

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC 10/2016

THE STATE

And

PRESTON BAADJIES

Accused

Coram: **Chetty J**

Heard: **26 - 29 July 2016 & 1, 2 and 4 August 2016**

Delivered: **5 August 2016**

JUDGMENT

Chetty J:

[1] The accused, a twenty-eight (28) year old male, stands arraigned on multiple counts, to wit, two (2) counts of murder, two (2) counts of

attempted murder, two (2) counts of unlawful possession of firearms and two (2) counts of unlawful possession of ammunition. The charges arise from incidents which occurred on 12 July 2013 first, on an open field at the corner of Velozia and Hibiscus streets in Extension 31, Bethelsdorp, Port Elizabeth (the murder scene) and thence at a veld adjacent to Kroneberg Street in Extension 21, Bethelsdorp respectively. The accused pleaded not guilty to the charges as aforestated, declined to proffer any plea explanation, but as the trial progressed, the accused, through his counsel, admitted being on the open fields alluded to in the indictment, albeit, idiomatically, in the wrong place at the wrong time.

[2] It is not in dispute that during the course of the afternoon of 12 July 2013, two (2) persons, messrs *Ivan MacDonald, (MacDonald)* and *Randy Nel (Nel)*, respectively were shot and killed at the murder scene, *MacDonald* who was found in a motor vehicle died on the scene whilst *Nel*, found in an adjacent residential erf, died a few days later at the Livingstone Hospital. The complainant on the attempted murder charge (count 3), one Mr *Dean Gallant*, was, according to the indictment, similarly shot at the murder scene. He has in the interim been killed. The statements which he made to the police vis-à-vis the events outlined in counts 1-3 and at a photo identification, where it is common cause he identified the accused, were sought to be introduced into evidence

pursuant to the provisions of s 3 of the ***Law of Evidence Amendment Act***¹(the Act). I shall revert hereto in due course.

[3] It was formally admitted that both *MacDonald* and *Nel* died as a result of gunshot wounds to the chest and abdomen, and head respectively. The chief post-mortem findings vis-a-vis *MacDonald* were:

“4. . . .

1. Perforating gunshot wound of the head.
2. One perforating and one penetrating gunshot wounds of chest (involving also abdomen)
3. Bullet lodged in the right posterior shoulder.
4. Bullet tracks through spleen, stomach, left diaphragm, left lung and heart.
5. Haemothorax, haemopericardium.
6. Superficial, perforating gunshot wound of left upper back.

That the cause of death was determined to be:

Gunshot wounds of the chest and abdomen.”

whilst *Nel*’s chief post-mortem findings were recorded thus: -

“4. . . .

¹ Act No, 45 of 1988

1. 2 Gunshot entrance wounds in the left and right parietal areas.
2. Gunshot exit left temporal area
3. Gunshot exit right frontal area of head.
4. Lacerated brain.
5. Diffuse subdural and subarachnoid haemorrhage.
6. Crushed frontal skull.
7. Pale internal organs."

[4] As adumbrated hereinbefore, the precise location where the first shooting occurred, to wit, the murder scene is common cause and graphically depicted on exhibits E and F, a Google map and aerial photographs respectively. In addition thereto, a photo album containing some sixty six photographs, a plan and key thereto was likewise admitted. Photographs 1 – 45 correctly depict the murder scene and the remainder, the events which ensued and which ultimately culminated in the apprehension and arrest of the accused.

[5] The only account of the circumstances surrounding the shooting incident at the murder scene was narrated by reservist Constable *Wesley Alexander (Alexander)*. He was an impressive witness, who, despite the distance between his observation point and the murder scene, clearly had an unimpeded view of the events which unfolded. He observed a taxi

stopping on the tarred road adjacent to the murder scene, saw three (3) persons emerging therefrom, proceeding directly to the parked vehicle on the open field. His evidence that one (1) person was in the vehicle and the others in its environs, finds corroboration in the admitted photographs of the scene. It depicts the deceased laying sprawled across the front seats, bottles, an upended chair and glasses in the immediate surrounds and an assortment of cartridge cases. The latter lends credence to his testimony that several shots were fired by the three individuals who immediately fled the scene in the direction of Extension 21. His depiction of the route the gunmen fled finds corroboration in the evidence of Constable *Graven Hendricks (Hendricks)* who observed three persons running across the veld in the direction of the Kroneberg Primary School.

[6] It was put to *Alexander* that whilst the accused admitted being on the open field, his presence thereanent was merely fortuitous and entirely unrelated to the shooting incident. The version suggested was that when the shots were fired, the accused, who happened to be in Kroneberg Street near the Stepping Stones Institution, fled when he observed a group of people running in his direction behind the gunmen. A similar version was put to *Hendricks*, but both he and *Alexander* disputed that any group of persons, save for the three gunmen, ran in the direction of Stepping Stones. The version put is not only opportunistic but highly improbable. The probabilities favour *Alexander's* evidence that

whomsoever was on the open field fled towards the safety of the adjacent homes when the shots rang out – the reasons is obvious – no right thinking individual would pursue a group of armed individuals, who had, literally a few minutes earlier, brazenly fired several shots at a partying group. The probabilities overwhelmingly establish the falsity of the proposition.

[7] *Alexander's* evidence relating to the gunshots, the assassins' flight from the scene and the direction whence they fled, finds corroboration in the testimony of Hendricks. Whilst in Kamedie Circle on routine police duties, he heard several gunshots and hastened in the direction it emanated. When he exited the circle and turned right into Kroneberg Street proceeding in the direction of the Kroneberg Primary School he observed three (3) persons running across the field to his left. Fearful for his own safety he proceeded beyond their flight path and stopped his vehicle along Kroneberg Street. The three (3) persons, all of whom were armed, crossed the street to the rear of his vehicle. When *Hendricks* exited his vehicle he loudly announced that he was a policeman and ordered them to stop running. His exhortation went unheeded. The three (3) persons crossed the road and he fleetingly lost sight of them. He however immediately pursued them and when he entered the open field between the houses, shots were fired at him by two (2) of the gunmen.

[8] He lay prone, returned the gunfire but after the exchange the gunmen took flight. *Hendricks* returned to his vehicle, drove after them in hot pursuit and when he reached the vicinity of Stepping Stones, he once more observed two (2) of them running across an open field opposite Stepping Stones. A police vehicle fortuitously appeared on the scene and fortified by their presence, *Hendricks* pursued the two (2) persons he had seen running across the road. He once more commanded them to stop and when they did, ordered the person dressed in a purple top to drop his weapon. The command, coupled to *Hendricks'* pointing of his firearm at the purple clad individual and the other person, had the desired effect.

[9] *Hendricks'* testimony was corroborated in all material respects by Constable *Eldridge Jansen (Jansen)*, one of the occupants of the police vehicle, which, as adverted to in the preceding paragraph, fortuitously arrived when *Hendricks* stopped and exited his vehicle. Both of them identified the accused as one of the two (2) persons whom *Hendricks* had pursued and apprehended. Their description of the colour of the accused's T-shirt, to wit, greyish in colour, is moreover vouchsafed by the photograph, image 46 of exhibit B, which depicts the accused clothed in a grey T-shirt shortly after arrest.

[10] *Hendricks'* evidence hereanent was sought to be impugned by reason of his omission to recall the insignia on the front of the accused's

T-shirt. Mr *Cilliers* submitted that *Hendricks*' testimony must be evaluated with a measure of caution. Our law has long recognized the necessity of doing so but, in the final analysis, evidence is assessed holistically. *Hendricks* did not have a fleeting glimpse of the accused and his cohorts. He had heard the gunshots, repaired in its direction with, no doubt a heightened sense of awareness. Prior to stopping his vehicle he saw three people running towards Kroneberg Street. He thus had ample opportunity to observe not only them, but their impending flight route. The criticism directed against *Hendricks* is without substance. Holistically viewed, his testimony is unimpeachable.

[11] The avouchment made during the cross-examination of both *Hendricks* and *Alexander* that the accused was an innocent passer-by on the open field and took flight when hoards of people pursued the assassins is in direct conflict with the import of the evidence adduced. *Jansen's* evidence that the accused was armed when he first observed him finds corroboration in *Hendricks*' evidence that the person clad in a grey T-shirt was armed as he ran across the open field. The foregoing testimony stands uncontradicted. The accused elected not to dispute the evidence adduced on behalf of the state and the uncontroverted testimony adduced by the state must accordingly harden into proof

beyond a reasonable doubt. The legal position was aptly described in **S v Brown and Others**² as:

“Prakties beteken dit dat die probleem dus benader moet word uit die hoek van die onweerspreekte getuienis van die Staat en nie uit die hoek van die stilswye van die beskuldigde nie. Die vraag wat beslis moet word, is of die onweerspreekte Staatsgetuienis sterk genoeg is om die *facta probanda* bo redelike twyfel te bewys en nie of die beskuldigde se stilswye die een of ander bewyswaarde het nie. Sy stilswye het volgens my oordeel geen bewyswaarde nie, maar gewone logika sê dat sy stilswye nadelige gevolge vir hom kan inhou.”

[12] The mere fact that the accused was, when arrested, no longer in possession of the firearm is of no consequence. The photographic evidence which, it was admitted, depicts and explains what it purports, shows an area covered in vegetation. The probabilities are that during the latter portion of his flight, the accused either discarded the firearm or handed possession thereof to his cohort who made good his escape. The undisputed evidence that the accused was exhausted and out of breath when he was apprehended confirms that he could physically, no longer evade arrest. Furthermore, the mere fact that the prime residue test performed on his hands yielded a negative result does not inure to his benefit. Warrant Officer *Phillip Rudolph Bekker's* (*Bekker*), evidence

² 1996 (2) SACR 49 (WC)

provides the death knell for any suggestion that the accused did not fire any shots on the day in question.

[13] On the uncontroverted evidence, the firearm which was found in the immediate vicinity of the accused and his cohort, *Vuyani Kondile (Kondile)*, was the firearm whence the cartridges found on the murder scene had been fired. Despite the accused's protestation, put to the state witnesses, that he was unfamiliar with *Kondile*, I accept *Jansen's* evidence that he had seen them in each other's company. The criticism directed at *Jansen's* testimony is unwarranted. The import of his evidence was that he was driving slowly and had ample opportunity to observe the accused and *Kondile*. The accused's conduct, from the time when the shots rang out at the murder scene until his apprehension a short while thereafter is graphically chronicled in the evidence of *Alexander, Hendricks* and *Jansen* and I accept that he was one of the assassins who fired shots at the murder scene. The gun toting trio, whom *Alexander* saw alighting from the taxi had, on the probabilities, been appraised that their intended victims were sojourning on the open field. Their goal directed conduct conclusively establishes that they acted premeditatively. *Alexander* witnessed them with firearms drawn, and proceeding directly to the vehicle and firing. The location of the bullet wounds on the deceased's bodies demonstrate, unequivocally, that the accused and his cohorts had the direct intent to kill. Their collective flight from the murder scene

attests that they acted in concert. In my judgment, the evidence adduced on behalf of the state proves the accused's guilt on the two (2) charges of murder beyond a reasonable doubt. The inference may legitimately be drawn that the trio had the joint intention to possess the firearms rendering the accused guilty on counts five (5) and six (6).

[14] There is however a dearth of evidence to found a conviction on count 3. The complainant, Mr *Dean Gallant*, has, in the interim, departed this earth, and save for the allegations in the indictment, the summary of substantial facts and his police statements, there is no evidence concerning the location and circumstances in which the offence circumscribed in count 3 was committed. It is convenient at this juncture to provide reasons for the ruling, made during the trial, disallowing the admission of *Gallant's* police statements. The application was premised on the provisions of s 3(1)(c) of the Act which permits the reception of hearsay evidence in particular instances. It provides as follows: -

“3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) . . .

(b) . . .

(c) the court, having regard to-

- (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,
- is of the opinion that such evidence should be admitted in the interests of justice."

[15] The hearsay sought to be adduced, coupled to the pointing out of the accused by the declarant was no doubt intended to place the accused at the murder scene and the reliability of such testimony, in the overall assessment of the evidence adduced is a paramount consideration. There can be little doubt that the killing of the deceased was gang related. Gallant's presence at the murder scene would justify the inference that he was an affiliate of such a rival gang. The reliability of his testimony can only be tested under cross-examination and, absent such interrogation, the interests of justice clearly do not, in the circumstances of this case, allow for its reception. It is for these reasons that the hearsay statements

were ruled inadmissible. The accused must accordingly be found not guilty on count 3.

[16] As adumbrated hereinbefore, the accused and his cohorts acted with fixed resolve and in concert. They collectively fled the scene and, when confronted by *Hendricks* and commanded to submit, the accused' two cohorts responded by firing at him. Although *Hendricks* stated that the accused did not fire at him, his inaction does not inure to his credit. The firing at *Hendricks* was directed at ensuring that they were not apprehended and could make good their escape. The common purpose was not confined to the killing of the deceased but extended to facilitating their getaway. The accused's cohort's conduct in firing at *Hendricks* was to ensure the trio's successful escape and fell within their common design.

[17] The evidence adduced conclusively establishes that the accused was armed. The fact that the weapon was neither found in his possession nor gunshot residue on his hands does not, as I have earlier found, inure to his benefit. In the result therefore the accused is convicted on counts 1, 2, 4, 5 and 6 as charged.

D. CHETTY

JUDGE OF THE HIGH COURT

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