

SOUTH AFRICA / JUDGMENT

S v Coetzee and Others (73/2015) [2016] ZAWCHC 166 (17 November 2016)

[2016] ZAWCHC 166

COURT

Western Cape High Court, Cape Town

BEFORE

Rogers

CASE / FILE NUMBER

73/2015

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THE

HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

Case No: 73/2015

In

the matter between

THE STATE

And

JUSTIN

COETZEE

FIRST ACCUSED

BRADLEY

LUBBE

SECOND ACCUSED

RYAN

ABELS

THIRD ACCUSED

GARTH

DIEGAARD

FOURTH ACCUSED

Coram:

ROGERS J

Heard:

12, 13, 17-20, 24-27 OCTOBER 2016, 3, 7-10, 14 & 15 NOVEMBER 2016

Delivered:

17 NOVEMBER 2016

JUDGMENT

ROGERS J:

Introduction

[1] The accused are charged with murder, armed robbery and unlawful possession of a firearm and ammunition. The charges arise out of an incident which occurred on the evening of 14 March 2015 at Osman's BP garage in Elsie's River and in which Ryno Andrews was robbed and murdered. Mr Breyer prosecuted. The accused were represented by Mr Fischer, Mr Van Zyl, Mr Cloete and Mr Adams respectively.

[2] At the end of the State's case the accused applied for discharge. For reasons I gave at the time, I refused these applications. In summary I considered that there was a prima facie case against No 1 on the charges in the indictment; that there was a prima facie case against No 4 on the competent verdict of being an accessory after the fact; and that although there was no prima facie

case against No 2 and No 3, they should not be discharged since there was a reasonable possibility that they might be implicated by No 4.

[3] The accused closed their cases without presenting evidence. For reasons which were apparent from my discharge judgment, No 2 and No 3 were immediately acquitted. Argument proceeded in respect of No 1 and No 4.

Factual background

[4] Osman's garage is on the right-hand (north) side of Owen Road as one drives in a westerly direction. There are two vehicular access points to the garage, both off Owen Road and both of which can be used to enter or leave the garage. The suburb of Matroosfontein is on the left (south) and Epping Forest on the right (north). Several kilometres to the north are the areas of Leonsdale and then Elsie's River Industrial. Also to the north but further to the west is Ruytewacht. Dunsheen's, a liquor outlet owned by No 1's grandfather, is located in Owen Road just opposite Osman's.[1]

[5] Hazel Anthony, with whom Andrews had a child, testified about Andrews' movements on Saturday 14 March 2015. Anthony's

sister was getting married on that day. Anthony went to Andrews' house at about 09h00 so that he could look after their daughter for a while. Anthony and Andrews lived near each other in Norwood Road, Leonsdale. Andrews was busy washing his car, a green Opel Corsa, with a hose and lappie. The Opel was to be part of the bridal procession. (This detail is relevant to the fingerprint evidence.) Since he was still busy, he was not able to look after their daughter. Anthony also knew that he was going to have his hair cut that morning. Andrews arrived at Anthony's house at about 11h00. They left for the church at about 12h00. The Opel, like the other

cars, was decorated with ribbon. There was some delay before the minister arrived. After the wedding the bridal procession moved to the Claremont Gardens for photographs. They got there at about 15h30. They left Claremont around 17h00 and drove back to Elsie's River. There were two tea tables with relatives in Avonwood Road, which lies to the south of Leonsdale. They then went to a hall in Matroosfontein where the main reception took place, arriving there at about 19h00. At around 22h30 Andrews told Anthony he was going to Osman's to buy cigarettes. By this stage the ribbon had been removed from his car. Anthony testified that she was with Andrews for the entire day from around 11h00 until 22h30.

- [6] The robbery and murder were caught on CCTV cameras. The main events occurred at 22h44/22h45 over a period of about 90 seconds. The quality of the footage is not sufficient for facial identification but does capture the main events. The two cameras were mounted on the convenience shop facing over the forecourt in a westerly direction with Owen Road on the left.
- [7] Andrews is seen reversing his Opel out of a parking place in front of the shop with a view to exiting onto Owen Road via the access point closest to the shop, ie nearest to the cameras. As he does so a white bakkie enters through the same access point. Each car is blocking the other. At this stage the action is occurring at the bottom left-hand side of the screen. One can only see the bakkie's bonnet. The registration number is not visible. The driver of the bakkie switches off his lights. After a few seconds, during which words are possibly exchanged between Andrews and the driver of the bakkie, Andrews drives forward a few metres, perhaps hoping to get around the nearside of the bakkie. The Opel comes to a halt. Two men, approaching from the near side of the bakkie, can be seen menacing Andrews at his door. One of them (designated B because he was wearing blue jeans) is wearing a black hoody. After a few seconds the Opel's interior light comes on, indicating that the driver's door has been opened. In the meanwhile two men (one of them designated W from the white pants he was wearing) walk around the front of the bakkie to the Opel's driver's side.
- [8] Andrews, evidently alarmed, drives forward a few metres and then starts reversing. His door, by now ajar, catches against the bakkie and is ripped off. As he is reversing W takes a firearm from his right pocket and fires several shots at Andrews. One can see the muzzle fire of two shots but it is clear from the post-mortem report that at least two further shots must have been fired, probably while the view of the shooter is partially obstructed by the Opel. The Opel comes to a halt, Andrews clutching his abdomen. B and another man (designated G from the grey jeans he was wearing) pull Andrews from the car. Andrews' foot must have been on the brake or clutch because as he is hauled from the car the Opel lurches back a few more metres, coming to rest on the plinth of a bank of petrol pumps. G rifles Andrews' pockets and appears to remove items. B peers into the Opel but finds nothing of interest. G runs off across the forecourt and into Owen Road in a westerly direction. W, who after firing the shots has been loitering at the back of the Opel while G and B are busy, disappears with B to the right of the screen. According to the evidence of the investigating officer, Col Kiewietz, they would have exited through a pedestrian gate on the north side of the service station.

[9] When the shots are fired a man can be seen retreating to the left on the nearside of the bakkie. A couple of seconds later the bakkie's suspension sags and the lights of the bakkie come on, consistent with the driver having got back into the vehicle. After a few further seconds the bakkie reverses into Owen Road and drives off in a westerly direction, initially on the right-hand side pavement (ie the wrong side of the road) before veering across to the left side of the road. In the distance the bakkie can be seen turning right into a road which Kiewietz identified as Loughton Avenue. One cannot see whether there was anyone in the bakkie apart from the driver.

[10] In the few seconds before the bakkie reverses out of Osman's, one can see four men running away down Owen Road in a westerly

direction. At least two of them can be identified earlier in the action as part of the group who surrounded Andrews' car and the likelihood is that all four men were part of the group. The footage does not show that the bakkie stopped to pick up any of the fleeing men though the bakkie was driving in the same direction.

[11] The CCTV footage runs for several further minutes during which Andrews can be seen writhing in agony. Bystanders gather. He was taken to hospital. According to the post-mortem report he passed away at 02h45 on 17 March 2015, ie he survived for about 52 hours. Dr Alfonso, who conducted the post-mortem, testified that he found six entry wounds and four exit wounds. One or two of the entry wounds might have been re-entry wounds, indicating a minimum of four shots. The main internal gunshot wounds were to the small intestine and liver. The most rapid bleeding would have occurred from the liver. Andrews died from the abdominal wounds.

[12] Three bullets, fired from a .38/.357, were recovered, two of them from inside Andrews' body. The ballistics expert stated in his report that two of these bullets (including one found inside the body) were fired from the same firearm. He could not determine

whether the third bullet (the other bullet found inside the body) was fired from the same firearm. The firearm used in the crime was not found.

[13] According to Anthony, the deceased prior to his murder was carrying a wallet and cellphone and wearing a gold chain she had lent him for the day. These items were missing after the murder. The wallet and cellphone were probably the items which G took from Andrews' pockets. The gold chain may well have been grabbed from Andrews' neck at an earlier stage because at the time the interior light goes on one can see Andrews putting his hands to his neck as if protecting himself.

[14] The State's case is that No 1, No 2 and No 3 are the persons I have designated as W, B and G respectively and that No 4 was the driver of the bakkie.

[15] During the course of the investigation summarised below, statements were taken from the two petrol pump attendants who can be seen in the video footage. Despite diligent search, Kiewietz was not able to trace them in order to procure their attendance as witnesses in the

present trial. Neither of them is still employed at Osman's. Phone calls to the cellphone numbers furnished by the pump attendants rang without answer. The addresses given by them, or ascertained from subsequent enquiry, directed the police to dwellings in an informal settlement. Because the dwellings were not sequentially numbered, Kiewietz was unable to find either of the attendants' dwellings.

- [16] Mr Breyl accordingly applied for me to receive the pump attendants' statements as hearsay in terms of s 3(1)(c) of Act 45 of 1988. There was no objection by counsel for No 1 and No 2. Counsel for No 3 and No 4 opposed my receipt of the hearsay. After hearing submissions I decided to receive the statements[2] in the interests of justice. The fact that the statements were properly taken by the police officials was proved or admitted. I was satisfied by Kiewietz's evidence that the witnesses could not be traced and that it was thus not possible to secure their

attendance at court. The video showed that the pump attendants had opportunity to observe what they recorded in their statements. The main value of the statements would be to add information about what happened just to the left (Owen Road side) of the visible footage. The pump attendants did not provide evidence of the identity of the perpetrators. I do not think they would have had any reason to be dishonest in the facts furnished to the police. The statements are consistent with what one sees on the footage and also consistent with each other.

- [17] According to the statements, the incident started out as an argument between the driver of the bakkie and the driver of the Opel, because they were blocking each other's way. Men then got out of the bakkie and started to fight with the driver of the Opel. They identified the shooter and robbers as persons who had come from the bakkie.

The investigation

- [18] On the morning of Sunday 15 March 2015 W/O Ravens dusted the Opel for fingerprints. He found nine prints of sufficient quality for identification purposes. There were many smudged finger-prints – between 40 and 50.
- [19] The first information about possible suspects came on 22 March 2015 when one Jonathan Hein, a member of the Americans gang, gave Kiewietz information implicating the accused. Kiewietz testified that No 1, No 2 and No 3 were members of the Rufty Bundy Kids ('RBKs'), a gang affiliated to the 26s. These three accused were known to Kiewietz. There was conflict between the Americans and the RBKs. Hein subsequently made two statements to the police.
- [20] Although Hein named all four accused (and others), only two of the accused – No 1 and No 3 – were in the police's

fingerprint system. Kiewietz asked Ravens to check whether their prints, and those of another suspect Raymond Julies, were among those he had lifted from the Opel. Of the nine usable prints lifted by Ravens, two belonged to No 1 and two belonged to the deceased. The other five usable prints did not belong to No 3 or to Raymond Julies and have not been identified.

- [21] Kiewietz did not immediately have the suspects arrested. The police continued to investigate. However on 13 May 2015 Kiewietz decided to make arrests because of intelligence of an impending gunfight between the RBKs and Americans. Acting on information that No 1 and No 2 were at an address in Loughton Avenue, Kiewietz and his colleagues went there and arrested them. The police took possession of their cellphones.
- [22] On the following morning, and having obtained a search warrant, Kiewietz and his colleagues went to the address which No 1 had furnished as his place of residence, viz 229 Chingford Crescent in Epping Forest. There he seized inter alia a pair of white pants and white Nike shoes.
- [23] About a month later, on 12 June 2015, No 3 was arrested at a property in Kuilsriver. His cellphone was seized.
- [24] Hein's initial report to Kiewietz identified one 'Garth' as the owner and driver of the white bakkie. This person was not known to Kiewietz. The police obtained information as to this person's address in Ruytewacht. The suspect was not at home but Kiewietz got a surname from a neighbour. A person with this name – No 4 – was found on the police system. The police information included a cellphone number. Kiewietz phoned No 4 who came to the police station. This was on 15 May 2015. No 4 confirmed that he owned a white Ford Bantam bakkie. He accompanied Kiewietz to his home in Ruytewacht. Kiewietz inspected the bakkie. He saw some faint green paint smudges on the driver's door. No 4 said that about a year previously a truck had scraped the side of his bakkie and that the damage had not been very well repaired. Kiewietz told No 4 that he was not satisfied with this explanation and impounded the bakkie for further analysis. He also asked No 4 for a statement which Kiewietz

took from him on 21 May 2015.

- [25] On 19 May 2015 a police paint expert, Lt-Col van Huyssteen, inspected the bakkie and the Opel and took paint samples from both. She furnished her report to Kiewietz on 23 June 2015. Based on her conclusion that the green smudge marks on the bakkie matched the Opel's paint, Kiewietz arrested No 4.
- [26] No 1 and No 4 sought bail. The bail proceedings took place in the first half of July 2015. The bail record was handed in as an exhibit.[3] No 1 raised an alibi. He testified that at about 19h00 on Saturday 14 March 2015 he left Epping Forest for Vredenburg in the company of his uncle Andrew Coetzee. The purpose of the trip was for No 1 to drive a loaded truck back from Vredenburg to the Cape Peninsula for his uncle who conducted a plastic recycling business in Vredenburg. No 1 said that he left Vredenburg mid-morning on Sunday 15 March

2015 and parked the truck at a designated family address in Elsies River. On the Monday morning another driver took the truck to the customer in Stellenbosch. In the bail proceedings No 1 called his uncle Andrew who corroborated this alibi.

- [27] No 1's then attorney provided to Kiewietz a statement from Andrew Coetzee setting out this alibi. In the statement Andrew

Coetzee furnished his address and cellphone number. Kiewietz issued a subpoena to Vodacom, the network provider. The relevant records were adduced in the present proceedings during the evidence of a State witness, Lynette Van Zyl of Vodacom.

- [28] No 4's version to Kiewietz, repeated when he testified at his bail application, was that neither he nor his bakkie were involved in the incident. No 4, who testified that he was an electrician, said that he was at work during the day of 14 March 2015. He got home at about 17h00. After washing and resting he went to fetch his children from their mother. This was at about 20h00. He spent the rest of the night at his home in Ruytewacht with his children and girlfriend, Vera Krotz. They watched movies and went to bed shortly after 22h00. He said he did not go out again that night. He called Krotz who confirmed this alibi.

- [29] No 4 furnished his address and cellphone number to Kiewietz who subpoenaed network records from the service provider, MTN. The records were handed in as an exhibit. This was in terms of s 15(4) of the Electronic Communications and Transactions Act 25 of 2002. Mr Adams for No 4 in any event agreed to the records being adduced without the need to call an MTN official – something which, according to Mr Breyll, would have led to delay.

Jonathan Hein

- [30] The State called Hein as a witness. He was uncooperative and evasive in the witness box. He made it clear from the outset that he did not want to testify. When asked about his written statements, he feigned an absence of recollection about what he had told the investigators. I granted an application by the State to declare him a hostile witness and to allow his written statements to be put to him. He would not confirm the truth of any of the material facts contained therein. Whenever pressed, he gave one of two contradictory explanations for why he had made statements implicating the accused, namely (i) that he had spent time in custody for things in which he had been falsely implicated and out of emotional frustration he wanted the accused to suffer the same fate, and (ii) that he had been told by members of the Americans gang, to which he then belonged, to make statements implicating the accused and he had feared for his life if he did not do so.

- [31] Hein was a thoroughly dishonest and unreliable witness. Mr Breyll did not argue that I could rely on the truth of anything he said in his statements or oral testimony. I would simply add this. In regard to Hein's first statement,[4] it seems unlikely that he would have been able to identify the accused as perpetrators simply from the video material. Kiewietz, who was familiar with No 1, No 2 and No 3, could not identify them from the footage. The footage is simply not of sufficient quality to make facial identifications. Since Hein in the witness box

did not claim to be able to identify any of the accused from the footage, there was no cross-examination as to how he might have been able to perform that feat. As to the second statement,[5] it seems unlikely that No 1 would effectively have made a confession to Hein in circumstances where Hein was part of a group in conflict with the RBKs.

[32] As it turns out, the information provided by Hein led the police to No 1 and No 4. If one or both of them should turn out to be guilty of one or more offences, this may reflect that what Hein told the police was not altogether without foundation. The source of his information is a different matter. It may have been ‘street talk’. Whatever the explanation, his assertions have no independent evidential value.

[33] The authorities should, in my view, consider prosecuting Hein for perjury. It is certain that he lied either in his written statements or in his evidence in the witness box, quite possibly on both occasions.

The case against No 1

[34] As I have mentioned, the video footage does not permit facial identification. It can be seen, though, the W (the shooter) is a tall lean man wearing white three-quarter length pants with a black or dark blue inset on each leg. The inset tapers from the waist to the knee. W is also wearing white shoes. Although the definition in the video material is not high, it appears that the shoes have a black tongue.

[35] No 1 is tall and lean. According to a police photograph his height is 1,82 m – about 6 foot.[6] Although there would be many men of No 1’s height and build, it was not suggested that W’s height and build ruled out a match with No 1.

[36] During the search at 229 Chingford Crescent, on the day following No 1’s arrest, Kiewietz took into possession inter alia a pair of white three-quarter length pants and white shoes matching the appearance of those W was wearing. These items were handed in as exhibits. The dark inset is navy blue. The police did not find a black sweater such as W was wearing.

[37] The lawfulness of the search was not impugned though Mr Fischer queried aspects of Kiewietz’s version. Kiewietz testified that when he and the police contingent arrived at the house, he spoke with the lady of the house, Mrs Maarten, No 1’s grandmother. He explained the purpose of their visit. She had no objection to the search. There were four bedrooms in the house. All the bedrooms were searched. Kiewietz testified that Maarten identified the one bedroom as hers and another bedroom as No 1’s. The remaining two bedrooms were spare rooms for family members when they visited. The pants and shoes were found in the room identified as No 1’s. The pants were on a cupboard shelf in a pile of ironed clothing.

[38] Mr Fischer asked Kiewietz whether she knew Maarten’s son, Mark. Kiewietz replied that Maarten went to an outside room to see if someone was there but it was locked. Kiewietz did not know who lived in that room. I do not recall that it was actually put to Kiewietz that Mark Maarten lived in the main house where the pants and shoes were found. What Mr Fischer did put to Kiewietz was that not only No 1 but also his brother Kyle lived at 229 Chingford

Crescent. Kyle Coetzee, I should mention, was also arrested but subsequently released. Kiewietz said that Kyle was short and stocky.

[39] Kiewietz was re-called as the last State witness to deal with certain aspects of the cellphone evidence. Before he was re-sworn, I asked Mr Breyll whether the State was intending to ask me to have regard to Kiewietz's hearsay evidence as to what Maarten had said about the occupant of the room in which the pants and shoes were found. If so, this would need to be properly dealt with in terms of s 3(1)(c) of Act 45 of 1988 before the State closed its case. I intimated that the availability of Maarten herself to testify might be of

importance. Subsequent information conveyed to me by Mr Breyll and Mr Fischer was to the following effect: that the police had not taken a statement from Maarten; that, pursuant to Kiewietz's previous testimony, Mr Fischer had asked No 1's father, who was the client, to get Maarten's answers to certain questions; that Mr Fischer had asked No 1's father to convey to Maarten that if the police approached her she was entitled to refuse to speak to them; and that the police had now approached her but that she refused to talk to them.

[40] Despite some uncertainty by counsel on both sides, I indicated that Maarten was a compellable witness and that a subpoena could surely be issued. These discussions took place on a Thursday afternoon. On the Monday morning Mr Breyll informed me that a subpoena had been issued but that Maarten had refused to accept service. I then raised with both counsel the possibility of Maarten's being called as a witness by the court in terms of s 186 of the Criminal Procedure Act and I also asked Mr Fischer whether he thought he might be able to persuade Maarten to come to court on that basis. Mr Fischer said that he agreed with the proposal for Maarten to be a witness of the court and would welcome an opportunity to see if he could procure her attendance. Mr Breyll also supported this course of action.

[41] The result was that Maarten was at court on the Tuesday morning. After I had questioned her, Mr Breyll and Mr Fischer had the

opportunity of cross-examining her. Her version differed from Kiewietz's materially. She said there were only three bedrooms

in the main house. One was hers, one was Mark's and the third a spare room for family members. The room where the white pants and shoes were found was Mark's room. She denied having told Kiewietz that this was No 1's room. She testified that the white pants and shoes did not belong either to No 1 or to Mark – they belonged to No 1's nephew, Ashton. A few days after No 1's arrest Ashton had asked for them. She told him that the police had taken some items from the room.

[42] Maarten denied that No 1 resided at 229 Chingford Crescent. She said he lived with his parents in Kuilsriver. She testified, however, that he spent a lot of time at her house because he had grown up in Epping Forest. If Mark had his girlfriend over for the night, Mark and she would sleep in the outside room because Maarten did not like girls in the house. In that event, No 1 would sleep in Mark's room. Otherwise No 1 would sleep in the spare room.

Other family members, like Ashton, would also sleep there on occasion if they came back late from dances.

[43] Maarten was, despite her previous reluctance to testify, quite a confident witness but her evidence was not altogether satisfactory.

By the time she testified she clearly knew what the key issue was. She had a motive to protect her grandson. It is apparent, even on her version, that he spent a lot of time at the house. Indeed she said he was there almost every day. She claimed not to have seen the items taken from the bedroom in question. All she knew was that the police put certain items in a bag. Yet when Ashton supposedly asked for these items, she intimated that they had been taken by the police. If she did not see what the police took, how did she know that they had taken anything belonging to Ashton?

[44] Kiewietz, who had been working for some time on an investigation relating specifically to the RBKs, knew No 1 as the leader of this gang. Mr Fischer himself asked the court to receive extracts from the police profile on the RBKs.[7] No 1, who was described as the leader, was said currently to reside at 229 Chingford Crescent. The RBK's demarcated area, according to the police profile, was Epping Forest.

[45] When No 1 was arrested, he gave 229 Chingford Crescent as his residential address. This accorded with Kiewietz's own

understanding. It was on this basis that he obtained a warrant to search those premises. Kiewietz, a senior officer, made a favourable

impression on me. It was not put to him that he had lied to the court and I am satisfied that he did not. If Maarten had told Kiewietz that No 1 did not live at the house and that the room belonged to Mark, this would have made an impression on Kiewietz because it would have been inconsistent with his understanding and with what No 1 himself had said. He would no doubt have asked Maarten where No 1 lived. He would also have asked her whether No 1 sometimes slept in the house and so forth. The information that the room's main occupant was Mark Maarten would not have destroyed the evidential significance of the clothes found there but might have warranted further investigation.

[46] Mr Fischer took Kiewietz to task because he did not immediately make a statement about the search. Kiewietz acknowledged that the search was an important event in the investigation. He said that although he should have made a separate statement, what he did was to type notes of the investigation as it unfolded which then became his statement. That statement did include information about the search.

[47] Furthermore Maarten's version is belied by the evidence which No 1 himself gave under oath during the bail proceedings. He was asked by his attorney, Mr McKay, where he resided. He said 229 Chingford Crescent. He was asked how long he had been living there. He replied about 20 years. When asked with whom he lived at the house, he said it was just himself and his grandmother. He did not mention Mark or Kyle as persons who resided there.[8]

[48] During Kiewietz's cross-examination in the bail proceedings, Mr McKay dealt inter alia with the evidence of No 1's supposed gang membership and the use of various hand signs. In the course of doing so, No 1's attorney showed Kiewietz two posters of rap musicians which depicted them using certain hand signs. Kiewietz's answers in respect of the hand signs is not germane. What is important for present purposes is that Mr McKay put to Kiewietz that these posters came from No 1's room, the same room where the pants and shoes were found. Kiewietz said that it is possible that the posters were on the wall of the bedroom.[9] What a legal representative puts to an opposing witness in cross-examination, whether expressly or by necessary implication, may

be regarded as an informal admission of the fact (*S v W* 1963

(3) SA 516 (A) at 523C-F; *S v Magubane* 1975 (3) SA 288 (N) at 291-292; *S v Jonathan & Andere* 1987

(1) SA 633 (A) at 641E-F; *S v Mathlare*

[2000] ZASCA 186 paras 9-11; *Zungu NO v Minister of Safety and Security* 2003

(4) SA 87 (D) at 91J-93C).

[49] In cross-examination at the bail proceedings No 1 was asked whether he was aware that the police had searched the house. He said yes. It was put to him that clothing was found which was identical in appearance to that worn by the shooter. No 1 asked what clothes. The prosecutor said pants and a pair of takkies, just as in the video footage. No 1's reply was not that he did not have such clothing. He said, 'Daar's mos klomp mense wat sulke broeke het of sulke takkies'.[10]

[50] Kiewietz testified in the bail proceedings after No 1 and No 4 had presented their evidence. Regarding the search, he described the clothing as a pair of white three-quarter length pants with blue insets on the side and a pair of white takkies with black Nike marks.[11] No cross-examination was directed at Kiewietz about the ownership of these clothes or that they had been found in No 1's room. Instead Mr McKay put to Kiewietz that knee-length white pants and Nike takkies were generally available, something Kiewietz did not dispute. Mr McKay then asked whether Kiewietz believed that the fact that No 1 had such a pair of white pants and white takkies supported the State's case. Kiewietz said yes, adding that the pants were not plain white pants, they had a dark blue inset. Mr McKay then took an instruction from his client and proceeded to another topic.[12] Mr McKay, in his closing submissions, dealt with the strength of the State's case against his client. He said Kiewietz had relied inter alia

on the fact that the shooter in the video was wearing a pair of white pants. Mr McKay continued:[13]

‘My kliënt het ook ’n wit broek en ’n paar Nike takkies. Hy het nie ’n hemp daar gekry nie. Nou ’n wit broek en ’n paar Nike tekkies soos ons almal weet, dis seker almal se reg om dit te hê.’

- [51] I accept that pants of the kind found at 229 Chingford Crescent are commercially available. The fact that No 1 owned such pants does not mean that he was the shooter. It is nevertheless an important piece of evidence when one assesses the cumulative weight of the case against him. While the pants are not unique, their colour, length and insets make them reasonably distinctive, certainly more so than a pair of jeans or track-suit pants. The police found in the same room a pair of white Nike shoes. No 1 appears to have accepted, through Mr McKay in the bail proceedings, that he owned such shoes.
- [52] I turn now to the finger-print evidence. Two of No 1's prints were found on the exterior of the Opel. That they were his prints beyond reasonable doubt was not challenged.[14] His left thumb-print was found on the right-hand side rear passenger window. His left palm-print was found about halfway up the column immediately to the rear of this window.[15] Given the distance between the two prints, one can say with certainty that they represent two distinct movements of No 1's left hand.
- [53] The video footage shows that in the early stages of the incident the shooter (W) was in the vicinity of the right-hand rear side of the Opel. At one point W appears to reach out to the Opel. I do not think the footage is sufficiently clear to identify a particular moment when W touched the Opel in the precise place where No 1's prints were found. If W touched the vehicle in this vicinity, it could have occurred in the few seconds when the Opel moved forward off-screen to the left before reversing. As the Opel moved forward, W followed the car out of sight. What can be said with certainty is that W was in the vicinity of, and very close to, the right-hand rear side of the Opel.
- [54] I have already summarised Anthony's evidence that Andrews was washing his car with a hose and lappie at about 09h00. Anthony was a confident witness who made a good impression. Since the Opel was to be used in the bridal procession, it is entirely plausible that Andrews would have washed his car that morning. Mr Fischer criticised the manner in which this part of the case was investigated and presented. The police took a perfunctory one-page statement from Anthony on Sunday 15 March 2015. The statement did not deal at any length with Andrews' movements during the course of the previous day and did not mention the fact that he had washed his car. The police approached Anthony again a few weeks before the trial started and asked her specifically whether Andrews had washed his car before the wedding. It was in response to this question that Anthony confirmed this to be the case.

- [55] During the bail proceedings, which took place in early July 2015, Kiewietz was asked whether No 1's prints could have got onto the Opel before 14 March 2015. He was confident this was not so – he had spoken with Andrews' parents who had told him about the wedding and that Andrews had washed and spring-cleaned the car during the morning.[16] It appears that Kiewietz did not then or subsequently have statements signed by the parents and they did not testify. Instead Kiewietz approached Anthony for information.
- [56] I do not know whether Andrews' parents were asked to make written statements and declined. The fact that they did not make statements and were not called does not, in my view, detract from Anthony's evidence. Although Mr Fischer questioned her about her statements, he did not ask me to receive them as exhibits, from which I infer that there was no material discrepancy between her statements and oral evidence. The police officer who took her statement on 15 March 2015 was not identified. It would not have been Kiewietz because he only got involved some time later. One does not know what questions the officer asked Anthony. Andrews was still fighting for his life and Anthony would still have been traumatised. There is nothing to show that anyone appreciated at that stage the significance of whether or not the car had been washed. I reject the notion that Anthony fabricated a version when she was asked more recently whether Andrews had washed his car.
- [57] Mr Fischer submitted that even if Andrews washed his car, one does not know how thoroughly he did the job. Finger-prints placed on the car in the preceding days may have survived the washing. That is possible but not very likely, since Andrews was using not only a hose but a lappie. No 1's prints were found on an easily accessible part of the car which is unlikely to have escaped cleaning, even by a lazy car washer. The prints were of good quality. Ravens regarded them as fresh on the basis that they reacted well to the black powder. In fairness I should mention that he did not give a precise timeframe to the word 'fresh' and that an expert's opinion on that question seems to be more a matter of experience than formal training. Ravens had only been qualified as a finger-print expert for about 11 months at the time he examined the Opel.
- [58] Mr Fischer argued that the presence of 40-50 smudged (poor-quality) finger-prints on the car suggested that either it had not been washed on 14 March 2014 or had not been very well washed. Neither suggestion is compelling. The Opel was part of a bridal procession. It is perfectly likely that persons who travelled in the Opel and other guests at the wedding and subsequent festivities would have touched the car. A number of the prints may have been left by W and other perpetrators.
- [59] In cross-examination in the bail proceedings No 1 was at a loss to explain how his finger-prints could have got onto the Opel.[17] In re-examination he speculated that if Andrews' car had been parked outside Dunsheen's on the day in question he might have touched the car – he said that was the only place where he touched cars as he walked past.[18] No 1 apparently helps out at Dunsheen's from time to time though his main work is as a truck driver. No 1 did not venture into the witness box in the present proceedings though the explanation he had offered in the bail proceedings was hinted at in

cross-examination of State witnesses.

[60] Since the finger-prints were of good quality, they are unlikely to have left the impression they did if No 1 trailed his hand along the car while walking by. Furthermore, the orientation of the prints (in the case of the thumb-print, the left hand was facing to the right, more or less parallel to the ground; in the case of the palm print, the left hand was facing vertically up and tilted slightly to the right) is inconsistent with a trailing left hand as one walks past the driver's side of a car. Furthermore Owen Road carries traffic in both directions. Unless a car were parked on the wrong side of the road, the driver's side would be on the road side, not the pavement side. A person touching the car as he walked along the pavement would thus touch the other side of the car, not the driver's side.

[61] Mr Fischer put to Ravens that a person leaning on a car to look inside might leave such prints. Ravens said this was possible. While that may be so in the case of the palm print on the rear column, it strikes me as distinctly unlikely in the case of the thumb-print on the rear window – why would a person who wants to look inside a car lean against the window? Speculation along these lines has no factual foundation. No 1 did not testify in the present case. In his bail proceedings he did not suggest that he had lent against this or any other vehicle while looking inside. There is nothing to suggest that this relatively modest Opel Corsa would have attracted his attention. And as I have said, a person peering into the Opel from the pavement would have touched the other side of the car, not the driver's side.

[62] In any event, the speculative hypothesis presupposes that Andrews' Opel was at or near Dunsheen's on or shortly before 14 March

2015. Andrews' movements on the Saturday are almost fully accounted for by Anthony's evidence and Andrews'

cellphone records[19]. His first cellphone activity was at 10h00. At that time his cellphone was routed through the Elsie's River Industrial tower, consistent with his being at or near his home. The first time on that day that his cellphone was detected by the Matroosfontein tower was at 18h58, which is around the time he arrived at the reception. The last time his phone was detected is 22h58, about 13 minutes after the shooting. By this stage his phone had been stolen. It was still routed through the Matroosfontein tower. Any cellphone activity by Andrews while he was at or near Dunsheen's would almost certainly have been detected by the Matroosfontein tower rather than the Elsie's River Industrial tower.

[63] Since the deceased had no cellphone activity between 10h00 and 11h15 and had not yet arrived at Anthony's house, he could notionally have driven to the vicinity of Dunsheen's at that time. However Anthony testified that Andrews had no reason to visit Dunsheen's. He was not responsible for supplying liquor at the wedding. He was a light drinker who might have a drink at a social function but would not visit bottle stores. Even if he had occasion to buy liquor, there were several outlets closer to his home than Dunsheen's. Kiewietz confirmed the existence of such other outlets.

[64] No 1's plea explanation was simply that he was not at the scene and denied involvement in the crimes. In his bail application he gave the alibi previously mentioned and his uncle Andrew confirmed it. In the present proceedings the State anticipated this alibi by adducing evidence to show that Andrew Coetzee was not in the Cape Peninsula on 14 or 15 March 2015 and could thus not have collected No 1 from his home in Elsies River as both of them claimed. The evidence in question was the network record for Andrew Coetzee's cellphone for the period 14-16 March 2015.[20] These records show that his cellphone was active in the vicinity of Vredenburg/Saldanha Bay for the whole of 14 and 15 March 2015. In particular between 16h00 – 21h15 on 14 March 2015 the phone was active in the Vredenburg/Saldanha Bay area to an extent incompatible with Andrew Coetzee's having been in the Cape Peninsula during that time. The phone was detected in Elsies River during the afternoon of Monday 16 March 2015, which may indicate that Coetzee drove to the Peninsula on that day.

[65] Mr Fischer submitted that there was no positive evidence that the cellphone in question was being used by Andrew Coetzee during March 2015. The fact that Coetzee furnished this telephone number when he furnished the statement provided to Kiewietz through Mr McKay (this would have been at the time of the bail proceedings in July 2015) did not justify the conclusion that this was his telephone number in March 2015. In the absence of evidence from No 1 and his alibi witness, there is a limit to the speculation which can be entertained in his favour. Apart from the fact that Andrew Coetzee gave this as his telephone number, it was not put to Kiewietz in cross-examination that the cellphone records for the said number were a red-herring because Coetzee had been using a different phone in March 2015. To this I may add that the Vodacom data includes information about all the devices in which the Sim card attached to this telephone number was used. Over the period 14 April 2014 - 28 February 2016 the Sim card was used in one

particular device corresponding to the one reflected in the network records for 14-16 March 2015. [21] On a few occasions during 2014 and 2015 the Sim card was used for a single day in other devices, indicating that the Sim card was removed from the main device to allow someone else to use it in another device for a short period. None of these isolated instances occurred in the period March - August 2015. This shows that the same device and Sim card were in operation in March 2015 and at the time Andrew Coetzee furnished his number to the police.

[66] Mr Fischer pointed to the fact that the RICA information reflected one Lee-Ann Williams of Saldana as the subscriber.[22] This is so but the registration appears to have been continuous as from 13 March 2011, including the time at which Andrew Coetzee

furnished the telephone number as being his. I think one may take judicial notice of the fact that cellphones and their Sim cards often change hands without corresponding changes in subscriber registration.

[67] A court must not assess circumstantial evidence on a piecemeal basis but in its totality. A piece of circumstantial evidence, standing on its own, might leave open as a reasonable possibility that an accused person is not guilty of the charged crime. But as the

circumstantial evidence accumulates its combined effect may become devastating (*S v Reddy* 1996 (2) SACR 1 (A) at 8c-9e; *S v Isaacs* [2010] 4 All SA 481 (SCA) paras 61-63). Even two pieces of circumstantial evidence, capable individually of innocent explanation, might in combination form a tight net from which an accused person will find it hard or impossible to escape (*R v De Villiers* 1944 AD 493 at 508; *S v Dos Santos & Another* 2010 (2) SACR 382 (SCA) para 33).

[68] In assessing circumstantial evidence a court must apply the two cardinal principles of inferential reasoning laid down in *R v Blom* 1939 AD 188 at 202-203: (i) An inference of guilt must be consistent with all the proved facts. (ii) Those facts in their totality must not leave open as a reasonable possibility that the accused is innocent. The State is not, however, required to eliminate every conceivable possibility that may depend on pure speculation. The State does not need to 'indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the court is called on to seek speculative explanations for conduct which on the face of it is incriminating' (*S v Sauls* 1981 (3) SA 172 (A) at 182G-H; see also *Dos Santos* supra para 34).

[69] By the end of the State's case there was what I would describe as a strong prima facie case against No 1. He left two good-quality finger-prints on the Opel by way of two distinct hand movements in the vicinity where W is seen as part of the group menacing the deceased. Anthony's evidence and the deceased's cellphone records point to the unlikelihood of the deceased's

car having been outside Dunsheen's or in Epping Forest after the car was washed on the Saturday or for that matter in the

immediately preceding days. Even a single finger-print may, in appropriate circumstances, be sufficient to establish an accused

person's guilt (cf *S v Legote & Another* [2001] ZASCA 64, where Harms JA was critical of the trial court's decision to discharge an accused person against whom the only evidence was a fingerprint on a vehicle). Pants and shoes matching those worn by W were found in a house where, according to No 1's evidence in the bail proceedings, only he and his grandmother lived and in a room which was accepted by No 1, through his attorney in the bail proceedings, as being his. He did not in those proceedings deny that the clothes seized by the police were his and the closing

submissions

of his attorney reflect an acceptance that they were. No 1, like W, is tall and lean. An alibi version offered in the bail proceedings was not repeated in No 1's plea explanation and is contradicted by the alibi witness' cellphone records.

[70] No 1 chose not to testify or present alibi evidence. He was entitled to keep his silence and require the State to prove the case

against him beyond reasonable doubt. But, as has been often said, the failure of an accused person to respond to a case calling for an answer is not without consequence: such failure may strengthen the prosecution's case and clinch a finding of guilt beyond reasonable doubt (*S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC) para 24; *S v Chabalala* 2003 (1) SACR 134 (SCA) paras 20-21; *S v Tandwa & Others* 2008 (1) SACR 613 (SCA) para 55; *S v Mavinini* 2009

(1) SACR 523 (SCA) para 23; *S v Naude*

[2011] 2 All SA 517 (SCA) para 37). If the case was capable of an honest rebuttal, No 1 could and should have entered the witness box to do so (*S v Dos Santos* supra para 35).

[71] Mr Fischer argued that there was some significance in the fact that there were a number of eyewitnesses, none of whom had identified No 1 as one of the perpetrators. During Kiewietz's cross-examination Mr Fischer put that No 1 was often at Osman's garage and was known to the pump attendants and cashiers. Since No 1 did not testify, there is no evidence as to how well, if at all, he was known at Osman's. Since he lived nearby, it is quite possible that he did frequent the convenience shop. Kiewietz testified that the cashier told him he should speak to the petrol pump attendants since they had been outside at the time. The pump attendants told Kiewietz that they would not be able to recognise the perpetrators. Despite diligent search, Kiewietz was not

able to locate the pump attendants to secure their attendance as witnesses at the trial. Kiewietz testified that his experience in gang-ridden areas is that eyewitnesses very often are unwilling to give names. If, as Kiewietz testified, No 1 was the leader of the RBKs, and if No 1 was indeed known to the staff at Osman's, it is quite possible that that if any of the eyewitnesses recognised No 1 they would not have been willing to disclose this fact. And it bears mentioning that the eyewitnesses did not give any names at all.

[72] In my view the only reasonable conclusion to be drawn from the State's evidence, coupled with No 1's failure to testify, is that No 1 and the person W shown in the CCTV footage are one and the same. From this it follows that the State has proved the count of murder against No 1.

[73] Mr Fischer made no submissions on the other counts if I should find that No 1 was the shooter. In regard to unlawful possession of a firearm and ammunition, it follows from what I have already said that No 1 was in possession of the firearm and ammunition used in the killing. The State adduced no evidence as to whether or not No 1 held a license to possess the firearm and ammunition. However by virtue of s 250 of the Criminal Procedure Act the onus to prove (on a balance of probability) that he was licensed to possess the firearm and ammunition rested on No 1. The indictment directed his attention to this provision. Since he offered no evidence, he must be convicted on these counts.

[74] This leaves the charge of armed robbery with aggravating circumstances. The video footage presents a strong prima facie case

that W, whom I have identified as No 1, associated himself with the conduct of B and G. It is clear, I think, that even at an earlier

stage one or more of the group from the bakkie were intent on robbing Andrews, not only assaulting him. After shooting Andrews, No 1 waited as B and G pulled him from the car and as B checked inside the Opel while G rifled Andrews' pockets. B and No 1 then ran off together. In the absence of an answer from No 1, a finding is justified beyond reasonable doubt that when he fired the shots at Andrews he intended that he should thereafter be robbed of any valuables found on his person and in the car.

[75] Insofar as Act 105 of 1997 is concerned, I cannot find it proved beyond reasonable doubt that any of the other perpetrators knew that No 1 was going to shoot Andrews. The State has thus not proved that the murder was committed by a group of persons acting in the execution or furtherance of a common purpose or conspiracy. At the beginning of the trial the State abandoned the assertion in the indictment that the murder was planned or premeditated. A finding would appear to be justified that No 1 caused Andrews' death in committing robbery with aggravating circumstances. Whether in the sentencing phase it will be open to the State, having regard to the terms of the indictment, to rely on this circumstance as bringing the case within Part I of Schedule 2 is something on which I have to hear argument in due course.

The case against No 4

[76] There are three main questions to be considered in respect of No 4:

- (i) Were he and his bakkie on the scene that night? (ii) If so, did he participate in any of the crimes? (iii) If not, does his subsequent conduct make him guilty as an accessory after the fact?

Was No 4 on the scene?

[77] I have already mentioned that a paint analysis of the green smudges found on No 4's bakkie was done by Col Van Huyssteen.[23] She was called as a witness. I accept her evidence that the green smudge marks on the bakkie are paint marks and that they have an identical chemical composition to the green paint of the Opel. Van Huyssteen said that other Opels which came off the production line at around the same time as the deceased's car may have been painted with the same paint batch. Theoretically, therefore, the paint transfer on No 4's bakkie could have come from another Opel car of similar vintage.

[78] I do not think Van Huyssteen went so far as to say that the only source of the paint transfer could have been an Opel of similar

vintage. It was theoretically possible that another manufacturer's green paint could have had identical properties. She did say, however, that vehicle manufacturers have their own paint binding systems so that she would not expect another manufacturer's

green colour to be chemically the same as Opel's.

[79] The presence of identical green paint on the bakkie is not the only circumstance potentially linking No 4's bakkie to the crime scene. The video footage allows one to see more or less where the Opel's driver's door came into contact with the white bakkie. There was vertical scrape damage on the edge of the Opel door at a height of 63 cm – 76 cm. Van Huyssteen took a sample from the Opel at a height of 63 cm. A green smudge was found just in front of the bakkie's driver's door at a height of 63 cm.

[80] When Kiewietz asked No 4 how the green paint smudges got onto his bakkie, he said that in the previous year (ie 2014) a truck had scraped along the side of his vehicle and that his car had been repaired by the insurer but that it was a poor job. No 4 showed

Kiewietz photographs of the damage which he had on his laptop. In response to a question whether the damage shown on these photographs

was green, Kiewietz replied in the negative, saying that the damage had been caused by the wheels of the truck. Kiewietz's version was not challenged. I asked Mr Adams at the time whether the photographs on the laptop were still available. I do not think I am being unfair to him if I say that his response was guarded.

[81] In the bail proceedings No 4 referred to an accident which had taken place in 2012 or 2013. He said he thought the truck was light blue. He reported the accident to the police. He had the damage repaired by a cheap panel beater. He did not mention an insurer. (There is potential significance in No 4's statement that the truck was light blue, though admittedly he did add that he cannot really remember. At the time of the bail proceedings his attorney would probably not have had access to Van Huyssteen's report. The video footage, particularly the second camera's footage, suggests that the Opel was blue. Indeed the photographs included in Van Huyssteen's report also show a blue colour. Anthony testified, however, that the Opel was green. Van Huyssteen confirmed that it was a green/turquoise. The blue appearance in the photographs, she said, was a consequence of the limitations of the digital camera or of the printer. No 4's version in the bail proceedings might have been designed to explain the colour he thought he saw in the video footage. In fact, though, the Opel was green and that was the colour of the smudges which had to be explained. I simply add that it seems highly unlikely that a truck would be painted with the same quality green/turquoise paint as a sedan motorcar.)

[82] Be that as it may, Van Huyssteen's evidence tends to confirm that the bakkie did at some stage suffer damage and as I have said Kiewietz saw photographs of the pre-repair damage. Those photographs did not, however, satisfy Kiewietz that the green paint smudges could have been caused by the truck incident. Kiewietz's scepticism is confirmed by Van Huyssteen's analysis. The paint samples from the bakkie revealed three layers: a yellowish body-filler such as panel beaters use, on top of which was a layer of white paint. The green smudges were on top of the white paint.[24] This showed, in Van Huyssteen's opinion, that earlier damage to the bakkie had been repaired with body-filler and white paint. Since the

green smudges were on top of the white paint, they could not have been part of the earlier damage. This opinion is logical and compelling.

- [83] Then there is the further circumstance that I have already found it proved beyond reasonable doubt that No 1 was one of the perpetrators. Maarten described the four accused as friends and said they grew up together. At an earlier stage in the trial Kiewietz was asked by Mr Adams whether he could dispute that No 4 had no association with the other accused. Kiewietz disputed this. Although No 4 was not part of the police's gang profiles, Kiewietz knew that No 4 previously lived in Chingford Crescent, the same road as No 1. When No 4 was 16 years old there was a shooting in which No 1's uncle Andrew was the complainant. No 4 provided a statement to the police in connection with that shooting from which it appeared that he and Andrew Coetzee had been part of a group of men gambling on a street corner. Kiewietz also said that No 4 sometimes went under the name of Garth Coetzee and still had a Facebook profile under that name, something he demonstrated in the witness box by calling up the profile on his mobile phone. In the bail proceedings No 4 testified that he had been living in Ruytewacht for about one year and that he had previously lived in Chingford Crescent for about ten years. No 1, No 2 and No 3 are known to each other and are members of the RBKs. No 4's telephone number was saved as a contact on No 3's phone.
- [84] In the absence of evidence from No 4, the conclusion is justified that he falsely underplayed his association with No 1 and the other accused.
- [85] The State's evidence also indicates that the alibi No 4 gave to the police and in the bail proceedings and in his plea explanation was false. No 4 claimed to have been at home in Ruytewacht with his children and partner, Vera, and that they went to bed shortly after 22h00. This is at odds with No 4's cellphone records.[25] The records in question, emanating from MTN, were handed up without objection in terms of s 15(4) of the Electronic Communications and Transactions Act 25 of 2002. In the formal admissions made by No 4 at the beginning of the trial, he admitted inter alia that the cellphone number in question belonged to him and that the MTN data was correct and authentic.[26] The State did not call an MTN official to testify. Apparently the forensic witnesses from the leading service providers are very busy and calling an MTN witness would have led to delay.
- [86] What the network records show is that the first time on 14 March 2015 that No 4's phone was routed through the Matroosfontein tower (ie in the vicinity of Owen Road/Osman's) was at 22h54. This was about nine minutes after the shooting. His immediately preceding cellphone activity was at 20h23 when No 4 received a call from a person whose phone was routed through the Matroosfontein tower. At that stage No 4's phone was routed through a tower called Elsie's River VC. The call No 4 received at 22h54 lasted 56 seconds from a caller who was also routed through the Matroosfontein tower. From data extracted by the police from No 1 and No 3's cellphones, one can see that the caller was one "Eier"/"Keegan",[27] ie Keegan Mitchell, the person who was in the caravan with No 3 at the time the latter was arrested and whom Hein had named as having some involvement. A few minutes later, at 23h02, No 4 – still routed via the Matroosfontein tower – received a further call from Keegan

Mitchell lasting 12 seconds. At 23h51 No 4, still routed through the Matroosfontein tower, made a 44-second call to an unknown number. At 01h22 and again at 03h25 on the Sunday morning his phone was detected by the Matla tower (location unknown). At 04h31 No 4's phone was again detected in Matroosfontein and then by the Elsie River Industrial tower on which occasion he received a call lasting 49 seconds.

[87] There is then no further activity until 11h31, which would be consistent with No 4's having finally gone to bed at around

04h31 on the Sunday morning. At 11h31 his phone was detected by the Matroosfontein tower. But by 11h40 he was again within the range of the Elsie River VC tower. At no stage during the rest of the Sunday on the Monday was his phone detected by the Matroosfontein tower.

[88] The deceased's phone was last detected, as I have said, at 22h58 on the Saturday night, about 13 minutes after the shooting. It was routed through the Matroosfontein West tower. At that stage the phone would almost certainly still have been in the possession of one of the robbers who had fled a few minutes previously from Osman's.

[89] In the circumstances, and although I cannot determine through which cellphone tower No 4's phone would have been routed when he was at home in Ruytewacht, I think it can be said with confidence that it would not have been the Matroosfontein tower. What can also be said is that No 4 was awake and active throughout the Saturday night and into the early hours of the Sunday morning and almost certainly on the move. This is incompatible with his alibi. Furthermore the network record is consistent with No 4 having been in the vicinity of Osman's at the time of the shooting.

[90] So what one has here is more than just a transfer of identical paint. There is the video footage which shows where the vehicles were likely to have come into contact, the location of the damage on the Opel and the location of the paint smudges on the bakkie. There is the fact that a person known to No 4, namely No 1, was one of the group which arrived in the bakkie seen on the video. No 4 previously advanced a false alibi and a false explanation for the green smudges. This is a powerful case which No 4 chose not to answer in the witness box. I am satisfied beyond reasonable doubt that he and his bakkie were on the scene.

[91] I should mention that the video shows that the bakkie had a canopy. No 4's bakkie did not have a canopy when Kiewietz inspected it two months after the crime. No 4 said it had been stolen well before March 2015. One possibility is that No 4 had a canopy which was stolen before March 2015 and that he was using a borrowed canopy as at 14 March 2015. Another possibility is that he still had his canopy on 14 March 2015 but that it was stolen after that date. Yet another possibility, urged by Mr Breyll, is that No 4 concealed the canopy in order to distinguish his bakkie from the one shown on the video. I do not need to make a definite finding on this issue. I am satisfied, though, that the No 4's bakkie is the bakkie shown in the video.

Complicity in the charged crimes?

- [92] Mr Breyl conceded in closing argument that there was no basis for finding that No 4 was a co-perpetrator of the crimes charged in the indictment. The concession was correctly made. The State does not allege that No 4 was B or G or that he was one of the persons menacing Andrews at the early stages of the action. Although one cannot see the driver getting out of the bakkie or back into it, I think it probable that No 4 was the driver and that he did indeed get out of the bakkie after its lights were turned off. Very shortly after the shots were fired a person in a white T-shirt can be seen retreating in the direction of the driver's side of the bakkie. The bakkie's suspension sags as it would if someone were getting in behind the wheel and a few seconds later its lights come on. It may well be that No 4 is the man in the white T-shirt. It is certainly very unlikely that he was any of the other men who can be seen at earlier stages of the action.
- [93] At the commencement of the trial the State formally abandoned the assertion that the crimes were premeditated. The hearsay evidence from the pump attendants is that the two drivers started arguing because they were blocking each other's way. This escalated rapidly into a robbery and shooting. From the time the first men began menacing Andrews at his window until the bakkie reversed and drove away was just over 30 seconds. If No 4 was the man in the white T-shirt, he retreated almost immediately after the shots were fired. There is no evidence that he was aware that No 1 was carrying a firearm or intended to use it at Osman's. There is nothing in the video footage to indicate that the driver of the bakkie gave Andrews' attackers support, vocal or otherwise. He may have got out of the bakkie to join in a verbal altercation with Andrews but he could well have been a bemused, even stunned, observer of what unfolded over the next 30 seconds or so. No 4's presence at the crime scene, and the fact that the men in the bakkie were his friends, is not a sufficient ground to find him guilty of the crimes on the basis of common purpose.
- [94] There is thus no basis for convicting No 4 of the charged crimes or lesser competent verdicts such as assault or theft.

Accessory after the fact?

- [95] This leaves the question whether No 4 was an accessory after the fact ('AATF'). In terms of s 257 of the Criminal

Procedure Act a person charged with a particular crime may be convicted as an AATF to that crime if the evidence does not prove the commission of the crime charged but does prove guilt as an AATF.

- [96] The possibility that No 4 may be liable as an AATF was first raised by Mr Breyl during argument of No 4's discharge application. It was on the basis that No 4 might be so liable that I refused to discharge him. Liability as an AATF was said to arise from the false information given by No 4 to the police and in his bail application.
- [97] The common law crime of being an AATF is committed where, after the completion of the crime, a person unlawfully and intentionally

engages in conduct intended to enable the perpetrator to evade liability for his crime or to facilitate such person's evasion

of liability (Snyman Criminal Law 6th Ed p 271). The requirement of an intention to enable the perpetrator to evade liability is in accordance with the narrower definition of the crime approved in *S v Williams & Others* 1998 (2) SACR 191 (SCA) at 193c-e.

- [98] The textbook examples of an AATF is the person who helps the murderer dispose of the body or weapon or harbours the perpetrator. Ordinarily a person is not an AATF merely because he witnesses a crime and fails to report it. There are circumstances, however, where even such an omission may give rise to AATF liability, namely where the person in question is under a legal duty to arrest the perpetrator or provide information. No 4, though he witnessed the crimes and indeed drove the perpetrators to the scene, was not under a legal duty to report the perpetrators to the police, however morally reprehensible such failure may be.
- [99] It is nevertheless well established in our law that if a person, not otherwise under a legal duty to report a crime, is interviewed by the police and chooses to provide information, he can be found guilty as an AATF if he provides false information with the intention of helping the perpetrator evade liability. Examples of such cases are *R v Victor & Another* 1965 (1) SA 249 (SRAD), *S v Naidoo* 1966
- (1) PH H210 (A), *S v Velumurugen & Another* 1985 (2) SA 437 (D), *S v Jonathan & Andere* 1987 (1) SA 633 (A) and *S v Nooroodien & Andere* 1998 (2) SACR 510 (NC).
- [100] Where multiple persons are charged with the main crime and it is certain by the end of the case that the crime was committed by one, some or all of them, but uncertain which, conceptual difficulties may arise where it is sought to hold them liable as AATFs, given the rule that a person cannot be an AATF to his own crime. This was the problem considered in the controversial decisions of *R v Gani & Others* 1957 (2) SA 212 (A) and *Jonathan supra*. The problem does not arise here. It is certain that No 1 was the shooter and thus guilty of all four crimes charged. It is certain that B and G participated in an armed robbery and were guilty at least of that crime. It is equally clear that No 4 was not guilty of the charged crimes. The conundrum which arose in *Gani* and *Jonathan* is thus not an issue here.
- [101] When Kiewietz tracked down No 4 and asked to see him, No 4 could have declined to talk to him. This is not the course which No 4 followed. When first interviewed at the police station he denied that his bakkie could have been used in a crime. He allowed Kiewietz to inspect the bakkie (he could not realistically have done otherwise). When Kiewietz asked him about the paint smudges, No 4 said they had been caused a year previously by a truck. This interview was on or around 15 May 2015, about two months after the crimes. No 4 gave a written statement to the police on 21 May 2015. The statement was not handed in but presumably it was consistent with what No 4 had told Kiewietz.

- [102] Following Van Huyssteen's report of 23 June 2015 No 4 was arrested. On 9 July 2015, which was during the course of Kiewietz's evidence in the bail proceedings, No 4 gave a further written statement. This accorded with the evidence No 4 had given in the bail proceedings on 6 July 2015, namely that on 14 March 2015 he had collected his children from their mother at about 20h00 and spent the rest of the night at his house. (Although the statement of 9 July 2015 was not handed in, Kiewietz asked to see it when Mr Adams put to him that No 4 had given this alibi. On looking at the statement, he confirmed that this is the version No 4 had advanced. No 4 through counsel repeated this explanation at the commencement of the present trial.)
- [103] It follows from the findings I have already made that what No 4 told Kiewietz orally and in his statements during the course of the police investigation and what No 4 told the magistrate in the bail proceedings was to his knowledge untrue. Some of his false statements were made prior to his arrest and some of them afterwards. The majority judgment in Jonathan and the full bench judgment in Nooroodien show that even statements made by an accused person after he has been charged with the principal offence may constitute conduct resulting in his conviction as an AATF if the statements were made with the requisite intention.
- [104] Once No 4 chose to answer the police's questions, he was obliged to speak truthfully. When he chose to testify in his bail proceedings on the merits of the case, he was again obliged to speak truthfully. This would have entailed telling Kiewietz and the magistrate that he and his bakkie had been present at the crime scene and that he had driven the perpetrators there. He could not then have avoided answering the question who the perpetrators were.
- [105] The question is whether the State has proved beyond reasonable doubt that in making the false statements No 4 had the intention of assisting No 1 and the other perpetrators of the principal offences to evade liability. In the case of B and G, No 4's untruthful conduct has succeeded. In the case of No 1, it is no thanks to No 4 that the State has been able to prove its case beyond reasonable doubt.
- [106] The cases I have cited show that a person who lies to the police to protect himself may yet be found to have the intention of shielding the true perpetrators. In Jonathan Jansen JA, who delivered the majority judgment, identified one of the criticisms of the Gani judgment, namely that in the factual scenario such as considered in Gani and Jonathan one could not say that the conduct of any particular accused (who might have been the murderer or one of the murderers) was not directed at evading liability himself for the principal crime. Jansen JA said that this criticism overlooked the fact that *dolus eventualis* sufficed (643E-F read with 643 in fine). In context, and having regard to the actual decision by the majority, this must mean that a direct intention to protect oneself can coexist with an indirect intention to shield others in the form of *dolus*

eventualis. A similar view is expressed by the learned authors of Smith & Hogan Criminal Law 8th Ed at 168-169.

[107] In Velumurugen Law J said that a person who provides false information might have the motive of protecting himself but the intention of shielding the main perpetrator (447I-J). I am not sure that the distinction in such a case is between motive and intention; it is rather a question of dual intentions. Be that as it may, Victor, Naidoo, Velumurugen, Jonathan and Nooroodien are all cases where the person found guilty as an AATF would to a greater or lesser extent have had self-preservation as one of his motives, purposes or intentions. This was not regarded as incompatible with an intention to shield the perpetrators. In all

those cases the person in question was charged as a principal perpetrator but convicted as an AATF.

[108] No 4 knew that he had not participated in the armed robbery and murder and that he had not been in possession of a firearm or ammunition. He had seen the video footage and would thus have known that either he was not shown there at all or that he was shown only fleetingly. He may have feared that he would somehow be implicated if he placed himself on the scene. Indeed he was charged as a principal perpetrator. Nevertheless the case against him was weak, if not non-existent. Evading personal liability would not have been nearly as significant a motivating force on the facts of the present case as it appears to have been in Victor, Naidoo, Velumurugen, Jonathan and Nooroodien.

[109] By contrast No 4 knew that No 1 had fired several shots at Andrews and that B and G had proceeded to rob Andrews. Once they were identified, they could offer no exculpatory explanation. I am satisfied that No 1, B and G were part of the group that arrived at Osman's in No 4's bakkie and that No 4 was the driver. He was on friendlier terms with No 1 than he made out. He had a long association with No 1's family. It is also safe to assume that B and G, whoever they were, were known to No 4. I have no doubt that No 4 knew that if he had placed himself on the scene, he would have been obliged to identify these people and that he would probably be subpoenaed to testify against them in due course. He had ties of friendship which are a plausible reason why he would not have wanted to identify them.

[110] Once again, No 4's decision not to testify has consequences for him. He was duly warned during the discharge application that the State would seek to hold him liable as an AATF. In my reasons for refusing discharge I said that a reasonable court, acting carefully, might conclude that No 4 and his bakkie were on the scene that night and might conclude that his sole, primary or at least equal purpose in giving false information to the police and in his bail proceedings was to shield the perpetrators. In explaining why I was refusing to discharge No 2 and No 3, I observed that the video footage did not preclude a plausible case for No 4 along the lines that although he was on the scene he did not foresee or associate himself with the attack on the deceased. He might thus go into the witness box to explain what happened. I also observed that the risk of conviction as an AATF was something which might give him and his counsel pause for thought. If the truth was that he and his bakkie were on the scene, his state of mind when giving a false version to Kiewietz and in the bail proceedings would be to the forefront. I said I should allow for the reasonable possibility that No 4 might be advised by counsel that his risk of an adverse decision on this aspect

would be increased if he failed to testify or did testify but persisted in claiming that he was not on the scene.

- [111] Despite this procedural background, No 4 decided to close his case without presenting evidence. This occurred after I allowed Mr Adams a brief adjournment to confer with his client. It has been said in a variety of contexts in our criminal law that where an accused's state of mind is in issue it is not easy for a court to come to a conclusion favourable to him unless he himself has given evidence on the subject (*R v Mohr* 1944 TPD 105 at 108; *S v Kola* 1966 SA 322 (A) at 327F; *S v Theron* 1968 (4) SA 61 (T) at 63D-H; *S v De Oliveira* 1993 (2) SACR 59 (A) at 64h-65c). This failure, coupled with the natural inference flowing from the evidence adduced by the State, satisfies me beyond reasonable doubt that No 4 made false statements with the intention of helping No 1, B and G to evade criminal liability.

Conclusion

- [112] For the sake of completeness, I record that when the State closed its case there was no prima facie case against No 2 and No 3. The only evidence which specifically implicated them was to be found in Hein's written statements. Hein was a wholly dishonest and discredited witness. One of the active robbers – G – was wearing the same or a similar T-shirt to that which No 3 is seen wearing in a photographic image found on No 2's cellphone. However, and unlike No 1's case, there was no other evidence linking him to the scene. The clothing on its own was not enough nor was the evidence of a gang association between the first three accused. Since all the accused closed their cases without presenting evidence, and since Mr Breyt did not seek to persuade me that No 2 and No 3 could be convicted, they were acquitted without further ado.
- [113] No 1 is thus found guilty on all four counts in the indictment.
- [114] No 4 is found guilty as an accessory after the fact to each of the counts in the indictment.

ROGERS J

APPEARANCES

For the State Mr NG Breyt For 1st Accused Mr W Fischer For 2nd Accused Mr CD van Zyl For 3rd Accused Mr R Cloete For 4th Accused Mr Adams

- [1] See exhibit "W" for a map of the area.
- [2] Exhibits "RR" and "TT".
- [3] Exhibit "OO".
- [4] Exhibit "EE".

- [5] Exhibit “FF”.
- [6] Exhibit “CC”.
- [7] Exhibit “CC”.
- [8] Exhibit “OO” pp 4-5.
- [9] Exhibit “OO” pp 181-182.
- [10] Exhibit “OO” p 32.
- [11] Exhibit “OO” p 104.
- [12] Exhibit “OO” pp 161-161.
- [13] Exhibit “OO” p 212.
- [14] Exhibits “H” – “V”, adduced in Ravens’ evidence.
- [15] See photo 14 of exhibit “H” – No 1’s prints were the print on the column and the lower print on the window.
- [16] Exhibit “OO” pp 108-109.
- [17] Exhibit “OO” pp 32-33.
- [18] Exhibit “OO” pp 43.
- [19] Exhibit “PP2”.
- [20] Exhibit “QQ2”.
- [21] Exhibit “QQ2” p 6, 3rd row from the top.
- [22] Exhibit “QQ2” pp 20-28.
- [23] Exhibit “DD”.
- [24] See exhibit “DD” photo 9.
- [25] Exhibit “SS2”.
- [26] Exhibit “C” para 9.
- [27] Exhibit “GG2” pp 8-8 and exhibit “HH2” p 5. The relevant number is 074 9300977.

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