

SOUTH AFRICA / JUDGMENT

S v Davids and Others (CC103/2019) [2022] ZAWCHC 216 (31 October 2022)

[2022] ZAWCHC 216

COURT

Western Cape High Court, Cape Town

BEFORE

Henney

CASE / FILE NUMBER

CC103/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO. CC103/2019

In the matter between:

THE STATE

vs

DAWNAY DAVIDS

Accused 1

MAHLUBANDILE JACOBS

Accused 2

MOEGAMAT SWARTS

Accused 3

VINCENT DAVIDS

Accused 4

JUDGMENT HANDED DOWN ON 14 OCTOBER 2022 AND PRESENTED TO THE PARTIES
ELECTRONICALLY ON 31 OCTOBER 2022 AND ALSO PUBLISHED IN SAFLII

HENNEY, J:

Introduction

and Background:

- [1] The offences the accused are alleged to have committed have their origin in two incidents that happened in the township of Uitsig, near Ravensmead, situated in this division. The first incident, which occurred on 26 March 2019, resulted in the murder of two persons, an adult male and a young 4-year-old girl.
- [2] The second incident occurred on 7 April 2019, where another person was killed, and there was also an attempt to kill her daughter. From these two incidents a total 11 charges are set out in the indictment, with which I shall deal here under. Not all of the accused were charged with all of the charges set out in the indictment. There are

three categories of charges in the indictment.

- [3] Firstly, the charges that relate to the accused's criminal gang activity in terms of the Prevention of Organised Crime Act 121 of 1998 ("the POCA"). All four accused were arraigned on these charges, counts 1 and 2 in the indictment, contraventions of section 9 (1) (a) and 9 (2) (a) of the POCA respectively. Secondly, only accused 1 and 2 were arraigned on the charges relating to the first incident on 26 March
2019. Thirdly, only accused 2, 3 and 4 were arraigned on the charges relating to the second incident on 7 April 2019.

The POCA charges:

- [4] Count 1 deals with the charge of aiding and abetting of criminal gang activity in contravention of section 9 (1) (a) of the POCA. In respect of this charge, the State alleges that during the period March 2019 to April 2019, at or near Uitsig, the accused, by being active participants in or members of a criminal gang, named the "Ama Don't Care" gang, wrongfully and unlawfully aided and abetted in criminal activity for the benefit of, at the direction of, or in association with the "Ama Don't Care" gang, by partaking in the activities and offences as set out in counts 3 to 11 of the indictment.
- [5] Count 2 is concerned with the charge of causing or contributing to a pattern of criminal gang activity, wherein the State alleges that all 4 of the accused wrongfully and unlawfully performed an act which was aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity, by partaking in the activities and

offences as set out in counts 3 to 11 of the indictment. The State further alleges that the offences comprising a pattern of criminal

gang activity were committed during the first and second incident.

- [6] In respect of the first incident on 26 March 2019, only accused 1 and 2 were charged with the murder of the two deceased. On that date Christopher Cornelius (“the first deceased”) was killed in a very cold-blooded manner, after he was shot with a firearm, count 3 in the indictment. During the same incident and at the same date, time and place, L[....] J[....], a 4-year-old girl (“the second deceased”), who had been at the back of the loading area of a bakkie where the first deceased had been present, was also shot and killed with a firearm, count 4 in the indictment.
- [7] They were also charged with the illegal possession of a firearm, of which the calibre and make was unknown to the State, in contravention of section 3 of the Firearms Control Act 60 of 2000 (“the FCA”), count 5 in the indictment, as well as being in illegal possession of ammunition, at least 6 x .45 ACP calibre bullets, without being the holder of a license, permit, dealer’s license or any other authority to have such ammunition in their possession, in contravention of section 90 of the FCA, count 6 in the indictment.
- [8] Only accused 2, 3 and 4 were indicted on the charges relating to the second incident, committed on 7 April 2019. The three accused were charged with the murder of Glenda Ruiters (“the third deceased”), by shooting her with a firearm, count 7 in the indictment. They were also charged with the attempted murder of Nikita Ruiters, by shooting her with a firearm, count 8 in the indictment.
- [9] During this incident accused 2, 3 and 4 were also charged with two counts of being in illegal possession of a firearm, of which the calibre and make was unknown to the State, without them holding a license, permit, or other authorisation issued in terms of the FCA to possess such a firearm, respectively counts 9 and 10 in the indictment. They were also charged with one count of illegal possession of ammunition, of at least 2 x 9 mm Parabellum bullets, without them being the holder of a license, permit, dealer’s license or any other authority to possess such ammunition, in contravention of the FCA, count 11 in the indictment.
- [10] All the accused were legally represented throughout the proceedings. At the initial stages and up to the closing of the State case, Adv Pienaar appeared for accused 1, 2 and 4, whereafter he withdrew from the proceedings; Miss De Jongh, from Legal Aid South Africa, thereafter conducted the defence of these three accused until the end of the proceedings. Adv Pothier appeared for accused 3.

The Pleas:

- [11] All the accused pleaded not guilty to all the charges proffered against them. They denied the allegations against them. In respect of the first incident, accused 1 and 2 denied any involvement therein. Both of the accused stated in their plea that they had not been in the Uitsig or Ravensmead area at that time, and that they were mistakenly identified by the state witnesses. Accused 2, 3 and 4, in respect of the second incident, also denied any involvement in the commission of the respective offences. Accused 2 and accused 4 also stated that they were mistakenly identified, and they had not been in the Uitsig or

Ravensmead area at the time of the commission of the offences.

- [12] With regards to the POCA charges, all the accused denied any membership of the “Ama Don’t Care” gang, and that they aided and abetted any criminal gang activity, or caused, brought about, promoted or contributed to any pattern of criminal gang activity.

Admissions and Facts not in dispute:

- [13] It is clearly not in dispute that on 26 March 2019 the first and second deceased were shot and killed by a person or persons in the manner as described by the witnesses. It is also clearly not in dispute that on 7 April 2019 the third deceased was also shot and killed by a person or persons in the manner as described by the witnesses.

- [14] All the accused made admissions in terms of the provisions of section 220 of the Criminal Procedure Act 51 of 1977 (“the CPA”). Accused 1 and 2 made the following admissions in respect of the first and second deceased:

- 1) In respect of the first deceased, that he was at all times correctly

identified as Christopher Cornelius, an adult male, as per count 3 of the indictment;

- 2) That he sustained gunshot wounds to his head and abdomen on 26 March 2019 at Geranium Street, Uitsig, Ravensmead;

- 3) That his body suffered no further injuries during the period after these gunshot wounds were inflicted and before the post-mortem examination was conducted;

- 4) That the state pathologist, Dr. Heidi-Lee Okkers, conducted a post-mortem examination on the body of the first deceased on 1 April 2019, and found the cause of death, as indicated in the post-mortem report, to be gunshot wounds to the head and abdomen;

- 5) That they had no objection to the post-mortem report being handed in as an exhibit, and which was then handed in as exhibit E;

- 6) That the second deceased was at all relevant times correctly

identified as L[....] J[....], a 4-year-old female child, as mentioned in count 4 of the indictment;

- 7) That Dr. Heidi- Lee Okkers also conducted a post-mortem examination

on the body of the second deceased, and found the cause of death to be a gunshot wound to the chest;

- 8) That the second deceased sustained a gunshot wound to her chest on 26 March 2019 also at Geranium Street, Uitsig, Ravensmead, which resulted in her death, and that the body sustained no further

injuries during the period after the gunshot wound was inflicted and before the post-mortem examination was conducted.

[15] In respect of the second incident, accused 2, 3 and 4 made the following admissions regarding the third deceased:

- 1) That she was at all times correctly identified as Glenda Ruiters, the adult female mentioned in count 7 of the indictment;
- 2) That the third deceased sustained gunshot wounds to the head, chest and abdomen on 7 April 2019 in E[...] Street, Uitsig, Ravensmead, and she died on the scene as a result of the injuries sustained;
- 3) That the body suffered no further injuries during the period after the gunshot wounds were inflicted and before the post-mortem examination was conducted;
- 4) That Dr Bjorn Andrew Swigelaar conducted a post-mortem examination on the body of this deceased on 15 April 2019; that he correctly noted his findings and that the accused had no objection to this report being handed in as an exhibit;
- 5) That the cause of death, as indicated in the post-mortem report, was a gunshot wound to the head.

[16] None of the accused had any objection to the handing in of the various photographs and photograph albums, which depicted the crime scene in respect of the first as well as the second incident.

[17] The State, in its attempt to prove its case against the accused, called 11 witnesses. They are: Christie J[...], L[...]2 J[...], Nikita Ruiters, Donovan Witbooi, Norman Tromp, Caryn Gertse, Ricardo Siyaya, Sgt Reginald Wakefield, Sydney Mkizhe, Sgt Curwin Engelbrecht, and Rochelle Rooi.

All the accused testified in their own defence, and accused 4 also called Elvis Ntombane as a witness.

Summary of evidence:

[18] I shall, for the purposes of this judgment, not summarise all the evidence, but will only deal with those portions of the evidence which, firstly, are not in dispute and, secondly, would not take the case any further. In some instances, where such evidence is relevant, I will only make a reference thereto. I shall also deal with the evidence in a chronological manner, by first dealing with the evidence of the first incident, thereafter with that of the second incident, and lastly with the evidence relevant to the POCA charges.

Evidence in respect of the first incident (26 March 2019):

- [19] Christo J[...] (“Christo”) is the son of the first deceased. He testified that he knows accused 1, 2 & 4 as members of the “Ama Don’t Care” and “28 vierde kamp” gangs. He also knows them by their nicknames: accused 1 as “Choccie”, accused 2 as “Sloebie”, and accused 4 as “Skelato”. He has known them for many years and all of them stayed in the Uitsig area. Accused 2 and 4 are cousins, and he knows accused 1 as a family friend of theirs. He used to see them with a person known as “Sieniebom” at times when he went to buy drugs.
- [20] On the Monday evening before his father was shot, 25 March 2019, accused 2, accompanied by other persons with the nicknames “Ghoene”, “Spoon”, and “Kikke” had been at his father’s house, and accused 2 had asked his father to give them some money. During this incident, accused 2 warned his father to making certain gestures to indicate that he must watch out as enemies would shoot him so that his head would roll. The witness testified that at that time he did not see this as a threat, because he did not know what they were talking about; with hindsight, however, he realised that it had been a threat.
- [21] The next day, 26 March 2019, shortly before his father was shot, he had been with his father, standing by a bakkie that they used to transport scrap. As he walked away from the bakkie he came across accused 1, who was wearing a hoodie top and walking towards his father. Accused 1 was accompanied by another person, but he did not take notice of who it was. He and accused 1 greeted each other in so called gangster language.
- [22] As he walked on, he heard shots. He immediately ran back to their house, where he observed his father falling and realised that his father had been shot. He did not see who shot his father. He further observed that his sister’s young daughter, L[...], had also been shot. He further testified that the Saturday after his father was killed, he saw accused 4 shouting “Ama Don’t Care” at the Malawi camp in Gousblom. He knows the history of the “Ama Don’t Care” gang. During cross-examination, he denied that accused 1 and 2 had not been in the area at the time of the incident. He was furthermore persistent that accused 2 had been at his father’s place on Monday 25 March 2019.
- [23] Donovan Witbooi (“Donovan”) mostly confirmed the evidence of Christo J[...] regarding the presence of accused 1 and 2, and the other persons Christo referred to in his evidence, at the home of the first deceased on the night before the shooting. He had been present, earlier that morning of 26 March 2019, at the first deceased’s house, before the shooting had taken place. He testified that he left the first deceased, and the other persons there, standing in and on the bakkie. He did not see who was responsible for shooting the first and the second deceased. He had been on his way to E[...] Street, just around the corner from Geranium Street where the incident took place, where he had to collect money from someone named “Heinie”.
- [24] Whilst on his way to Heinie, he heard gunshots. He saw L[...]2 and the other children running around the corner in his direction, and L[...]2 reported to him that his grandfather had been shot. He also observed two persons running down E[...] Street in the opposite direction. He did not see who it was, but he observed that one person was wearing a hoodie

top. He returned to the scene of the shooting in Geranium Street, where he observed the first deceased lying at the back of the bakkie, next to it, and the second deceased lying on the loading area at the back of the bakkie.

- [25] The second deceased was still alive and he rushed her to Tygerberg Hospital, where she was later declared deceased. The third deceased, Glenda Ruiters, was known to him, and he saw her standing on the corner after he came from the hospital. Whilst he had observed the third deceased standing in her yard before the shooting, he was unable to say whether she had been there at the time of the shooting.
- [26] He knows accused 1 and 2, and everybody in the area knows that they are part of the “Ama Don’t Care” gang. They are also part of the “28” prison gang. According to him accused 4, who he knows as Skelato, is the leader of the “Ama Don’t Care” gang. All the accused, according to his knowledge, are part of the “Ama Don’t Care” gang. He testified that it is not correct that the accused were not around, or not staying in the Uitsig area, at that time.
- [27] Norman Tromp (“Norman”) is the first deceased’s brother-in-law and they lived at the same address in Geranium Street, Uitsig. He also confirmed the evidence of Christo and Donovan about the presence of accused 1, accused 2 and other persons at their premises on the evening before the shooting. All the people entered the premises through the gate and went to the back of the property, except for accused 1 who remained standing at the gate inside the property. Accused 2, Kikke and Khoene went to the back. Spoon was outside the small gate. Kikke had been the one who asked the first deceased for money.
- [28] At about 08h00 that morning, just before the shooting, he went to Gousblom Avenue, where he saw accused 4 and his daughter, walking in Gousblom Avenue towards E[...] Street. A few minutes later he went back to Geranium Street, where the first deceased was still standing by the bakkie. After speaking to the first deceased, he left to go to Bellville, but, before they could reach Bellville, he received a phone call that the first deceased had been shot and killed. He knows accused 4, as he met him one day about 2 years prior, when accused 4 came to warn him to leave his girlfriend alone after this witness joked with her at her workplace.
- [29] L[...]2 J[...] (“L[...]2”), the next witness, was a 13-year-old child at the time of his testimony. He was the only eyewitness to the shooting of the first and second deceased. He testified with the assistance of an intermediary, in terms of section 170A of the CPA; no objection had been raised to him testifying in this manner. The first deceased was his grandfather and they lived together at the same address at the time of the incident. The second deceased, L [...], was his cousin, who also stayed at the same address.
- [30] He observed that accused 1 and accused 2 came out of a bush situated near a bridge. At that time the first deceased, known as “Tevis”, L[...] (the second deceased), and Nathaniel were at the bakkie. Accused 2 asked his grandfather for R20. The witness had gone into the house, and as he went back out he heard a shot. He observed accused 2 standing in the middle of the road, shooting at his grandfather, shooting continuously in the direction of the bakkie.

He was able to see this, as he was in the yard behind a gate that was covered with netting, and he saw this through holes in the netting. He saw accused 1 standing on the corner while accused 2 was shooting, apparently keeping a lookout. Thereafter, accused 1 and 2 ran away together towards the bridge. He knows accused 1 very well.

- [31] In answer to a question in cross-examination, he testified that he also knows accused 1, accused 2 and accused 3, known to him as “Gamat”, and other persons known as “Wille”, “Aggies” and “Boza”, as members of the “Ama Don’t Care” gang in the area. He further testified that he knows accused 1 and accused 2 and he observed that they frequented the Malawi camp, which abuts the Uitsig area. He also saw them frequenting Whitey’s yard. Accused 2 frequently visited his grandfather at the house. Sometimes he was accompanied by accused 1.
- [32] He further testified that when he made a statement to the police on the day of the incident, he mentioned that Choccie had been accompanied by an unknown person who was responsible for the shooting. He did not mention the name of accused 2, because he was afraid that accused 2 would shoot him. In cross-examination he was adamant that accused 1 had been at his grandfather’s house many times before. He was also adamant that he saw accused 1 and 2 walking together, on numerous occasions. He was furthermore adamant that accused 1 was still staying in the Uitsig area at the time of the shooting.
- [33] He furthermore denied that accused 2, at the time of the shooting, had moved out of the Uitsig area to Gugulethu. During cross-examination it was pointed out to him that, in his statement, he indicated that the person who shot at his grandfather handled two firearms, because the one firearm had jammed. He explained that he forgot to mention that in his evidence. It was further put to him that in his statement he said he saw his grandfather running and falling after he was shot. In his explanation he said that, after his statement was made, no one discussed or explained the contents thereof with him. When he was made aware of it by the prosecutor, he indicated that there was something wrong with the statement. It was also pointed out to the police, but it was not read out to him, and he never in his statement mentioned to the police that accused 2 asked his grandfather to give him R20. In his answer to this question, he said that he had mentioned it.
- [34] Rochelle Rooi was the next important witness regarding the first incident. She was 19 years old by the time she gave evidence. She testified that on the morning of the shooting, she went to buy a newspaper. She walked towards Geranium Street, and on the corner before she entered Geranium Street she saw accused 1, accused 2 and a third person standing on a nearby field. She observed accused 2 cocking a firearm, which he handed over to accused 1. As she walked further down Geranium Street she saw a bakkie standing on the side of the road. She observed a man standing outside the bakkie and a child playing at the back on the loading area of the bakkie. She also observed other people in the road.

[35] She went into the shop, which was situated about 2 to 3 houses away from where the bakkie had been standing. Later when she came out of the shop, she saw accused 1 standing in the road not far away from the bakkie, with his hands in his pockets. When she saw him she started walking faster, because she had seen him with a firearm on her way there. She also saw accused 2 and the other man standing on the corner of the field and E[...] Street, peeping into the road. She ran around the corner away from them, and as she approached the first pole of the next road, she heard gunshots. She then ran into the nearest yard on the corner. Not long thereafter, she saw accused 1 and the other two running together towards the railway line, to Malawi camp. Accused 1 had a firearm in his hands. She also noticed that they were exchanging clothes whilst they were running. She was

not able to say who fired the shots or what accused 2 did after she left him on the corner.

[36] She knows accused 1 and 2 as members of the “Ama Don’t Care” gang, and she also knows accused 1 because they attended the same primary school. She often sees them shooting in the road, standing on the corners of Disa Avenue, when shooting at other gangs, shouting “Nog, Ama Don’t Care!” and showing the “28” hand signs. As she was testifying in a different room and through closed circuit television, she was shown photographs of the accused and asked if she knew the persons on the photographs. She was able to identify accused 1, 2 and 4, and stated that she knows that accused 4 used to be part of the “G-unit” gang. She confirmed during cross-examination that people were afraid to tell the police what happened when they arrived on the scene. When it was put to her in cross-examination that accused 1 and 2 deny that it had been them, asserting instead that they had not been on the scene, that accused 1 had been in Delft and accused 2 in Gugulethu from the beginning of 2019, she was adamant that it had been the two of them that she saw that day. She was also adamant that she, on occasion, observed accused 1 and 2 walking with each other or shouting on corners.

Evidence in respect of the second incident (7 April 2019):

[37] Nikita Ruiters (“Nikita”) was the only eyewitness to the shooting of the third deceased, Glenda Ruiters, her mother. At the time of the incident, she and her son lived with her mother, at number [...] E[...] Street, Uitsig. However, by the time she gave evidence, she was no longer staying at this address; both she and her son had been placed in witness protection. It was apparent from her demeanor and presence in court that she was scared for her life. During her evidence she was very nervous and scared to testify in open court. At times she had emotional outbursts, and was overcome with grief and sadness when she had to recall the events giving rise to the death of her mother. The court will deal with her demeanor as a witness at a later stage.

[38] Nikita testified that the third deceased had had a very close relationship with the first deceased. She acted very strangely after he was killed and did not want to go anywhere, not even to the funeral, which was out of character for her. The funeral of the first and second deceased was held on Saturday 6 April 2019, and she acted very strangely by covering her

face with a baby's blanket. She was emotional and praying a lot. Her mother wanted to speak to Ricardo Siyaya, who was a captain in the police at that time. The witness testified that on the morning of the third deceased's murder, 7 April 2019, accused 4, to whom she referred as Skelato, was walking past their house with Sieniebom, and they spoke to her mother. Much later that day, at about 18h45, there was a knock at the door. The third deceased went to the door, which was open, but which had the security gate in front of it closed, though unlocked. Her mother said: 'Skelato', to which he replied: 'Wie's jou Skelato', adding a profanity.

[39] Nikita testified that she was about 2 metres away from them when she observed what happened. She saw accused 4 put one foot in the door to prevent it from closing, and fire three shots at her mother, hitting her on her forehead. Accused 4 then moved away and left. As Nikita bent down to catch her mother, accused 3, to whom she referred as "Gammie", fired one shot at her but missed her as she ducked. Accused 2, to whom she referred as Sloebie, then pulled accused 3 away. The projectile of the shot fired at her was later found to be imbedded in the wall, in the room behind where the shooting had taken place. She knows accused 1, to whom she referred as Choccie, from his brother Lorenzo, who used to come to their house.

[40] She had also seen him squatting down and shooting at other gangsters, namely the "Terribles", before then. He is always with accused 4. She also knows accused 2 very well, and he has always been very friendly towards her. She conceded that he may have saved her life on that day. She knows accused 3 from a previous incident when she was involved in an altercation with her mother; her mother had wanted to hit her. Accused 3, who at the time had been walking past their house, had been called by her mother to come and remove her from a pole that she had climbed. She also knows him as uncle Zane's

sister's child, and she described a person with the name of "Farieda" as his aunt or mother.

[41] She further testified that she saw him many times after that. They were always fighting with each other, as she was angry at him for helping her mother. She would throw stones at him. She also used to beat his uncle playing cards. She also knew accused 2 and 4 as gangsters. According to her, everybody in the area is afraid of them. Accused 4 is the leader of the gang "Ama Don't Care". Accused 1 always carried accused 4's firearm. On one occasion she saw accused 1 give accused 4 a firearm to shoot a person named Sean. She also on occasion saw accused 1 and accused 3 shoot at the

"Terribles". According to her, the accused themselves would loudly exclaim that they are the "Ama Don't Care" gang when they walked in the street. She pointed out that accused 2 was the one who always said it. She further testified that at the time of the incident on 7 April 2019, accused 2 was living with his grandfather, while accused 4 and accused 3 lived one street over in A[....] Avenue.

- [42] After the incident, she pointed out to the police where accused 3 and accused 4 lived, and testified that both of them lived in A[....] Avenue in Uitsig. Thereafter she also showed the police where accused 2 lived. She testified that she does not have any knowledge of the first shooting incident. She further testified that she has extensive knowledge of the gangs in the area and admitted that she used drugs and used to buy it from them.
- [43] During her emotional testimony, she confronted accused 4 in court, accusing him of shooting her mother. She knows him very well and describes him as someone who is cross-eyed. She was able to give a description of his clothing on the day. Although his face had been covered, she was able to see his eyes. He looked straight at her. During cross-examination, she was confronted with a video made by a journalist. She confirmed during that examination that her mother was shot three times in the head. In response to the court's question, she confirmed that she knows all the accused and their families very well and that they know her. Accused 2 and her sister were friends. She used to be friends with accused 2 and is dumbfounded that he was involved in shooting at her or her mother.
- [44] Nikita stated, in response to statements put to her in cross-examination that accused 1, 2 and 4 lived in different places from January that year, that she saw them at Sieniebom's place during the week that the first deceased was shot, as she is friends with Sieniebom's sister Meira. On the morning of the day that her mother was shot, she also saw accused 4 and Sieniebom walking past the house. Nikita denied an allegation by accused 3, when it was put to her that he had had sex with her in exchange for drugs a number of times, but did not keep his end of the deal and did not give her drugs.
- [45] Caryn Gertse is the sister of Nikita and the other daughter of the third deceased. Her evidence, in my view, does not take this matter any further and mainly relates to her mother's strange reaction to, and behavior after, the killing of the first and second deceased. She was also not an eyewitness to the murder and attempted murder of her mother and sister. Her further evidence with regards to what her mother had told her amounts to inadmissible hearsay, and cannot be taken into consideration for the purposes of this judgment.
- [46] Ricardo Siyaya's evidence, similarly, was also about certain utterances made to him by the third deceased prior to her murder. He testified that at some point during either a Saturday or Sunday in April 2019, the third deceased had been looking for him; he went to visit her at their house. He wanted to inquire from her why she wanted to speak to her him. The only words she uttered to him were 'Siyaya, ek is bang'. The third deceased continued to say that she was afraid and he could observe that she was scared, but she never came around to telling him what she was afraid of.
- [47] Sergeant Reginald Wakefield was the investigating officer who initially investigated both the first and second incidents, and he attended both scenes. There was a huge crowd at the first scene, but no one wanted to give information or speak. The third deceased was known to him from working in the community in the area. When he arrived at the scene of her

murder, Sergeant Meissenheimer informed him that her daughter, Nikita, witnessed the incident. He approached Nikita and took her to the station to take her statement. She was emotional. He testified that the reason why he took a statement that evening, was that due to his experience with other dockets and other scenes, if a statement was not taken as soon as possible, there might be a chance that a witness would not give a statement at a later stage or that the witness would be threatened and would not give a truthful statement.

- [48] Although he managed to calm her down somewhat, she was still very emotional, but he was able to obtain a full statement from her. She insisted that she wanted to return to the scene before the mortuary personnel took her mother away from the scene. Nikita gave him the names of the shooters and people that were there. Although it is protocol for them to read statements back to the witnesses, he could not say with certainty that he did, because he had his hands full getting her to at least calm down. He had difficulty calming her down, but she said she would speak to him because she wanted him to get the people that killed her mother. She named accused 2, 3 and 4 as being involved.
- [49] After the ballistics experts had already left the scene, Sergeant Meissenheimer found another projectile on the scene, which he sealed and took to the Ravensmead Station to book into the SAP 13. Sergeant Wakefield took Nikita to one of her family members as a safe place, out of the area. The police were searching for the people Nikita had identified, but they could not be traced. Sergeant Wakefield was also the one who took a statement from Nikita about the pointing out of accused 3's address. He testified that this was merely a pointing out statement, that was only meant to indicate where one of the suspects lived. It was not meant to replace the initial statement that she made.
- [50] Nikita was under witness protection for only a few days, whereafter she left and went to her grandmother's place. Thereafter she moved from address to address. Wakefield knows accused 2 and 4. At one time he investigated a robbery case against accused 2. He also knew accused 4 from the area and other cases involving him. He knows the "Ama Don't Care" gang and its history from when "the Firm" and the "G-unit" gangs existed. He testified that according to his knowledge they mainly operated in Malawi camp. They were known to commit "smash-and-grab" robberies in the area. He explained "number gangs" and "vierde kamp". Members usually tattoo the number and not the "vierde kamp", as names can change. He knows some of the "Ama Don't Care" gang members and knows that

accused 4 is identified as the leader. Nikita pointed out to him where the projectile hit the wall. It came to light that the third deceased was a possible witness to the first deceased's murder case.

Evidence on the POCA related charges:

- [51] During the presentation of the evidence in respect of the first and second incidents, evidence relating to the respective accused's gang affiliation was given by certain of the witnesses. The prosecutor, in her endeavour to prove the POCA related charges, presented the evidence of Sidney Mkizhe ("Mkizhe") who was at some point a Crime Information Management and Analysis Centre officer ("CIMAC") and was stationed at the Ravensmead police station.
- [52] After he resigned from the South Africa Police Service, his post was taken over by Sergeant Curwin Engelbrecht. A lot of the evidence given by Mkizhe especially was contentious and to a certain extent prejudicial to the accused, and inadmissible. It was based on hearsay and character evidence which was shown during the presentation thereof to be, to a certain extent, unreliable. Most of the evidence with regards to the individual accused's gang affiliation, or gang involvement, was presented by the witnesses who knew them from the area and also those witnesses to the first and second incident. Some of Mkizhe's evidence, about certain tattoos that he observed either on photographs or physically on the body of the accused individuals, depicting gang affiliation, was not disputed. Regarding his knowledge of the individual accused's criminal gang membership and in particular of the "Ama Don't Care" gang, he testified as follows:
- a) That he has seen graffiti/writing in the police cells: "Ama Don't Care" and "32", referring to 32 Box, the Glock firearm, which has an extended magazine. This is a slogan used by "Ama Don't Care".
 - b) That he has had many dealings with all 4 accused since he started working in the area in 2008, and attended many searches relating to illegal firearms and drug smuggling at [...] A[...] Avenue, where accused 1 and 4 lived.
 - c) That he knew accused 2 as he used to find him with members of the "G-unit" gang. Accused 1 and 4 also grew up in the gang's environment.
 - d) That [...] A[...] Avenue was the gang's stronghold, and that Charmaine, accused's 1 mother, is known in the community as "Mama 8" due to their affiliation with the "28" gang.
 - e) That he often saw accused 3 spending time around people identified as "Ama Don't Care", standing or walking with the group, but that to his knowledge accused 3 was not a member of any gang.
 - f) That he knows the history of the "Ama Don't Care" gang, which initially was the "G-unit" gang, with leaders Andre Cloete (a.k.a "Toerels") and Silas Monyake (a.k.a "Wando").
 - g) That Leandre Fortuin (a.k.a "AK") was a member of "Ama Don't Care".
 - h) That the main criminal activities of the "Ama Don't Care" entail smash-and-grab robberies in Bishop Lavis, Malawi camp, and Robert Sobukwe Road, as well as murder and attempted murder.

- i) That towards the end of 2018, accused 4 himself freely and voluntarily informed Mkizhe that he (accused 4) was not part of the “Terribles” gang, which also operated in the Uitsig area, but that he was part of the “Ama Don’t Care” gang, when this witness asked him whether they moved from the “G-Unit” gang to the “Terribles” gang.
 - j) That different members of the public would on different occasions say that ‘Skelato en sy mense’ operate in the area. The same information was also obtained from other police officers.
 - k) That he knew accused 4, as he was a regular at the police station. He was frequently arrested for shootings. He knew accused 4 from when he was still part of the “G-unit” gang.
 - l) That the “Ama Don’t Care” comprised of “28” prison gang members and some “26’s” would walk with them.
 - m) That accused 4 and his brother Abongile (a.k.a “Mabong”) had a “shack” in Malawi camp where they slept.
- [53] Sergeant Curwin Engelbrecht grew up in the Uitsig area and has worked at the Ravensmead police station since he joined the police service 12 years ago. He testified that he knows accused 1, 2 and 4 very well, and accused 3 not as well, but that he has seen him in their company on occasion - in the street and at [...] A[...] Avenue, when they searched the house. He arrested accused 2 once and knew him from the area, as a member of the “Ama Don’t Care” gang.
- [54] According to him, accused 2 is part of “Ama Don’t Care” gang; the accused always hang out together; accused 2 was present at [...] A[...] Avenue on those occasions when search and seizure operations were conducted. He also corroborates Mkizhe’s explanation of how the gang started and the history of “G-unit” gang, as he knew from growing up in the area.
- [55] His further evidence is that before they were known as “Ama Don’t Care”, this gang called themselves “32 Box” (meaning extended magazine). Engelbrecht would even tease them about their ‘chopping and changing’ of their names. In this regard, he testified that during 2017, Abongile said in the presence of all 4 of the accused that they are all members of the “Ama Don’t Care”, when he jocularly told them that they continuously change their gang affiliation, like a person would change underwear.
- [56] He grew up in the same area, he and the accused know each other well, and the accused even call him by his first name and they were very open about their gang involvement. They never denied belonging to the gang. It never came to his knowledge that any of them quit the gang.
- [57] He knows of only one person, recently, who had an “Ama Don’t Care” tattoo. They normally use “28” gang signs and have graffiti at the toilets. A[...] Avenue is their stronghold and their operating area is Malawi camp and A[...] Avenue.

[58] In response to a question during cross-examination, Engelbrecht identified members of “Ama Don’t Care” to also include Abongile; Leandre Fortune and Nino Japhta, whose father is Wando (Silas). Members of gangs would greet each other with hand signs - “Ama Don’t Care” used “28” gang signs.

[59] In cross-examination he stated that it was not correct that accused 1, 2 and 4 were not members of the “Ama Don’t Care”, when this was put to him.

That concluded the evidence for the prosecution. All four accused testified in their own defence.

[60] Accused 1 testified that in 2019 he was 16 years old, and had since January of that year lived in Delft with his mother, his sister and his sister’s children. Prior to that he lived at [...] A[...] Avenue, Uitsig. It was his uncle’s place, and the reason why he moved was because people used to shoot at that house. On 26 March 2019 he was in Delft. He did not know the deceased that had been killed during the shooting on that day. He was told that the police were looking for him and his mother told him about the shooting when she took him to the police station. He was not in Uitsig on that

specific day, and he cannot remember what he did on that day because it was a long time ago. He never went back to Uitsig after he moved to Delft.

[61] He further testified that the state witnesses were lying when they said he was in Uitsig on either 25 or 26 March 2019. He does not have any knowledge of any shooting that took place on 26 March 2019. He does not know why L[...]2 would say that he was there. He also does not know Crystal, Donovan or Norman. He does know Rochelle, they attended school together and were in the same class, however they were not friends. He further testified that he grew up in Uitsig and has friends living in the area. He left school at grade 5, whereafter he went to work with his grandfather. He is not part of any gang and knows that there are gangs like the “Terribles” in the Uitsig area.

[62] His late uncle had been a member of the “G unit” gang, but he does not know any other persons belonging to a gang. Accused 2 is his mother’s cousin. He knows that accused 2 resided in Gugulethu. He does not really know accused 3, but he knows his family, and they lived in the same road when he resided in Uitsig. Accused 4 is his cousin, his mother and accused 4’s father are siblings. Accused 4 also resided in Gugulethu before he was arrested. The shooting at their place in Uitsig happened when the “Terribles” gang came to look for his uncle Silas, who hadn’t lived there. He denies having been at the first deceased’s house on the night before the shooting incident. He admits that his nickname is Choccie. Accused 2’s nickname is Sloebie, accused 3’s nickname is Gammat and accused 4’s nickname is Skelato.

[63] Accused 2 testified that he is 25 years old, and during January 2019 he moved to Gugulethu, where he lived with his aunt, Doris Matseko, her husband and their children. He lived there until he was arrested. Prior to that he lived at 51 Disa Avenue, Uitsig. He knows this area very well and his family also lives in Uitsig. He is accused 1’s uncle, and accused 4 is his

father's cousin. They all grew up together, though not in the same house. He is aware of the "Terribles" and "G unit" gangs that operate in the Uitsig area. He is also aware of the fact of the "G unit" gang broke up, and his cousin Silas had been involved in the "G unit" gang. These two gangs were regularly shooting at each other.

- [64] He testified that because he did not want to be involved in gangs, the "Terribles" shot at him, after which he moved out of the Uitsig area. As a result of the shooting, he sustained an injury to his right arm. This incident happened on 14 January 2019. It was for that reason that his grandfather sent him away. He moved to Gugulethu five days after he was discharged from Tygerberg hospital, and subsequently never went back to Uitsig. The people that shot at him are unknown to him. He knows where the gangs operate in the area and he himself is a member of the "28" prison gang. He became a member in 2018, while he was incarcerated at Goodwood Prison. Outside prison, however, he does not belong to any of the gangs. He also has tattoos on his arms and shoulders, which he acquired in prison. His nickname is Sloebie. He knows accused 3 from seeing him around in the area.
- [65] He also knew the first deceased, Christopher Cornelius, from seeing him. He never talked to him, but he knows that he lived in Geranium Street, which is situated a few streets away from where he used to live in Uitsig. He also knows Christo, the first deceased's son, from seeing him, but he never spoke to him. He saw L[...]2 for the first time when he testified in court. He saw Norman in the area when he used to live there. Donovan is not known to him and he cannot recall if he had seen him. He does not know Rochelle.
- [66] On 26 March 2019, the day of the first shooting incident, he was in Gugulethu with his cousin and her then husband. He cannot remember what he did on that specific day. His cousin and her husband have since divorced, but her now former husband still lives there. He denied ever having been at the first deceased's house on 25 March 2019. After accused 1 moved out of the area, he did not have any contact with him. Accused 4 lived with him in Gugulethu, in a shack at the back of his aunt's yard.
- [67] He further testified that he did not have any problems with the witnesses who testified about the first incident. Regarding the second incident, he testified that he knew the third deceased, Glenda Ruiters. He knew her from seeing her where she lived in Uitsig, but he never spoke to her. He also knows Nikita from seeing her, but he never spoke to her either. The third deceased lived a few streets away from him. He has no knowledge about the shooting incident involving her. He was only made aware of this by his uncle, who told him that the police came to look for him in connection with this incident.
- [68] Accused 3 is 23 years old. He testified that at the time of his arrest, he had been living at his aunt's house at 2 A[...] Avenue in Uitsig. He confirms that his nickname is Gammat. He further testified that he had not been a member of any street or prison gang during the period March to April 2019. He was also not a member of the "Ama Don't Care" gang. He heard there was such a gang operating in the area where he lived.

- [69] Accused 1 is known to him because he lives in the same street. Accused 2 he knows from seeing him in the area. He has never spoken to him and just saw him in passing. He also knows accused 4 from seeing him in passing. He does not know where accused 2 and 4 live. It is not true that he was in the company of the “Ama Don’t Care” gang members at [...] A[...] Avenue. Whilst he was aware of the existence of such a gang, he does not know who the members are.
- [70] He further denies having been at Nikita’s house on 7 April
2019. Furthermore, he denies having been with accused 4 when accused 4 shot Nikita’s mother. He also denies having tried to shoot Nikita. He was never there and he was not involved. He remembers the incident where Nikita had been on the roof at her house, which happened in February
2019. This incident occurred when he was with his girlfriend on his way to the Bellville court, and the third deceased requested him to assist her in taking Nikita from the roof.
- [71] He got on to the roof and kicked her off the roof. It is not correct, as Nikita testified, that she kicked him off the roof. She was also not on top of a pole as she testified. After this happened she told him that ‘you will see’ and she was very angry at the time. He did see Nikita again before the shooting when he was at Whitey’s yard. He was arrested two weeks after the shooting incident. He made a warning statement to the police, where he said that on the corner of A[...] Avenue he saw three persons running past him, who he recognised as Sloebie, Boza and Skelato. He also said that they were running in the direction of Malawi camp, when he saw that Boza had a firearm in his hand. He testified that the statement he made was not true, and that he had been told what to say by some policeman, who was unknown to him. It happened when he was on
- his way to the cells at the time when they came to take photographs of him. The policeman told him to tell them that, and that they would then leave him alone. He further testified that he does have any knowledge of the charges against him.
- [72] Accused 4 is 31 years old. He testified that prior to his arrest he lived in Barcelona Road, Nyanga, at his aunt Doris’s place, who lived there with her husband Elvis and two children. His girlfriend and her daughter also lived there, as well as accused 2. He went to live there in January 2019, but before that he lived in his father’s house at [...] A[...] Avenue, Uitsig, where he had lived since his childhood, having grown up in the area . He lived at that address in Uitsig, with his father, Lawrence Davids, his mother Charmaine Davids, accused 1, Dawnay Davids, Lorenzo Davis, Cynthia Davids, as well as Abongile Davids. He lived in a shack at the back of the house.
- [73] He knows about the gang activity in the area. The gangs that operate in the area are the “Terribles”, “G units”, “Bad Boys” and “Ama Don’t Care”. He became a member of the “28” prison gang whilst incarcerated, but outside prison he is not a gang member. He has tattoos on his body, of his daughter’s and mother’s names, but nothing else. He knows that his late

uncle Silas was a gang member. He does not know whether Silas had been a leader because he never talked to him about it, but other people told him that he had been. Silas' gang membership had an influence on his family, because gangsters would come to the house to look for him, and if they could not find him they would shoot at the house. The gangsters would come and chase people in the house. Silas passed away in 2018, but the situation with the gangs did not change. This was the reason why he had to move away from that house.

- [74] He denies having been involved in the shooting of the third deceased, Glenda Ruiters, on 7 April 2019, and he does not have any knowledge of it. He also cannot remember what he did on 7 April 2019; however, he knows that he and Elvis had been busy with his car, because his car had broken down the previous day. There was a problem with the car's brakes, and he remembers being involved in an accident because the brakes failed. They could not finish the repairs to his car on that specific day, but he remembers he was at home the whole day because he and his uncle worked on the car. Accused 2 assisted

them.

- [75] He knew the third deceased, Glenda Ruiters, and her daughter from seeing them. It was not true that he and the other accused walked together, or that they would be in each other's company. He only heard about the shooting of the third deceased, when his father called them and told him about it. His father also told him that the police were looking for him, and he came to fetch him and took him to the police station. He heard people saying that he is the leader of the "Ama Don't Care" gang, but it is not true, because he does not belong to a street gang, he is a member of the "28" prison gang. He furthermore cannot say and understand why people would be saying that he is a gang member. He also does not know why Nikita said that she saw him running in Uitsig on the day of the shooting.
- [76] Accused 4 called his uncle, Elvis Mnothobani, as a witness. This witness testified that in 2019 he resided at Barcelona Road Gugulethu. Accused 4's father is his wife's cousin. In January 2019 they came to him because they needed their car repaired. The witness testified that he is a mechanic and he had to repair the car's brakes. The reason for the two of them coming to his house, was to assist him with his work, and he only started to work on accused 4's car in March 2019, because he had so much work to do.
- [77] The witness testified that he does not know why accused 4's father sent them to his place, but when they came there, they assisted him with his mechanic work. They did not leave his house at any point. He only saw accused 4's father again when he came to fetch him and accused 2. That was during April or May 2019, he cannot recall the exact date. When accused 4's father brought them, they initially said they have a problem with their vehicle.
- [78] The two accused then told him that they were looking for a place to stay while they were waiting for the vehicle to be repaired. He did not immediately repair the vehicle when they came to him and they asked him for a place to stay. He then told them that there was a shack in the yard that they could clean and where they could stay. After they cleaned the shack, they lived in it; he is not sure whether they lived there for four or five months. He was

impressed with their work and that was why he asked them to stay longer. They only left the premises when they had to go to the shop. Accused 4's father came to fetch them and he said that the police were looking for them. He took both of them away and the next time he saw them was

when they appeared in the Goodwood court.

[79] The other accused closed their cases and did not call any further witnesses. That concluded the case for the defence. I shall deal with the rest of the evidence given by the individual accused during cross-examination, when I evaluate the evidence, with which I shall proceed with now.

Evaluation:

[80] I shall firstly deal with the evaluation of the evidence in respect of the first incident; thereafter shall deal with the evidence in respect of the second incident, and lastly deal with the evidence, as well as the legal aspects, of the POCA charges. L[...]2 was the only witness that gave direct evidence about the murder of the two deceased in respect of the first incident. When he observed the incident, he was a young child of 11 years, and when he came to testify in court, he was 13. Although he could understand and was admonished to tell the truth, he did not understand the importance of his role as a witness. He was restless in the witness box and had a short attention span.

[81] The court, as well as the intermediary, had great difficulty in trying to get him to concentrate and pay attention to the court proceedings. There was a combination of reasons for why he acted like this. Clearly, he was still scared and traumatised by the events that led to him becoming a witness in these proceedings. His grandfather and niece were brutally killed right in front of him. He was also very scared to testify in an open court and to be in the presence of the accused.

[82] Notwithstanding these difficulties, he, as a young child, managed to give a clear and detailed version of the events that happened on 26 March 2019. His evidence was detailed, in the sense that he could tell the court exactly who the accused were; how he observed accused 1 and 2 approaching his grandfather; where his grandfather and the second deceased, L[...], were at that time; how accused 2 asked his grandfather for R20; where he was when the first shot went off; and how he turned around to observe accused 2 standing in the middle of the road, firing in the direction of the bakkie where his grandfather

was.

[83] He also explained to the court exactly where he was in relation to accused 2 at the time when he fired at his grandfather, and how he observed accused 1 standing a distance away, keeping a lookout. On these aspects he was clear and concise, and the court had no difficulty in understanding him and getting a picture of what exactly he had observed as a witness. Although he was not a model witness, his evidence was not vague or lacking in clarity and detail. He was also not unsure of himself, and he was able to answer the questions and tell

the court exactly what he knew.

- [84] There were no direct contradictions and differences in his evidence, and what he said in evidence in chief and during cross-examination. When differences were pointed out between what he said in a statement to the police and what he said in court, he could give a clear explanation and the reasons therefore. One of the biggest criticisms against his evidence was that he did not mention in his statement that accused 2 had been accompanied by accused 1, who he referred to as Choccie. He referred to accused 2 as an unknown man. He was asked in court why he failed to mention accused 2's name, and his answer was that he was scared that accused 2 would also shoot him.
- [85] In my view, given the nature of the crime committed and the cold-blooded manner in which his grandfather was killed, this is a reasonable explanation for why he omitted to mention accused 2 in his statement. His evidence with regard to the presence of accused 2 in and around the crime scene is corroborated by the evidence of Rochelle, who, moments before the shooting, had observed accused 1 and 2 further down the road in the vicinity where the shooting had taken place.
- [86] Christo's evidence supports his version that accused 1 and another person, whose face he did not see, had been on the scene immediately before the shooting took place. Donovan, although he did not see who the persons were that were responsible for the shooting of the first and second deceased, confirms that he saw two persons running away from the scene, down E[...] Street, immediately after the shooting.
- [87] The evidence of these witnesses, and also of the witnesses who had observed accused 1 and 2 at the first deceased's property on the evening of 25 March 2019, though not directly strengthening L[...]2's version regarding who the perpetrators were who committed the two murders, disproves the version of accused 1 and 2 that they were not in the Uitsig area at the time of the shooting, and strengthens L[...]2's version on this aspect. This witness was painstakingly taken through his evidence during cross-examination by Mr Pienaar, and he could answer clearly and precisely. He did not materially deviate from his version, despite exhausting and longwinded cross-examination.
- [88] It is a fact that this witness, besides being a single witness with regard to the first incident, is also a child witness. The court is well aware of the dangers inherent in accepting the evidence of such a young child, and has to apply the necessary caution when dealing with such a witness. Firstly, due to the absence of any further witnesses that directly corroborate his evidence about the shooting, and, secondly, because of the fact that he is a young child, and might be susceptible to influence, especially by adults, or even by the police. I have already pointed out evidence of corroboration with regard to the identity of accused 1 and 2, apart from that of the child witness, that disproves the version of accused 1 and 2 that they were not on the scene.

[89] I am also convinced that this child's evidence is based solely on what he had observed as a witness, which I find acceptable. This is, firstly, due to the manner in which he testified. He gave a detailed, clear and concise version of the events, some of which he would not have been aware of had he not personally observed the events of that specific day. For example, the insignificant detail about him having gone inside the house to fetch some cups, which he had taken back afterwards, which he and the other children had used earlier on to drink cool drink out of, which places him directly on the scene to have observed the shooting. Further, that he had observed the scene whilst he was in the yard of his grandfather's

house by peeping through a hole in the mesh which covered the outside gate.

[90] Secondly, that he was the only eyewitness; no one else, either part of his family or acquainted to it, like Christo and Donovan, had observed what had happened. Therefore, it is highly unlikely that he could have been influenced by any of them, because they were not privy to what actually happened during the shooting, even though Christo and Donovan were also around that morning, immediately before and after the shooting had taken place. It is also clear that it would not have been wise for the police to have influenced this child, who displayed a lack of understanding of the importance of being a witness, who had to be prepared by a child psychologist to come to court, and who was so severely traumatised by the horrific incident that he was scared to testify in an open court. Lastly, it was clear that he was scared of the accused who, on his understanding, were known gangsters, and dangerous criminals.

[91] Given these facts, it is difficult to understand why someone would influence him by putting his life in danger, or why he himself would make up a story to falsely implicate these dangerous gangsters. I also found him to be an honest witness, who could have told the court that accused 1 also, together with accused 2, fired shots at the two deceased, but did not. I therefore have no hesitation in accepting his evidence, despite L[....]2 not being a model witness, but rather an extremely difficult witness who failed to understand what his role as a witness was.

[92] Similarly, Rochelle was also a good witness, who initially, because she was fearful for her life, was reluctant to testify. She made a good impression on the court. She does not directly implicate any of the accused with regard to the first incident. She could very easily have embellished her evidence against the two accused, by saying that she saw them shooting at the deceased. She did not know the first or second deceased and there is also no reason for her to falsely implicate accused 1 and 2. The evidence of this witness, just as in the case of Christo and Donovan, refutes the versions of all the accused that they were not in and around the Uitsig area during March and April 2019, when the two incidents took place, and it supports

the identification evidence of the eye witnesses to the two incidents.

- [93] Norman also does not implicate accused 1 and 2. While he states in his evidence that all the accused are part of the “Ama Don’t Care” gang, his evidence comes across as honest and is mostly uncontroversial. He says though that the accused were part of a group of people who came to the first deceased’s house on 25 March 2019.
- [94] Donovan also does not directly implicate any of the accused. He could easily have done so, because he was in the area where the first and second deceased were killed, and could have said that the two persons who ran away, were accused 1 and 2.
- [95] Regarding the second incident, Nikita was the only witness that testified about the incident, even though it seems, her son was also a witness, but it seems that due to the trauma that the child was still experiencing, the prosecutor chose not to call him, which is understandable.
- [96] I was reminded in argument by Mr. Pothier, of an observation I made during the course of the trial, as to whether L[...]² or Nikita had been the most problematic witness. I made this in the context of her also being a difficult and unpredictable witness. She too was not a model witness who in a calm and dispassionate manner relayed her evidence to court. She was at all times erratic, highly emotional, and gave evidence that was at times incomprehensible and unintelligible. These negative qualities should, however, be viewed in the context of this case and what she had experienced, which was that she observed a horrific and most violent murder, perpetrated on her mother, committed in her presence, and wherein she was almost killed. It is an experience that will be etched in her mind for the rest of her life, and which has left her emotionally in tatters. It is highly unlikely she will ever recover from the incident.
- [97] Apart from being scared, feeling threatened, and fearing for her life, she also suffered the horror of reliving in the minutest detail the horrific murder of her mother, while giving evidence. This experience broke her down emotionally, to the extent that she had terrible outbursts in the witness box, and at times refused to answer the repeated questions posed to her in the most exhaustive duel of cross-examination, which spanned a period of four days. During this tormenting experience, she became to a certain extent uncooperative, and wanted to leave the witness box because she wanted the ordeal to come to an end.
- [98] At some point she became rude, abrasive and dismissive when she testified. It is the first time in my experience as a judicial officer, that I came across such a volatile witness. However, this did not impact on the sincerity, honesty and accuracy of what she had observed. Despite the difficult and almost inhumane experience she encountered in the witness box, she remained steadfast and persisted with her version as to what she had observed regarding the involvement of the accused 2, 3 and 4. Her evidence remained unassailable. The record, on the face of it, would paint a picture of a deranged person whose evidence has to be viewed with the utmost caution and care before it could be taken into consideration by a court to make any factual findings in this particular case. Her observations of the incident were very good. She could give a detailed version of what she

had been doing, and also what her mother had been doing; where she had been and where her mother had been, when the incident happened. Also of the position of accused 4 and his actions before he fired the shots. On more than one occasion, she graphically illustrated the movements accused 4 made and the manner in which he operated before he shot her mother, so much so that that picture had been reinforced in the mind of the court, which illustrates how she came across as a convincing witness.

- [99] Her evidence about the identity of the accused, coupled with the fact that they are known to her, and the role each of them played, is overwhelmingly convincing. She also gave a detailed description of the clothing accused 4 had been wearing during the incident. She came across as an honest person who did not seek to unnecessary or falsely implicate the accused, especially with regards to the role that each of the accused had played in the attack. She clearly tried to exonerate accused 2, when she stated that he actually saved her life by pushing accused 3 away after he tried to fire another shot at her.

In this regard, her evidence is once again clear.

- [100] Although some differences were pointed out between her evidence and the statements she made to the police, the overall picture she portrayed remains consistent and intact. I also have no hesitation in accepting her evidence as truthful. As I said earlier, all the accused are known to her, especially accused 2, who knew her sister very well, and who had saved her life, when he pushed accused 3 away from her, as he tried to fire a second shot at her. She also told a most extraordinary story as to why she knows accused 3, which he confirmed to a certain extent. Furthermore, it is also seems that she knows accused 4 very well. It was, according to her, easy to recognise him because of him unfortunately being cross-eyed.

- [101] In the face of the overwhelming evidence by most of the state witnesses, even those that do not directly implicate any of the accused in the commission of any crime, it is clear that they were in the Uitsig area at the time of the commission of the offences on 26 March 2019 and 7 April 2019, despite their claim to the contrary. All the witnesses without fail saw them roaming the streets on several occasions and, in the case of accused 1 and 2, being in the area when the shooting took place on 26 of March 2019. And equally that accused 2 and 4 were in the area prior to and during the incident on 7 April 2019.

I will now look at the versions of the accused, which amount to bare denials and an alibi. There is no onus on the accused to prove an alibi; the converse is true, which is that the State has to disprove the existence of an alibi.

- [102] In considering the evidence of accused 1, I am not convinced that he was not in the Uitsig area during the period March to April 2019, if one should have regard to the reasons he gave as to why he moved out of the area. He says that the address at which he resided, [...] A[...] Avenue, Uitsig, was known to be a gangster house, because his uncle Silas lived at that address. He says this house was regularly attacked by other gangs prior to him moving out in January 2019.
- [103] It is also common cause that Silas passed away during January 2018, which is more than a year before he moved out of the house. It is, therefore, incomprehensible why other gangs would still launch attacks on the house to get back at Silas, more than a year after he had passed on. Accused 1 had difficulty explaining this to the court. What I also do not understand is why only he and the accused 4 moved out of the house because they were afraid of the attacks, but all the other occupants remained behind. His version as to where he lived during March 2019 is also inconsistent with what he told the magistrate during his bail application, when he stated that he lived at [...] A[...] Avenue, Uitsig.
- [104] The further difficulty I have is that if he had not been in the area, and the witnesses hadn't identified him on the day of the shooting, why had the police gone to his house in A[...] Avenue immediately after the incident. His evidence that he does not have any knowledge about the gangs that operate in the area is also unconvincing. It is difficult to understand how he could not know that the "Ama Don't Care" gang came into existence after the "G unit" gang, of which his uncle Silas had been a leader, had disbanded, if he lived at the same address as Silas. Accused 1 was not a good witness, and his version, which amounts to a bald denial in the face of the strong evidence against him, is not reasonably possible true and falls to be rejected.
- [105] Regarding accused 2, his evidence is equally unconvincing. One aspect that I find strange in his version, and that of especially accused 1 and 4, is that all the state witnesses seems to know them from the area, but none of them, who have lived in the area for most of the lives, know any of the witnesses, especially accused 2. In respect of his alibi, it is strange that if he had not been living in Uitsig at the time of his arrest, he nonetheless gave the police an address of 51 Disa Street, Uitsig. His given reasons for moving out of the Uitsig area, due to his cousin Silas being involved in gangs, is just as unconvincing as that of accused 1 and 4.
- [106] According to him, he was attacked by other gangs for two reasons: firstly, because of him being a family member of Silas, who passed away a year before he moved out of the Uitsig area; and secondly, because of him refusing to become a gang member. The same questions that arose with regards to the improbability of the version of accused 1, also arise with regard to the version of accused 2, and also, as will become apparent, in respect of accused 4. I also find it highly improbable that he would be regularly attacked by other gang members without good reason, or without he himself being a gang member.

- [107] It is furthermore clear that his, and accused 4's, version as to why they moved to their uncle Elvis in Gugulethu, is contradicted by Elvis in his evidence. According to Elvis they came to his house and stayed there because they wanted him to fix accused 4's car. According to Elvis's evidence, they did not come to live with him because they were fearing for their lives. Their evidence as to why they were not in the area, and could not have been involved in the commission of any of the crimes with which they were charged, is a fabrication and falls to be rejected.
- [108] It is also highly unlikely that he, accused 1 and 4, who are family members, would not walk together or be in each other's company in the Uitsig area. I find it highly unlikely that all the witnesses, and even members of the police, know that they belong to the "Ama Don't Care" gang, based on what the witnesses observed, but none of them know anything about it. The version of accused 2, and his bald denial of the charges against him, is not reasonably possibly true and also falls to be rejected.
- [109] I now come to the evidence of accused 3, which I also do not find convincing. The reason he gives to the court as to why Nikita would falsely implicate him, is because she was cross with him for helping her mother by kicking her off the roof. This Nikita admits; however, he says at the time he did not think anything of it, and he did not thereby consider it to be serious. What I find rather astonishing of accused 3's version, is why he now thinks of it as a reason why she would falsely implicate him. This incident seems to be a very strange and childish incident, in which Nikita's mother played an important role, because she requested the assistance of accused 3. And I think it is an incident which Nikita would not have been proud of, especially since it places her and her mother in a bad light.
- [110] I therefore find it highly unlikely that she would use this incident as a reason to implicate accused 3, if she knew it was not him, but someone else, especially in light of the fact that it was not disputed that Nikita was the only one who saw the perpetrators. Why would she then lie about who the real perpetrators were, because of this childish incident? For this to have happened she must have had enough time to come up with her version as to what person she would want to falsely implicate, but given her state on the evening after her mother was murdered in her presence, it would have been highly unlikely for her to immediately have come up with this elaborate story, to take revenge against accused 3, in order for her, on the same night, to have been able to tell the police that he was one of the perpetrators.
- [111] His version as to the reason why Nikita would falsely implicate him, is unconvincing and an opportunistic attempt to discredit her evidence. It is also inconsistent with the version that was put to Nikita during cross-examination, when Mr. Pothier stated that accused 3 will say that he had sexual relations with her, and because he refused to give her drugs, she made up the story against him. I also find his evidence unconvincing and not reasonably possibly true.

- [112] I now come to the evidence of accused 4, and as I have already pointed out when I dealt with the evidence of accused 1 and 2, I find the version as to why they moved out of the Uitsig area highly problematic. Especially with regards to their version, which is that their house was attacked by other gang members because of Silas' gang affiliation, when the evidence clearly points out that Silas had passed on a year before they supposedly moved out of the Uitsig area. I also find it highly improbable, as I said earlier on, that members of rival gangs would attack their house on numerous occasions for no reason other than that house being associated with Silas. This would rather be consistent with the fact that accused 1, 2 and 4 are indeed gang members, who are being attacked by rival gangs. It fortifies and supports the evidence of the state witnesses, that they were all members of the "Ama Don't Care" gang.
- [113] His evidence about him moving to Gugulethu, as I said earlier, is also problematic. It is clearly contradicted by the evidence of Elvis, who testified that the reason for them moving to Gugulethu was not because of them being attacked by gang members, but for the purposes of having the brakes of his car repaired. Accused 4 boldly stated in his evidence in chief that on the day before he was arrested, he was working at his uncle's place, because his car had been involved in an accident due to the fact that his brakes had failed. This was on a Saturday, and the next day, the Sunday, he was working on his car at his uncle's place for the whole day. He therefore could not have been in Uitsig when the crime was committed.
- [114] It seems, however, on closer questioning, that accused 4 has clearly miscalculated the time and dates when the offences were committed, when he fabricated his alibi. He was arrested on 7 May 2019 and, on his own version, if his date of arrest was 7 May 2019, the accident must have happened on 6 May 2019. On closer questioning, he could not say when the accident happened and he was very vague as to the month in which it happened. Thus, his evidence as to where he was on the day when Nikita said he killed her mother, which was on 7 April 2019, is unconvincing and a clear fabrication, based on his own version and also that of his uncle Elvis.
- [115] With regards to his gang affiliation, it is strange that he would not have known that Silas had been a leader of the "G unit" gang, when he and Silas lived at the same address before Silas passed away, and also given the fact that Silas was the purported reason why he had to move out of his house in January 2019. I find it highly unlikely that he only heard from other people that Silas had been the leader of the gang. It is also unlikely that people would be referring to him as the leader of the "Ama Don't Care" gang and he is unable to give a reason why people would say that about him. It is clear that more than one witness, and even the police, based on the evidence of Mkizhe and Curwen Engelbrecht, regarded him as the leader of the "Ama Don't Care" gang. As said earlier, it is highly unlikely that he would be attacked by other gang members if he himself was not a member of a gang.

[116] I also find the version of accused 4, which is a bare denial of his involvement in the second incident, to be not reasonably possibly true. And I also find it highly unlikely that he, accused 1 and accused 2 are not members of the “Ama Don’t Care” gang, when the evidence is overwhelmingly to the contrary. The evidence against accused 3, however, points to the opposite conclusion in respect of his gang membership, based on the evidence of Mkizhe and Engelbrecht, and there is no conclusive evidence that he is a member of the “Ama Don’t Care” gang.

Findings and conclusions:

[117] I am therefore, in respect of the first incident, on 26 March 2019, satisfied beyond reasonable doubt that accused 1 and 2 were responsible for the killing of the two deceased, namely, Christopher Cornelius and the young child, L[....] J[....], based on the evidence of L[....]2 as supported by Rochelle. Now, on the evidence of Rochelle, it seems that accused 1 was the person that walked towards the vehicle where the deceased had been, whereas L[....]2 testified that he saw accused 2 as the person who walked towards the vehicle and fired in the direction of the deceased. It must, however, be remembered that both these witnesses observed the incident from different vantage points. Rochelle was not even an eyewitness to the incident. At the time when the shots were fired, Rochelle was already around the corner, out of sight in the next road. L[....]2 was in a static position, behind a gate, where he had a good opportunity over a short distance to observe where the two accused were, and I found his evidence to be acceptable and to be reliable beyond reasonable doubt.

[118] There is therefore no doubt in my mind, based on the evidence of L[....]2, that accused 2 was the person that fired the shots at the deceased, which in the process killed Christopher Cornelius, the first deceased, and L[....] J[....], the second deceased. At that time, accused 1 had been standing at the top end of the road keeping a lookout.

[119] In my view, the evidence clearly suggests that there was a common purpose on the part of both the accused to murder the deceased. In respect of the first deceased, the evidence points to a direct intention to commit the murder. In this regard, the evidence of Rochelle points to the fact that when she saw the two accused together with an unknown man, they were busy putting their plans in place to launch an attack on Christopher Cornelius. There was an exchange of firearms. This also seems to indicate that there was an agreement between the two accused that the firearm and ammunition used to kill the two, would be held by accused 2 on behalf of both of them. This is what the court held in *S v Nkosi* 1998 (1) SACR 284 (W), which the Supreme Court of Appeal has held, in a number of judgments, to be the correct position. See *S v Mbuli* 2003 (1) SACR 97 (SCA). They did this in a clandestine manner, behind a wall, out of sight. One person walked towards the first deceased. One person remained behind. After the shooting, they ran away and, while doing so, were busy exchanging clothes.

- [120] This evidence points not only to a common purpose, but a prior conspiracy to murder, and it seems clear that there was a measure of planning and premeditation involved. In respect of the second deceased, it was clear from the evidence that she and the other children had been playing on the loading area at the back of this bakkie, and accused 2, knowing this full well, fired in her direction. It is clear that he also formed the necessary intention, to kill the deceased. The evidence clearly shows that there was a direct intention to kill the deceased or at the very least, an intention in the form of *dolus eventualis*. It must further have been clear to accused 1, who kept a look out further down the road, that it was not only Christopher Cornelius in or around the bakkie, but also other people, including the second deceased. There is no doubt in my mind that he had foreseen that accused 2, by shooting into the group of people, would not only kill Christopher, but also some of the other people, which included L[...] J[...].
- [121] In respect of the second incident, it is clear with regard to the murder of the third deceased, Glenda Ruiters, that accused 4 acted in a cold-blooded manner when he, at a short distance, shot the deceased directly in the forehead. It is clear that the murder perpetrated on the third deceased, Glenda Ruiters, was a planned and premeditated assassination. There must have been a reason why she was targeted by the accused. She was not a gang member, and there is no evidence that she posed any threat to any of the accused.
- [122] According to the evidence of Donovan, she had been standing in the yard before the shooting of the first and second deceased had taken place on 26 March 2019. According to her daughter, Caryn, shortly after the first and second deceased were shot, she received a phone call from the third deceased, who was very upset about the incident. Caryn further testified that when she arrived at home, her mother was not at home but on the scene of the first incident, which was visible from her mother's house. It seems that she may have seen the persons that had been involved in the shooting of the first and second deceased.
- [123] Both Caryn and Nikita testified that their mother acted strangely; she did not want to leave the house and did not even attend the funeral of the first and second deceased. Their evidence was supported by Siyaya, who said that when he talked to her, she was extremely scared. The following happened: on the Sunday, after the funeral, accused 2, 3 and 4 entered her property and killed her in a cold-blooded manner. Accused 2 was also involved in the murder of the first and second deceased on 26 March
2019. According to Norman, accused 4 was also in the area on the morning before the first and second deceased were killed by accused
2. This killing happened in the road opposite the house where Donovan said the third deceased had been standing in the yard before the shooting of the first and second deceased. According to the evidence, one could see from the third deceased's yard into Geranium Road, where the first incident happened. This, in my view, establishes a link between the killing of the first and second deceased, and the subsequent killing of the third deceased, and can be the only logical reason why accused 2, 3 and 4 went to kill the third deceased.

- [124] I am in agreement with the prosecutor that, although there is no direct evidence that the third deceased was a witness to the killing of the first and second deceased during the first incident, one can clearly infer from all the surrounding facts that she must have known, and the three accused must have known, that she was a witness to those murders. As I said, this was the only logical reason why accused 2, 3 and 4 went to all the trouble, in a planned and premeditated manner, to enter the property of the third deceased, to go and kill her, which, in my view, was part of a criminal gang activity, to which I will refer to later in this judgment.
- [125] There was also clearly a direct intention to murder this deceased. Accused 4 was accompanied by accused 3 and accused 2. Accused 4 and 3 were armed when they entered the premises from the road, which was situated at the back of the main house. Accused 2 and 3 must have known, and did in fact know this, when accused 4 entered into that premises. It was clearly for the purposes of killing someone, given the fact that they directly targeted Glenda Ruiters. They entered onto the property to perform a clear and specific act. It was not a random shooting, but a clear and planned assassination. This they had known, because all three of them were at the door of the house when accused 4, in a cold-blooded manner, murdered the third deceased. In the process, accused 3 attempted to kill Nikita, by firing more than one shot at her.
- [126] I am satisfied, based on the circumstantial evidence[1] and based on these proven facts, that the only reasonable inference one can draw is that accused 2 and 3 formed a common purpose with accused 4 to murder Glenda Ruiters. There can be no other explanation for their presence on the premises with accused 4, who was armed. The fact that accused 2 prevented accused 3 from firing a further shot at Nikita, cannot, in my view, disturb this court's inference that he formed the common purpose with accused 3 and 4 to murder Glenda Ruiters. I cannot, however, given the facts, conclude as the only reasonable inference that accused 2 and 4 made common purpose with accused 3 to murder Nikita. I am therefore satisfied that all three accused formed the requisite intention to murder the third deceased, while only accused 3 attempted to murder Nikita.
- [127] Inherent in this common purpose to murder the deceased, it seems that they entered the premises where the deceased lived with firearms to execute the murder. This also shows that the three of them intended that the firearms and ammunition be held be each on behalf of the other, as pointed out earlier in paragraph 120 of this judgment. All three of them are therefore guilty of the unlawful possession of both firearms, and the ammunition discharged therefrom, that had been in the possession of accused 3 and 4 during the incident.
- [128] Regarding the POCA charges, it seems that to be held liable under Chapter 4 the accused person must either be an active participant, or a member of a criminal gang, and will only be held liable if he or she willfully aided and abetted any criminal gang activity. Gang membership or active participation are therefore essential elements in proving a contravention in terms of chapter 4 of the act. Prosecutors usually face a daunting task in

proving such gang membership. It is always denied by an accused and courts are reluctant to admit such evidence, because it will of necessity be evidence of bad character which would ordinarily be inadmissible. It seems, however, that this type of evidence would be admissible given the nature of the charge, and given the fact that proof of gang membership is an essential element of the charge. In this regard Schmidt[2] states:

‘The prohibition does not apply when the evidence, irrespective of what it reveals of the character of the accused, contributes to the proof of the offence in question. Evidence showing directly that the accused performed the actions mentioned in the charge sheet, will always ipso facto also show that he is a criminal (the person who committed the offence concerned), which is naturally admissible. Occasionally it is an essential part of the state’s case that the accused committed another crime. For example, when he is charged with escape from custody then evidence that he is an offender is indispensable and thus also admissible. In addition, it is possible that evidence of other offences or misdeeds or even of criminal propensity, is admissible on the ground of the law relating to similar facts.’

[129] Prosecutors can also call in aid the provisions of section 11 (1) of POCA, to assist them to place before court the factors mentioned in that subsection, which might be able to assist a court to conclude that a person is a gang member. Section 11 (1) states the following:

‘In considering whether a person is a member of a criminal gang for purposes of this Chapter the court may, have regard to the following

factors, namely that such person-

- (a) admits to criminal gang membership;
- (b) is identified as a member of a criminal gang by a parent or guardian;
- (c) resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of a criminal gang;
- (d) has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activities;
- (e) is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.’

This section, however, does not absolve the prosecution from proving any of these factors by means of the rules applicable to the

admissibility of evidence in a criminal trial[3]. Furthermore, proof of the existence of any one or more of these factors does not per se prove membership of a criminal gang. For example, in respect of (a) above, any admission made by an accused would be governed by the requirements to prove that the accused made an admission, either in terms of the common law or in terms of section 219A or section 220 of the CPA. As to factors (b) and (c), the rules relating to the

admissibility of evidence of character or bad character, similar fact evidence, opinion and hearsay might be applicable, as discussed above.

The provisions of section 2(2) of POCA under Chapter 2 dealing with racketeering and the admissibility of evidence to prove the offence of racketeering is not applicable in gang related cases under Chapter 4 of POCA.

Section 2(2) states that:

“The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.”

It is not clear why the legislature confined the application of that section only to prosecutions for racketeering under POCA and not also under gang related matters in terms of Chapter 4 of POCA. In this regard, Van Der Linde remarks:

“It is important to note that chapter 4 of POCA does not contain a similar provision to s 2(2) for allowing previous convictions. It may merely be ‘careless drafting’ that an equivalent provision was not included in chap 4. There are however certain

important consequences due to this lacuna: most importantly, that there is no statutory provision in POCA allowing for hearsay,

similar-fact evidence and evidence of previous convictions. Is chap 4 hence left impotent?”

[130] In this particular case, the evidence overwhelmingly points to the fact that accused 1, 2 and 4 belonged to the “Ama Don’t Care” gang, the gang that frequents the Uitsig area, and the nearby Malawi camp. This was shown by means of utterances or loudly boasted on several occasions in the presence of most of the witnesses, which in my view would amount to an admission. Accused 4 also made such an admission to Mkizhe. These admissions, given the circumstances under which they were made, were spontaneous and undoubtedly intended to show to those people in whose presence they had been made, that they are members of that gang. It was further made as a show of force about their presence in the area, to intimidate and to ignite a reign of terror and fear in the community. There is no doubt in my mind that they were made freely and voluntary.

[131] There was also some strong circumstantial evidence, especially that of Engelbrecht about his knowledge and the circumstances under which the court can safely infer that they are members of the “Ama Don’t Care” gang. I am therefore satisfied that this fact was proven by the State beyond reasonable doubt. The evidence also points to the fact that when they committed these offences, they were part of that criminal gang.

[132] The question now to consider is whether their conduct, either collectively or individually, constitutes the offences as set out in section 9 (1) (a) and 9 (2) (a) of POCA. Section 9 (1)

(a) of POCA states:

‘9 Gang related offences

- (1) Any person who actively participates in or is a member of a criminal gang and who-
- (a) wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang; . . .

shall be guilty of an offence.’ (Own emphasis supplied.)

[133] Given the number of cases in this division where accused persons are being charged under this particular section of POCA, notwithstanding the judicial pronouncements on it, in particular *S v Jordaan* 2018 (1) SACR 522 (W), *S v Peters* (ss17/2013) [2013] ZAWCHC 218 (4 November 2013), and *S v Solomon* (CC23/2018) [2020] WCHC 116 (29 September 2020), it is perhaps necessary to restate the law in respect of participation in a crime as an accomplice and as a perpetrator. Especially in the context of prosecution for gang related matters. This section seems to codify the already existing common law forms of participation in a crime as an accomplice, in circumstances where ‘a person . . . actively participates in or is a member of a criminal gang and who wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang’.

I pause here for a moment to say I shall also deal with the question whether a co-accused who has been convicted as a co-perpetrator on the basis of common purpose can be convicted of the crime as contemplated in section 9 (1) (a) of POCA.

[134] An “aider and abettor” usually means an accomplice.[4] In its technical sense, perpetrators, or co-perpetrators, that is, persons who comply in all respects with the definition of the crime, are not included in the definition of the concept of accomplice. To be an accomplice, someone else must have committed the crime. The liability of the accomplice is dependent on someone else’s liability as a perpetrator. This implies that a person cannot be an accomplice of his or her own crime, that is, in respect of a crime committed by him or her as a perpetrator. Apart from an accomplice’s own act and culpability, there must have been an unlawful act by someone else.

[135] In order for the court to determine whether any of the accused have committed the offence as defined in section 9 (1) (a), it must first determine the role each accused played in the commission of the offence. Concerning the first incident, accused 2 was the principal actor, in that he was the one that directly shot and killed the deceased. He can therefore not have aided and abetted, or have been an accomplice as described above, in the crime or criminal activity as stated in the act, as he was a principal perpetrator. In this regard, I am in respectful agreement with the views expressed by Binns-Ward J regarding section 9 (1) (a) of POCA, as he explained in *S v Jordaan*:

[134] Turning, lastly, to consider the charges on count 1 brought under the Prevention of Organised Crime Act. The expression “to aid and abet” means to assist in or facilitate the doing of something or to give counsel or encouragement in respect of its doing; see Claassen Dictionary of Legal Words and Phrases sv “Aid and abet”:

“If a person assists in or facilitates the commission of a crime, if he gives counsel or encouragement, if, in short, there is any

co-operation between him and the criminal, then he aids the latter to commit the crime.”

R v Van Niekerk 1944 EDL 202.

The expression cannot apply to the conduct of the principal actor, only to a person who assists him. Accused 2 therefore cannot be guilty of contravening s 9(1)(a) of the Act in respect of the shooting on 24 December 2015, nor can accused 1 and 4 in respect of that on 27 April 2016. There was nothing in the evidence to support a finding that accused 1 had aided and abetted the commission of the offence of attempted murder by accused 2. He is therefore entitled to be acquitted and discharged on the main charge in terms of count 1. Similarly, there is no evidence to establish that accused 5 aided and abetted accused 1 and 4 in the commission of the murder of Ashley Davids. His mere presence at the scene did not constitute assistance, facilitation or co-operation in the relevant sense. Accused 5 will therefore also be acquitted and discharged on the main charge in terms of count 1.’

In S v Solomon, Rogers J made the following comment in this regard:

[923] The difficulty in convicting No 9 on this count is Binns-Ward J’s finding in Peters and Jordaan that a principal actor cannot be convicted under s 9(1)(a). That view might be thought to give rise to an anomaly, since the secondary actor may receive a POCA conviction while the primary actor will not. Of course, the primary actor would be convicted of the predicate offence (here, attempted murder), but where there is a secondary actor who has “aided and abetted” the predicate crime, the secondary actor would usually also be convicted of such crime on the principles of common purpose. The anomaly can only be avoided if s 9(1)(a) is strictly confined to conduct falling short of that giving rise to culpability for the predicate offence.

[924] I can only depart from Peters and Jordaan if I am satisfied that they are clearly wrong in this respect. Although I have my reservations, there was no argument on this particular aspect of the judgments, and I do not think in the circumstances that I would be justified in departing from Binns-Ward J’s

interpretation.’

Based on this, and the fact that accused 2 was convicted as a co-perpetrator, as will be shown below, accused 1 could also not have

aided and abetted accused 2 in the commission of the crime.

[136] Accused 1 was a co-perpetrator whose degree of participation was not the same as that of accused 2, but given his role before and after the shooting, and based on the overwhelming circumstantial evidence, the only reasonable inference that this court can draw was that there was an agreement before the commission of the crime, with accused 2 to commit the offence, or, in the absence of such an agreement, the evidence also overwhelmingly points to the fact that he actively associated himself with the conduct of accused 2, and, on the facts, formed a common purpose with accused 2 to commit the murder. When the court applies the doctrine of common purpose, the conduct of persons who committed a criminal act in concert, is imputed to another regardless of the actual degree of participation.

In committing the predicate offences, as I have already found, the liability of the accused, in respect of both the first and second

incidents, is based on common purpose. In this regard Gamble J, in *S v Miller*[5], albeit in an obiter remark, said the following:

‘[290] In my view there can be no principial objection to applying the doctrine of common purpose to establish liability under a predicate offence. One need only think of the type of gang-related activities which are routinely prosecuted under POCA, for example, murder, rape and robbery, in which it could hardly be claimed that the doctrine of common purpose could not be used to establish the liability of an individual gang member in relation to crimes committed by the collective. The offences to which I have just referred are, of course, consequence crimes, but as I have already said there can be no objection to apply the doctrine to statutory crimes, committed by such a collective. The court must simply be cautious that it does not circumvent proof of the predicate offences and, if it relies on common purpose to do so, that all the elements of the doctrine are found to exist.’

It is also once again useful to revisit the principles underlying the doctrine of common purpose, especially in the context of POCA. In *S v Thebus*[6] the court defined the doctrine of common purpose as follows:

‘Where two or more people agree to commit a crime or actively associate in the joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within the common design. Liability arises from their “common purpose” to commit the crime.’

[137] The Constitutional Court referred to the learned author Burchell’s[7] definition of common purpose:

‘Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their “common purpose” to commit the crime.’

If the participants are charged with having committed a “consequence crime”, it is not necessary for the prosecution to prove beyond reasonable doubt that each participant committed conduct which contributed causally to the ultimate unlawful consequence. It is sufficient that it is established that they all agreed to commit a particular crime or actively associated themselves with the commission of the crime by one of their number with the requisite fault element (*mens rea*). If this is established, then the conduct of the participant who actually causes the consequence is imputed or attributed to the other participants.

Furthermore, it is not necessary to establish precisely which member of the common purpose caused the consequence, provided that it is established that one of the group brought about this result.’ (Internal footnote omitted.)

[138] The doctrine of common purpose, therefore, presupposes that there are no degrees of participation, but that participation in the common purpose is imputed to the other. It is therefore difficult to conceive a situation where a person could be regarded as having aided and abetted in a criminal activity, where such a person’s conduct and degree of participation is fully imputed to another based on the doctrine of common purpose. This is so, since once a person’s liability for a crime has been proven on the basis of common purpose, there can be no question of such a person having aided and abetted, or that such a person is an accomplice to that crime; he or she is a perpetrator to the crime.

Snyman[8] says the following in general with regard to the doctrine of common purpose:

‘Once that is proved, the act of X, who actually shot and killed Y, is imputed to Z, who was a party to the common purpose and actively

associated himself with its execution, even though a causal relationship between his (Z’s) act and Y’s death cannot

readily be proved. X’s act is then regarded as also that of Z.

It is not unjust to impute X’s act, which caused the death, to Z. By engaging in conduct in which he co-operates with X’s

criminal act, Z forfeits his right to claim that the law should not impute to him another’s unlawful act. He signifies

through his conduct that the other person’s (ie, X’s) act is also his.

It is, however, only X’s act which is imputed to Z, not X’s culpability. Z’s liability is based upon his own culpability (intention). There need not necessarily be a prior conspiracy. The common purpose may also arise spontaneously or on the spur of the moment, and evidence of the behaviour of the different co-accused may lead a court to conclude that this has happened. The operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful result will be brought about.

The basis of the doctrine used to be the idea that each member of the plot or conspiracy gave the other an implied mandate to execute the unlawful criminal act, and accordingly the liability of those participants in the common purpose who did not inflict the fatal blow depended upon the question of whether the unlawful criminal result fell within the mandate.’ (Internal footnotes omitted.)

[139] Therefore, in a case like this where there was a prior agreement between, or where there is an active association, which gives rise to a common purpose between accused 1 and accused 2, that accused 2 would execute the “criminal activity” within the definition of section 1 of POCA, which in this case concerned the killing of the two deceased, and where there are no degrees of participation, their conduct can hardly be regarded as having aided and abetted in any criminal activity for the purposes of section 9

(1) (a) of POCA. The accused can therefore not be convicted of contravening section 9 (1) (a) of POCA.

[140] Similarly, accused 2, 3 and 4, after they agreed to actively associate themselves to murder the third deceased, are each therefore responsible for the criminal conduct committed by the other. Their liability is also based on common purpose; all three of them could therefore also not have aided and abetted any criminal activity, which was the shooting of the third deceased. Accused 2, 3 and 4 can therefore also not be convicted of section 9 (1) (a) of POCA in respect of the second incident.

[141] In respect of count 2, Section 9 (2) (a) of POCA provides that:

‘Any person who-

(a) performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity; . . .

shall be guilty of an offence.’

[142] The term ‘pattern of criminal gang activity’ is defined in section 1 of POCA as follows: it

‘includes the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed-

(a) on separate occasions;

(b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang; . . .’

I am satisfied, if regard is had to this definition, that accused 1, 2 and 4 committed the offences, commonly known as a predicate offenses, which are necessary to constitute a pattern of criminal gang activity[, either individually or collectively, when they committed the offenses on the first and second occasions.

[143] In my view, the State has overwhelmingly showed that, at the very least, accused 1, 2 and 4 are members of a criminal gang, the “Ama Don’t Care” gang, that operated in the Uitsig area at the time when the offences were committed. In *S v Peters* (supra) Binns-Ward J said the following in respect of what is meant by this section, and what conduct can be construed as a “pattern

of criminal gang activity”:

‘[95] . . . It is clear than an offence in terms of s 9(2)(a) of POCA is established only if it is proven that the act performed by the accused is performed by him with the intention of causing, bringing about, promoting or contributing towards a pattern of criminal gang activity. The test is a subjective one, not an objective one. The fact that the conduct might objectively be recognised as conduct that caused, brought about, contributed to or promoted a pattern of criminal gang activity does not mean that it was necessarily undertaken by the accused with the intention that it should have such an effect. While there was evidence suggesting that the Mongrels gang was engaged on an on-going basis in what might in ordinary language be described as a pattern of criminal activity, there was no evidence that the acts performed by either of the accused were performed with the requisite intention. It was not apparent on the evidence that either of the accused did anything with a conscious view towards the effect thereof within the broader picture of gang-related activity in the area. It was also not suggested to either of them in cross-examination that they had done so. In our view a contravention of s 9(2)(a) of POCA has not been established against either accused.’

[144] From my understanding of this judgment, it seems that the act performed within a certain period by an accused, must be with the intention of causing, bringing about, promoting or contributing towards a pattern of criminal gang activity; there must be therefore a clear link between the act performed, whether in the form of committing an offence, defined in section 1 of the act, or other form of conduct must have as its purpose to cause, bring about or contribute towards a pattern of criminal gang activity. It seems that the intention must be clear. If a gang member, for instance, commits a murder or possesses a firearm, that conduct must be aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity, as defined. The facts and circumstances of a specific case will determine whether such a pattern of criminal gang activity has been established when a specific act had been performed.

[145] In coming back to this case, if regard is had, not only to the predicate crimes that the accused committed, but also to the circumstances prior to, during and after the two incidents, a pattern of criminal gang activity was clearly established. Regarding the first incident, where Christopher Cornelius and L[....] J[....] were killed, the evidence clearly

points to the fact that on the previous night, 25 March 2019, accused 1, 2 and 4, as well as other members of the “Ama Don’t Care” gang, descended upon the residence of the first deceased, Christopher Cornelius. This was not just a mere social visit, and it is clear that they had some axe to grind with the first deceased. They were not invited to be there and it seems that they were not friends of Mr. Cornelius. They went as a group, all of which were gang members.

[146] It is clear from the discussion that ensued that the purpose of the visit was to intimidate the first deceased, as a gang. During the incident, accused 2 warned the first deceased to watch out, as his enemies would shoot him so that his head would roll. They also wanted him to give them some money. Accused 2, on 26 March 2019, the day of the shooting, also paid the first deceased a visit. Once again, in the moments before the shooting, he asked the first deceased for some money. On both these occasions, accused 2 together with accused 1 and 4 on the evening of the 25 March 2019, and accused 2 together with accused 1 on 26 March 2019, tried to extort money from the first deceased. I used the word “extort” because on 25 March 2019 when accused 1, 2 and 4, together with other members of the “Ama Don’t Care” gang, came to seek money from the first deceased, the giving of money under such circumstances surely cannot be regarded as a voluntary donation.

[147] The next day, accused 4 was roaming around the area, while accused 1 and 2, in a carefully planned attack, proceeded to assassinate the first deceased. Although I mentioned accused 4, the evidence is not strong enough to link him to the murder that accused 1 and 2 perpetrated on 26 March 2019. This conduct of accused 1 and 2, in my view, falls within the purview of what section 9 (2) (a) seeks to criminalise. It was an act aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity for the benefit of himself, or the “Ama Don’t Care” gang as defined.

[148] With regards to the second incident, on 7 April 2019, I found earlier that there must have been a reason as to why accused 1, 3 and 4 descended upon the property of the third deceased, Glenda Ruiters, armed with firearms. Their aim, as I said earlier, was clearly to assassinate the third deceased. There must have been some reason for this. It seems, based on the evidence, that the only possible reason was that she, living as she had opposite the place where the first incident had taken place, must have been aware of the identity of the persons involved in the murder of the first and second deceased on 26 March 2019; she must have known accused 1 and accused 2 were directly involved. This fact is supported by strong evidence, which is that, prior to the first shooting incident, she had been standing in her yard, from where she would have been able to see what was happening

at the time when Christopher Cornelius and L[....] J[....] were killed.

[149] The other evidence was that after the first incident she was still on the scene, she was severely traumatised by it and told her daughters, Nikita and Caryn, as well as the policeman Siyaya, that she was very scared. This conduct, in my view, also falls within the purview of the act that was performed and aimed at causing, bringing about, promoting or

contributing towards a pattern of criminal gang activity, as defined in the act. A person had observed the brazen commission of two murders, in broad daylight, by two members of a criminal gang, whereafter the members of that criminal gang walked onto the person's premises, stepped right up to the front door of that person's house and, in a cold-blooded and brazen manner, assassinated her.

[150] The killing of Glenda Ruiters was clearly an act performed and aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity. The evidence, however, does not show that accused 3, while he associated himself with the conduct of accused 2 and 4 with regard to the predicate offences, had the subjective intention to commit the offence as set out in section 9 (2) (a) of POCA.

I therefore bring out the following verdict:

Count 1, contravention of section 9(1)(a) of POCA - I find all 4 accused not guilty.

Count 2, contravention of section 9(2)(a) of POCA – I find accused 1, 2 and 4 guilty, and accused 3 not guilty.

Count 3 – The murder of the first deceased, Christopher Cornelius, I find accused 1 and 2 guilty.

Count 4 – The murder of the second deceased, L[...] J[...], I find both accused 1 and 2 guilty.

Count 5 - Unlawful possession of a firearm, I find both accused 1 and 2 guilty.

Count 6 – Unlawful possession of ammunition, I find both accused 1 and 2 guilty.

Count 7 – The murder of the third deceased, Glenda Ruiters, I find accused 2, 3 and 4 guilty.

Count 8 – The attempted murder of Nikita Ruiters, I find accused 3 guilty, and accused 2 and 4 not guilty.

Count 9 - Unlawful possession of a firearm, I find accused 2, 3 and 4 guilty.

Count 10 - Unlawful possession of a firearm, I find accused 2, 3 and 4 guilty.

Count 11- Unlawful possession of ammunition, I find accused 2, 3 and 4 guilty.

R.C.A. HENNEY

JUDGE OF THE HIGH COURT

[1] R v Blom 1939 AD 188

[2] The Law of Evidence, S1 20, May 2002 update, page 16-7, para 16.2.3.2

[3] See also D C Van Der Linde: Evidentiary and Procedural issues relating to the Prevention of Organized Crime Act 2020 SALJ501.

[4] CR Snyman: Criminal Law, 7th Ed, page 221

[5] S v Miller 2017 JDR 1773 (WCC)

- [6] 2003 (6) SA 505 (CC)
- [7] Jonathan Burchell: Principles of Criminal Law, 5th Ed, page 477
- [8] Fn 3 above, pages 226-227
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