botha JA summarized and encapsulated the following:

“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 inmates of room 12. Thirdly, he must have intended to make common cause 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 the others. Fifthly, he must have had the requisite mens 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 or not death was to ensue. In order to secure a conviction against No 6, in respect of the counts on which he was charged, the state had to prove all of these prerequisites beyond reasonable doubt.”

The Constitutional Court in *S v Thebus* [7] endorsed the doctrine of common purpose thus:

“If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite mens rea concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue.”

[61] What is evident in the present matter is that the Accused were in the same vehicle as testified to by Simon. They were all present at the scene. Accused 2 and the unknown person were seen entering the house where the deceased were killed. Gunshots were heard prior to the entering and upon entering the house by Simon. Thereafter, the assailants left in the van, which was driven by Accused 1. That, there were two guns which were used comes from the evidence of Constable Africa as aforesaid. It is clear therefore that the Accused acted in common purpose with each other even if the roles played by each are different. Accused 1 was a driver transporting the assailants of the deceased. Without him the offence would not have been committed in the sense that he brought them to the scene, waited for them and took them away from the scene immediately after the deceased were killed.

[62] I am saying this about Accused 2 mindful of the fact that he had never been seen carrying either a firearm or shooting at the deceased. I conclude that he shot at the deceased by using inferential reasoning based on the circumstances of this case. He and the unknown were seen entering the house where shortly thereafter shots were fired, the ballistic report points to two firearms having been as stated above. The only inference that can be drawn in the circumstances is that Accused 2 did possess a firearm, which he used in shooting at the

deceased.

[63] The leading case authority when it comes to circumstantial evidence is *R v Blom*[8], where the court referred to two cardinal rules of logic. “(1) The reference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”

[64] It is my finding that the State proved beyond reasonable doubt that the Accused were at the scene and participated in one form or the other in the killing of the deceased having the same purpose to achieve that. I further prefer the evidence of Sergeant Peta and the other witnesses who testified in respect of counts 8 to 12 than to accept that of Accused 1. I further find that the State has proved its case against Accused 1 in respect of counts 8 to 12. I believe the evidence of Sergeant Piedt as dealt with above, that the Accused are members of the Hondekoppe and that the motive for the killing of the deceased was a revenge attack based on the killing of the grandmother of Accused 2 and the imprisonment of his cousin brother Rivaldo Klass. Therefore, the offenses were committed in the furtherance and fulfillment of a common purpose as members of the Hondekoppe. Hence members of Hondekoppe were seen being on the lookout for people talking to the police at the scene.

[65] Consequently, I find the Accused guilty as follows.

Accused 1 is found guilty of counts 1 to 12.

Accused 2 is found guilty of counts 1 to 7.

M MAKAULA ADJP

ACTING JUDGE PRESIDENT OF THE HIGH COURT

For the State: Adv Landman For Accused 1: Mr W Minnie Instructed by: Legal Aid Ggeberha For Accused 2: Adv J Coertzen Instructed by: Legal Aid Ggeberha Date Delivered: 30 June 2023

[1] 1932 0PD 79

[2] 1956 (3) SA 81 (AN) at 86.

[3] 1981 (3) SA 172 (A) at 180E-G and the cases cited therein.

[4] 2006 (1) SACR 135 SCA

[5] 1971 (3) SA 754 (A)

[6] 1989 (1) SA 687 (A).

[7]

[2003] ZACC 12; 2003 (2) SACR 319 (CC) para 49.

[8] 1939 AD 188 at 202 to 203.

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