

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 1727/2019

Date heard: 23 – 26, 30 September 2019;

25 – 28 November 2019

Date delivered: 9 December 2019

NOT REPORTABLE

In the matter between:

THE STATE

And

DAMIAN KAMMIES

Accused 1

DEILON MAKOPPA

Accused 2

KURT BOSMAN

Accused 3

WARREN STEYN

Accused 6

JUDGMENT

Goosen J:

[1] The accused are charged with several offences arising from events alleged to have occurred on or about 19 November 2016 at various locations in Port Elizabeth. When the trial commenced there were six accused charged with 15 separate offences. At the conclusion of the state case an application for discharge was brought on behalf of each of the accused. The application was refused in relation to some of the accused in respect of specified offences. It was granted in relation to certain charges preferred against the accused. Accused 4 and 5 were discharged on all counts.

[2] It is appropriate therefore to record the charges which remain to be considered:

- (a) Accused 1 and 6 were put to their defence in relation to counts 1 to 5, and
- (b) Accused 1, 2 and 3 were put to their defence in relation to counts 6 to 10.

[3] Counts 1 to 5 concern events that are alleged to have occurred at 67 Gideon Road, Schauderville, Port Elizabeth on the morning of 19 November 2016. The state alleges that on the said morning the accused (for present purposes accused 1 and 6) acting with a common purpose broke into the house at 67 Gideon Road. It is alleged that they kidnapped Mohammed Abdullah (a.k.a Mielie) and thereafter at or in the vicinity of Malabar, Port Elizabeth killed him by shooting him with a firearm. It is alleged that the accused were in unlawful possession of a firearm and ammunition.

[4] Counts 6 to 10 concern events that are also alleged to have occurred on the morning of 19 November 2016. The state alleges that on the said morning the accused (for present purposes accused 1, 2 and 3) arrived at a property off Lawler Street, Schauderville and there assaulted one Franklin Matthys; attempted to murder one Nigel Matthys; kidnapped Franklin Matthys forcing him to take them to the home of Deon Matthys at 165 Lawler Street where they killed Deon Matthys by shooting him with a firearm. It is alleged that the accused were in unlawful possession of firearms and ammunition.

[5] The accused pleaded not guilty to all charges. Each pleaded an alibi. The alibis pleaded by the accused shared common features, although (as will be apparent from discussion of the evidence of the accused later in this judgment) the specific alibis raised differed slightly as between the accused. The common feature of the alibis pleaded was that all of the accused had, on the night of 18 November 2016, been in each other's company attending a braai held at Crystal Heights (a block of apartments) in Glendenning Road, Schauderville. The accused denied involvement in the commission of the offences pleading:

- (i) In the case of accused 1, that at the times of the commission of the offences he was either at No. 2 Crystal Heights or asleep in his own apartment at No. 6 Emerald Court, also part of the same apartment complex;
- (ii) In the case of accused 2, that he was at the times of the commission of the offences at/outside 2 Crystal Heights in the company of accused 6 and Jonathan van Rhyn, a.k.a China.
- (iii) In the case of accused 3, that he was asleep at 2 Crystal Heights with his girlfriend and upon being woken proceeded to the apartment of his girlfriend which apartment was also situated in the same apartment complex.
- (iv) In the case of accused 6, that he was at the time of the commission of the offences at or outside 2 Crystal Heights in the company of accused 2 and Jonathan van Rhyn, a.k.a China.

[6] The state led the evidence of a number of witnesses. Several witnesses testified in relation to charges for which the accused were discharged. I do not consider it necessary to recount that evidence save where it may bear upon the testimony of witnesses relevant to the remaining counts against the accused. Formal evidence, in the form of admissions made in terms of s 220 of the **Criminal Procedure Act**¹ was also presented.

[7] Based on these admissions it was established that the deceased in count 5 was Mohammed Gamaldien Abdullah (a.k.a Mielie). He died on 19 November 2016 as a result of gunshot wounds to the head with blunt force chest injuries. His body

¹ Act No. 51 of 1977

was found and recovered from alongside a roadway in Malabar on the morning of 19 November 2016, in a vicinity opposite the Malabar Cemetery.

[8] It was also established, by way of admissions, that the deceased in count 6 was Deon Matthys. He died on 19 November 2016 as a result of a perforating gunshot wound to the chest. His body was recovered from inside a backyard dwelling at 165 Lawler Street, Schauderville.

[9] Formally admitted evidence also related to photograph albums, depicting the various scenes, aerial photographs depicting the interrelationship and proximity of various locations relevant to the crimes; and exhibits recovered from the scenes. I shall refer to these only where necessary in the discussion of the evidence presented by the main witnesses.

[10] Before dealing with the main witnesses in relation to the two crime events which gave rise to the remaining charges, a general comment on the witnesses called by the state is appropriate.

[11] The witnesses Neville Bruintjies, Clodene Booysen, Merinda Kock and Roelene Campher testified in relation to counts 12 to 14, viz. arson charges that arose from events at Riverside (an informal settlement) on Highfield Road, Malabar early on the morning of 19 November 2016. In the judgment on the s 174 application I remarked that the evidence of Neville Bruintjies and Roelene Campher was of very poor quality. Since Booysen and Kock did not implicate any of the accused there was no reliable evidence upon which a court might reasonably convict the accused on those counts.

[12] Bruintjies and Campher's evidence has some relevance to the evidence of Luciano Kiddo who was the principal eyewitness in relation to counts 1 to 5. I shall for this reason deal with their evidence insofar as it is relevant to the evidence of Kiddo.

[13] There is, however, one aspect regarding the evidence of Bruintjies which should be highlighted since it formed the subject of some debate regarding an alleged motive for the commission of the offences. I deal with the argument hereunder. For the present it is recorded that Neville Bruintjies' evidence was that on the night of 18 November 2016 or very early hours of 19 November 2016 he and a friend, Austen, had walked from Riverside to a tavern in Lawler Street, Schauderville (Milton's Place) to buy mandrax. When he was at the tavern several of the accused arrived (he claimed it was the erstwhile accused 5 and accused 6). He became involved in a fight with accused 6. They struggled for possession of a firearm. Bruintjies dispossessed accused 6 of the firearm whereupon accused 6 and the others fled. He claimed that they made their escape in a white Corsa bakkie which he identified as belonging to accused 1. Bruintjies then made his way back to Riverside arriving back after dawn. His further evidence, which I do not intend recounting, concerns the subsequent events at Riverside giving rise to the arson charges already referred to. His testimony implicated a number of the accused, explaining that those events were in response or relation to what had occurred at the tavern when he took a firearm off accused 6.

[14] I turn now to the evidence presented by the state in respect of counts 6 to 10 and thereafter in respect of counts 1 to 5².

The events at Gideon Street

[15] Luciano Kiddo testified that on the morning of 19 November 2016, at daybreak, he was awoken by the sound of the front door of 67 Gideon Street being kicked open. He had been asleep in a room at the rear of the house with his partner and two children. The house was that of his friend, Mielie. Mielie was asleep on the floor in the same room. He saw three men enter the room. He recognized them as people known to him. They were accused 1 (known by the nickname Oom Jan), accused 6 (a.k.a Wakka) and one Pokkel.

[16] Accused 1 was brandishing a firearm, a chrome coloured revolver. He spoke in crude language enquiring about the whereabouts of China (this being the nickname of Neville Bruintjies). He wanted to know his whereabouts because he had a firearm belonging to accused 1. Both Mielie and Kiddo told accused 1 that China was not there; that they had not seen him. Accused 1, 6 and Pokkel then left. Kiddo told his partner to leave with their child. A short while later the three men returned. Kiddo was in the kitchen and made his escape out of the window. He stated that he heard accused 1 and accused 6 speaking. He was hiding alongside the house. He then saw accused 6 and Pokkel place Mielie into the back of a white Corsa bakkie. He said he recognized it as accused 1's bakkie. The bakkie then drove off.

[17] He said that he then set off towards Riverside so that he could warn Bruintjies that people were looking for him. According to the photographs, including the aerial

² This sequence is followed because the evidence points to the events occurring in such order.

photographs adduced in evidence (as also the minute of the inspection *in loco*), Gideon Street leads into Gelvan Street at its western end. Gelvan Street proceeds in a northerly direction along a ridge which overlooks and is parallel to the N2 highway. Gelvan Street is separated from the highway by a steep bushy area. From the area where Gideon Street turns into Gelvan Street the Riverside settlement alongside Highfield Road can be seen in a westerly direction some 1 kilometre distant.

[18] Luciano Kiddo explained that he walked along Gideon Street towards Gelvan Street. He then entered the bushy area alongside Gelvan Street and walked down towards the N2 highway. He met Bruintjies (a.k.a China) and Roelene Campher who were coming up the hill towards Gelvan Street. He told them what had happened at the house in Gideon Street and that accused 1 was looking for him, Bruintjies. According to Kiddo, Bruintjies told him of an incident at Milton's Place and what had occurred earlier at Riverside.

[19] The three of them then started walking back towards Riverside. According to Kiddo he decided to first go to check on his partner and children before making his way towards Riverside. He later met Bruintjies and Campher where they were seated in a bushy area behind the Much Asphalt factory. They proceeded to the quarry where they smoked Mandrax. Whilst there Roelene said that there is a bakkie at the shacks. He did not pay attention. Shortly thereafter Roelene said there was a fire at the shacks.

[20] Kiddo went to the shack fire together with Neville Bruintjies and Roelene Campher. He was present when the police arrived. Whilst there he heard a report on the police radio about a body having been found at Malabar. He told the police what

had happened earlier that morning. He was taken by the police to the place where the body was found. He identified the deceased as his friend, Mielie.

[21] According to Kiddo the bakkie that was at Riverside before the fire started was a white Corsa bakkie without a canopy. He said, when he was at Riverside he saw the same bakkie driving alongside Gelvan Street. Shortly after that, he saw smoke coming from the area where the house at 67 Gideon Street is located.

The events at Lawler Street

[22] Franklin Matthys testified that on the morning of 19 November 2016 he was at Milton's Place, a tavern off Lawler Street, Schauderville. He was in the company of Tubby Jones, Charmaine Jones, Nigel Matthys, and Devon Haan. Accused 1 (Oom Jan); accused 2 (Makoppa) and accused 3 arrived at the tavern. They were all known to him. Accused 1 was brandishing a chrome coloured firearm. Accused 2 carried a baseball bat. Accused 1 wanted to know the whereabouts of Neville Bruintjies a.k.a China. When they said they did not know, accused 2 assaulted Neville by hitting him with a baseball bat. He was then assaulted. When Neville was struck with the baseball bat it broke. The accused demanded to be taken to the house of Deon Matthys. They then took Franklin out of the tavern and he walked with them along Lawler Street to the house where his cousin Deon Matthys was living.

[23] Franklin stated that he directed them to the backyard shack. When they got to the back of the house he was made to sit on the rear step. Accused 3 remained with him. He then had in his possession a firearm. Accused 1 and 2 entered the shack. Shortly after doing so firearm shots sounded. Deon Matthys' partner Mandolise came running out of the shack and fled. Accused 1 and 2 then emerged. They came to

where he was seated on the step. Accused 1 said to him that he must say nothing. The three accused then left. He did not enter the shack. He left. A short while later that morning the body of Deon Matthys was found in the backyard dwelling at 165 Lawler Street. He had died as a result of a gunshot wound.

[24] In the evaluation of the totality of the evidence later in this judgment I will deal, where necessary, with the evidence presented in relation to the two crime scenes. For the present it suffices to state that the only evidence implicating the accused in the commission of these offences was that set out in the evidence of the two witnesses.

The defence case

[25] As indicated each of the accused relied upon an alibi. Each of the accused testified in his defence. In the case of accused 2 and 3 witnesses were called to support their evidence as to alibi.

[26] Accused 1 explained that on the night of 18 December and early morning of 19 December 2016 he had attended a braai at the Glendenning Flats. The braai was organised to celebrate the release on bail of two friends, viz. the erstwhile accused 4 and accused 6. They had been granted bail on the 18th and when informed of this he (accused 1) had gone to the New Law Courts to pay the bail and collect them. The braai was attended by all of the accused and some of their partners.

[27] According to accused 1, accused 6 had become drunk and had fallen asleep on the bed in 2 Crystal Heights. Accused 2's girlfriend had arrived to collect him and they left earlier that evening. He, accused 3, whom he knew but had not spent time

with before and the others remained drinking at 2 Crystal Heights. During the course of the night his girlfriend asked him to walk her home which he did. He returned to 2 Crystal Heights and continued drinking. In the early hours of the morning accused 4's mother arrived. She asked for money to buy cider. Accused 1 accompanied her back to his flat so that he could give her money.

[28] Accused 1 then went to sleep. He was woken later that morning to be told that the police had arrived and that they were removing his Corsa bakkie, he was not in a state to get up and so remained in bed. He emerged later that day to be told that the police had arrived at the flats and had impounded his car. He was arrested later that day.

[29] Accused 2 stated that he had attended the braai. He had remained until approximately 8 p.m. after they had eaten. His girlfriend then arrived and the two of them left. They went out for entertainment at the Boardwalk on the beachfront. The following morning a friend, Jonathan Van Rhyn came to his house. He wanted to smoke a hookah pipe. Accused 2 and he then walked the short distance from his home to the Glendenning Flats. He went into 2 Crystal Heights to retrieve the pipe. Accused 6 and some other friends were there. They went outside to smoke the pipe. They stood at accused 1's Corsa bakkie. They shared some beer that Van Rhyn had in his possession.

[30] Whilst they were standing there he heard several gunshots. The sound came from the direction of Highfield Road. He and accused 6 went inside to smoke the pipe. Van Rhyn left to buy more beer. Later whilst standing near the Corsa bakkie the police arrived. They seized the bakkie belonging to accused 1.

[31] That afternoon accused 2 was arrested. He explained that on being informed of the reason for his arrest he denied involvement. He told the police that he was at Glendenning Flats at the time. He stated that he was near Glynn Carelse's house and that this would have been recorded on CCTV cameras at the house.

[32] Van Rhyn testified that on the morning of 19 November 2016 he had gone to the Glendenning Flats to look for accused 2. When he found that he was not there he walked the short distance to accused 2's house. The two of them then returned to the flats so they could drink and smoke a pipe. He confirmed they were standing outside when he heard shots being fired. It sounded like they were fired at or near Highfield Road.

[33] Accused 3 testified that his girlfriend, Charmelle, who is a friend of accused 1's girlfriend, invited him to attend a braai to be held on the evening of 18 November 2016. He had not socialized with accused 1 before. He knew accused 2 though. He and his girlfriend attended the braai.

[34] During the course of the evening he received a telephone call from his father who asked him to buy him a lottery ticket. Accused 3 then went home, collected the money and went to a nearby café to buy the ticket. On the way back home Franklin Matthys, with whom he had a previous altercation, attempted to rob him. He was able to avoid the robbery and hastened home. When he got home he told his father what had happened. His father knew Matthys' father and had previously spoken to him about Franklin Matthys' behaviour. Although accused 3 did not see his sister he was aware that she was present in the house in her bedroom. After dropping off the ticket he returned to the flats in Glendenning Road.

[35] On his arrival accused 1 was not there. He went inside and spoke to the women who were present, including his girlfriend. Accused 1 then returned. They sat in the lounge where accused 6 was asleep on a bed and drank and talked.

[36] They continued in this fashion until the very early hours of the morning. His girlfriend and the other women had fallen asleep on a bed. At some stage accused 4's mother arrived looking for him. She asked accused 1 for money for drinks and he took her to his flat to give her money for drinks. Accused 3 fell asleep on the bed alongside his girlfriend.

[37] He was awoken by his girlfriend who told him that Shamila wanted to clean the house. He got up and went to a friend's flat in the same block. After being there for a while his girlfriend called him and they then walked to her apartment. On the way there he saw accused 2 and 6 standing outside Crystal Heights. He and his girlfriend spent the day at her apartment. He denied being involved in the events at Lawler Street. He was arrested that afternoon when the police arrived at 3 Crystal Heights where he was with his friend, Sheldon. He was arrested apparently because a firearm was found under the bed he was sitting on.

[38] Charmelle Paterson, accused 3's girlfriend, testified in his defence. She confirmed that they had attended the braai; that she had gone to sleep on a bed along with some of the other women. She said that she awoke at about 5:00 a.m. Accused 1 and 3 were still awake drinking. She stated that one Yolande came looking for accused 4. Accused 1 left with her to give her money with which to buy ciders. At that stage accused 3 came to lie down on the bed with her. He fell asleep. When she awoke again he was still sleeping. She woke him when Shamila wanted to

clean the apartment. Accused 3 went next door. After they had cleaned up she called him and they went to her apartment in Ruby Heights.

[39] Accused 3 also tendered the evidence of Mr Carstens, the Headmaster of Excelsior Primary School. His evidence concerned the question as to when accused 3 attended the school. For reasons that will become apparent later it is unnecessary to deal with this aspect any further.

[40] Accused 6 also testified. His evidence was brief. He stated that he attended the braai which was held to celebrate his release on bail. He was responsible for braaing the meat. He was drinking with the other accused who attended. After the food was served they continued to drink and he fell asleep on a bed in the lounge of 2 Crystal Heights. He was awoken the next morning by three of his friends who wanted to smoke a hookah pipe. He got up, went outside to prepare the pipe and came inside to smoke it with them. Later that morning accused 2 came and said he wanted to smoke a pipe. He again went outside to prepare the pipe. China was there. They drank some Flying Fish beer and when van Rhyn (China) went to buy more beer, he and accused 2 went in to smoke the pipe.

Evaluation and Assessment of the evidence

[41] Mr Sandan, for the state, readily conceded that the witness, Neville Bruintjies was not a good witness. His evidence (and that of Roelene Campher) could, in its detail, be disregarded. However, he submitted that his evidence establishes the context in which the events occurred. In this respect it provided insight into what motive underlay the commission of the offences.

[42] Mr Sandan submitted that it must be accepted that Bruintjies had been involved in an incident at Milton's Place early on the morning of 19 November as a result of which he came to be in possession of a firearm. It was this that triggered the events that followed. There was evidence that some persons (members of the Spotbouer gang and including some of the accused) had come looking for Bruintjies at Riverside on two occasions. Kiddo testified to the fact that accused 1, 6 and a Pokkel were looking for Bruintjies and that this related to a firearm.

[43] Franklin Matthys, who was at Milton's Place on the morning of 19 November testified that accused 1, 2 and 3 came looking for Bruintjies there. This evidence suggests that Bruintjies' description of what occurred is reliable as a background explanation for the sequence of events that followed.

[44] Evidence of an accused's motive for the commission of an offence is generally relevant to the determination of intention or identity³. In the present instance no question arose regarding the admissibility of Bruintjies' evidence. It was tendered as part of the narrative of events giving rise to the alleged commission of offences which occurred at Riverside. The accused were all discharged from those charges on the basis, as explained in the judgment on the s 174 application, that the evidence implicating the accused was of such quality that no reasonable court could convict thereon. The question that now arises is what probative value, if any, does the narrative evidence have in relation to the remaining offences. The answer to this, it seems to me, must be very little. The identity of the perpetrators of the offences at Gideon Street and Lawler Street and their intention is to be determined on the basis

³ S v Sithole 1980 (4) SA 148 (D) at 150C-F

of the credibility and reliability of the witnesses to those events and not the existence of an underlying motive. It is with this in mind that I turn to this evidence.

[45] It is a trite principle that the state bears the onus to prove all of the elements of a crime beyond a reasonable doubt. In deciding whether the onus has been discharged the court must consider the evidence in its totality. Each piece of evidence must be taken into account and its effect, if accepted, upon every other piece of evidence must be carefully weighed and considered.

[46] An accused person bears no onus to prove his or her version of events. It suffices if the evidence of an accused or that tendered on his/her behalf raises sufficient doubt in the mind of the trier of fact that the court is not satisfied beyond a reasonable doubt that the evidence of the state must be accepted. This test, and what constitutes proof beyond a reasonable doubt has been articulated a great many times by our courts. It is apposite, however, to call it to mind.

[47] In ***S v Van der Meyden***⁴ it was said:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation

⁴ 1999 (1) SACR 447 (W) at 448f-449b

which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. In *R v Hlongwane* 1959 (3) SA 337 (A), after pointing out that an accused must be acquitted if an alibi might reasonably be true, Holmes AJA said the following at 340H-341B, which applies equally to any other defence which might present itself:

'But it is important to bear in mind that in applying this test, the alibi does not have to be considered in isolation The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.'

Counsel for the accused referred us to three cases which are frequently cited in this Court in elaboration upon that test. In *S v Kubeka* 1982 (1) SA 534 (W) Slomowitz AJ said the following at 537F - H:

'Whether I subjectively disbelieve (the accused) is not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true.'"

[48] In this case the accused each rely upon an alibi defence. The evidence as to alibi must, therefore, be considered within the totality of the evidence. The

impression created by the witnesses and question as to their credibility and reliability bear upon the conspectus of the evidence.

[49] It should be stated, before dealing with this latter aspect that issues of identity do not arise. Although there was some dispute regarding the extent to which the witnesses Kiddo and Matthys knew each of the accused there was no doubt that they knew the accused and had had sufficient contact with and even dealings with each of the accused as would render them readily recognizable and identifiable. Nor was there scope for the identification of the perpetrators at Gideon Street or Lawler Street to be undermined by factors such as lighting; opportunity for observation and the like. The accused contended that they were not present relying upon their alibis and that the evidence given by the two key witnesses was false.

[50] Mr Sandan argued that both Luciano Kiddo and Franklin Matthys were credible and reliable witnesses. In the case of Kiddo it was submitted that he was a very scared witness. This was evident from his conduct and demeanour whilst in the witness box. He positioned himself in a way which avoided any eye contact with the accused or with defence counsel. He appeared quite terrified despite assurances given to him.

[51] It was also submitted that he was not a highly educated or sophisticated individual. He cannot be criticized for this. His evidence, it was submitted, was simple and was given without exaggeration or elaboration. The fact that he did not in any way ascribe a greater role to either accused 6 or Pokkel points to honest and adds to his credibility. Mr Sandan accepted that there were contradictions between his evidence and that of Neville Bruintjies, regarding where they met and what was

reported, but these were immaterial to the essence of his evidence. It was argued that notwithstanding the application of the cautionary rule applicable to a single witness, his evidence should be accepted as credible and reliable.

[52] Mr Nel, for accused 1, submitted that Kiddo was not a reliable witness. He pointed in this regard to his assertion that the events occurred on a Thursday morning and not, as other evidence established, a Saturday morning. He pointed also to the assertion, by accused 6, that Pokkel was then in St Albans. This was not gainsaid by the state. Mr Nel also argued that the evidence regarding the bakkie changed, first it was with a canopy then without. It was also, he submitted “a *ubiquitous bakkie*”.

[53] Relying on the contradictions between Neville Bruintjies and Roelene Campher on the one hand and Kiddo on the other it was submitted that Kiddo’s evidence regarding events at Gideon Street was false.

[54] Kiddo was unequivocal in his evidence that when Mielie was placed in the bakkie it had a canopy. Insofar as he saw a bakkie at Riverside he could not say if it was the same bakkie. The assertion that the bakkie which was seen by Bruintjies and Campher did not have a canopy does not detract from his evidence. It was Kiddo’s evidence that a person who called himself Pokkel was present. He did not know him. The fact that accused 6 might know a Pokkel who might have been in prison does not render Kiddo’s evidence a fabrication. In any event to the extent that the person Pokkel to whom Kiddo referred as being present could prove that he was not there (and this was known to accused 6) such witness could have been called by him.

[55] In my view, Kiddo was indeed an honest and reliable witness. His evidence places accused 1 and 6 at Gideon Street at sunrise on the morning of 19 November 2016. It places accused 1 in possession of a firearm and it establishes that the deceased Mielie was taken from Gideon Street by the accused in the back of a white Corsa bakkie.

[56] What is the effect of this upon the evidence regarding accused 1 and 6's respective alibis? In the case of accused 1, he left 2 Crystal Heights at some time around 5:00 a.m. He did not provide a time. However, Charmelle stated that he left in the company of Jolene. His whereabouts immediately thereafter are not accounted for.

[57] According to accused 6 he was asleep until he was woken by his three friends. Charmelle is the only witness who says that accused 6 was woken by Pikka and the others. She does not, however, say when that was, nor does she testify to whether he was there after she again fell asleep with her boyfriend, Kurt.

[58] There is accordingly no direct evidence to reliably contradict the evidence of Kiddo. To the extent that the alibi evidence of accused 1 and 6 purports to exclude the presence of accused 1 and 6 at the house at Gideon Street, it must be rejected in light of the evidence of Kiddo. I shall return hereunder to the effect of acceptance of this evidence.

[59] Franklin Matthys, it was submitted by Mr Sandan, was also a credible and reliable witness whose evidence should be accepted. He submitted that he was

unshaken in cross-examination and that his evidence was simple and straight forward. There was also no doubt regarding his identification of the perpetrators.

[60] The challenge to Franklin Matthys' evidence, advanced by counsel for accused 1, 2 and 3, centred on three aspects. Firstly, it was submitted that whereas at trial he was a single witness he was in fact not a "*single*" witness. As is apparent from the charge sheet and indeed from Franklin Matthys' evidence, Nigel Matthys was also present at Milton's Place when accused 1, 2 and 3 are said to have arrived. The state had gone so far as to charge the accused with attempted murder because of the assault upon him, yet had failed to call him as a witness. No explanation was given for this. Since the state had available to it a witness who could have been expected to corroborate Franklin Matthys on crucial issues, the failure to call that witness should attract an adverse inference, so the argument went.

[61] The second challenge concerned the credibility of his testimony in the light of contradictions and inherent improbabilities. These are to be weighed against the credibility, consistency and reliability of the accused as witnesses and their alibi witnesses.

[62] The third concerned the failure by the state to fully and properly investigate the alibi raised by accused 2 at the time of his arrest and the failure to call a Warrant Officer Goosen to whom the alibi was conveyed and who had undertaken to investigate it.

[63] In ***Elgin Fireclays Limited v Webb***⁵ Watermeyer CJ held that:

⁵ 1947 (4) SA 744 (A) at 747-750

“. . . it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. See Wigmore (secs. 285 and 286).) But the inference is only a proper one if the evidence is available and if it would elucidate the facts.”

[64] In this instance, the indictment included a charge of attempted murder (count 11) in which the complainant was Nigel Matthys. The alleged attack upon him occurred at or near Lawler Street. The Summary of Substantial facts it should be stated makes no reference to this attack nor does it deal with counts 9 and 10. The list of state witnesses does not include the names of any of the lay witnesses to be called not the complainants in the respective charges. The absence of the name, therefore, does not mean that Nigel Matthys was not an intended witness available to the state. It was Franklin Matthys' evidence that he was present at the time of the assault upon him and that he (Nigel) was assaulted by accused 2 who struck him with a baseball bat.

[65] As I indicated earlier there was no explanation given for not calling Nigel Matthys. By not doing so the state effectively abandoned proof of the elements of count 11. It also failed to present evidence which would have provided crucial corroboration for the evidence of a single witness as to the identity of the perpetrators of the crimes allegedly committed at Milton's Place on the morning of 19 November 2016 and immediately thereafter.

[66] In these circumstances, it seems to me that it will be proper to draw an adverse inference from the failure by the state to call Nigel Matthys. It was submitted that Franklin Matthys' evidence must be approached with caution since he is a single witness and because he had testified under compulsion. To accept his evidence this court would need to be satisfied that it is satisfactory in every material respect.

[67] In arguing that his evidence was not satisfactory Mr Erasmus, for accused 2, pointed to the fact that it was his evidence that the accused had told him to show them where Deon Matthys lived. Yet, from his description of what followed they clearly knew where he lived. His description of how he was taken there also changed. First, he walked in front with a gun pointed at him. Later he said accused 1 and 2 walked in front. Finally, he said they walked alongside him.

[68] Regarding his testimony under compulsion, it cannot be ignored that Franklin Matthys was testifying in circumstances where the risk of harm was perceived as very substantial. It was for this reason that he had absconded from the witness protection programme and had prevaricated in his decision to testify. Nevertheless, it is appropriate that his evidence be approached with caution.

[69] One aspect which arises in this regard is that of inherent probabilities and improbabilities in the version he gave. He described the assault on Nigel Matthys as one in which the baseball bat with which he was struck broke. He too was assaulted with force. Yet, Nigel was apparently able to make his escape. Franklin's evidence regarding what occurred at 165 Lawler Street suggests that the accused went there with the prior intention to murder Deon Matthys when found. He was present when the killing occurred yet he was not harmed. Indeed two witnesses to the murder were left unharmed. In his case he was merely told to say nothing.

[70] On the probabilities, it must be accepted that the accused knew where Deon Matthys lived. They did not need to be directed to the property according to the evidence of Franklin Matthys. Accused 3 also lives in the neighbourhood. If that is so it strikes me as highly improbable that the accused would risk exposure by taking a witness along to what was to be an execution.

[71] In my view, however, the probabilities provide only an additional reason to reject the evidence as unreliable. In the light of the adverse inference to be drawn regarding the failure to call Nigel Matthys, which is to the effect that his evidence would not have corroborated the version of what occurred at Milton's Place, I am unable to conclude that the evidence of Franklin is satisfactory in every material respect.

[72] Since there is no other evidence implicating the three accused I am unable, on the strength only of the evidence of Franklin Matthys, to convict the accused. This conclusion would hold, in my view, even if the alibi evidence was not accepted.

[73] I have already pointed to the absence of evidence regarding the whereabouts of accused 1 at the time of the commission of the offence in counts 1 to 5. There is equally no evidence which can be framed as an alibi in respect of the period in which the offences in counts 6 to 10 were committed.

[74] Different considerations apply in respect of accused 2 and 3. In the case of accused 3 the evidence as to alibi is, at best vague. There is little or no detail regarding when accused 3 woke on the morning of 19 November 2016. The only witness who can confirm that he was at Glendenning Flats when the offences in

counts 6 to 10 were committed is his girlfriend. Whilst she says so there is no way of determining when that was.

[75] The position of accused 2 is different. In his case the alibi consists of being in the company of Van Rhyn at Glendenning Flats that morning and hearing gunshots from the direction of Highfield Road. Van Rhyn, it should be said, was an unimpressive witness who sought to adapt his evidence to meet challenges based on differences with what accused 2 had stated. Most notable in this regard was where he said they were standing and where his vehicle was parked. The impression he created was of a witness of convenience. As for the gunshots allegedly heard, the underlying assumption was that these must have been the fatal shots fired at Deon Matthys since Lawler Street also lies in the direction of Highfield Road from Glendenning Street. This hardly counts as a basis to conclude that accused 2 was indeed not in Lawler Street when the incident occurred.

[76] Although rejection of the alibi is unnecessary in the circumstances of this case, I nevertheless consider it appropriate to comment upon what appears to have been a failure by the police to investigate a disclosed alibi in the case of accused 2.

[77] It is common cause that accused 2 disclosed during his bail application that he had, on arrest, informed Warrant Office Goosen of an alibi. He had disclosed that since he was at the flats in Glendenning Street that it is likely his presence could be confirmed by video footage from the house of Glynn Carelse opposite where he was.

[78] Mr Erasmus argued that there is a duty upon the police to investigate a matter fully, particularly when an alibi is raised. Indeed, it is for this reason that an accused person is required to raise reliance upon an alibi at the earliest stage so that it may

be investigated. The onus rests upon the state to prove its case. That includes the onus to disprove an alibi. There is no duty upon an accused to prove his alibi.

[79] In **S v Mafiri**⁶, a matter concerning the unlawful possession of a firearm found under a pillow in a room occupied by the accused and in which the accused had told the police that another person had occupied the room, the court said⁷:

"[16] In my view, once the appellant had mentioned Makakula as being the person who occupied the bedroom in which the pistol was found, it was incumbent on the State to pursue it, given the onus that rests on it to establish the guilt of the accused beyond reasonable doubt. Even though that took place some 6 years after the appellant's arrest, a delay for which the appellant was not to blame, the fact of Makakula having resided at the appellant's house is not something that could on the facts of this case not have been established even at that stage. The appellant was not pressed in cross-examination on whether Makakula existed at all nor did the prosecution enquire as to whether he could still be found. The appellant did testify that Makakula could be found at the taxi rank. It seems to me that even at that stage the matter could have been stood down to establish whether Makakula did use and occupy the bedroom where the pistol and the ammunition were found. It was still open to the State to apply to reopen its case for this purpose."

[80] See **Vijai v Minister of Police and Another**⁸ where the duty to investigate an alibi is addressed in the context of an alleged unlawful arrest. In this matter a full and

⁶ (360/2002) [2003] ZASCA 37 (31 March 2003), 2003 (2) SACR 121 (SCA)

⁷ *Supra* at par [16]

⁸ (41706/2016) [2018] ZAGPPHC 100 (19 March 2018)

proper investigation may very well have been decisive of the treatment of the alleged alibi.

[81] It is perhaps also appropriate to consider the conduct of the investigation as a whole. Counsel for the defence sought to suggest that the case was poorly investigated (principally since aspects potentially favourable to the accused were not brought to light). There is, however, nothing that points to this save the aspect regarding investigation of accused 2's alibi. It cannot be ignored that crimes of the nature of these prosecuted where gang-related violence is as prevalent as it is in some parts of this city and where witness intimidation and even assassinations are fairly regular occurrences⁹. The task of the police and prosecuting authorities in such circumstances is particularly difficult. It appears from the record in this matter that the police did seek to gather forensic evidence, in the form of potential ballistic evidence; DNA samples and the like, from the various crime scene and from the vehicle linked to the commission of the offences without success. In the circumstances, criticism of the efficacy of the police investigation is not warranted.

[82] It follows from the evaluation of the evidence relating to counts 6 to 10 that I am not satisfied that the state has been able to prove beyond a reasonable doubt, and upon reliable evidence, that accused 1, 2 and 3 committed the offences. It must follow, therefore, that they are to be acquitted of those offences.

[83] As I indicated earlier in this judgment I consider Luciano Kiddo's evidence to be credible and reliable. He is, in relation to the events at 67 Gideon Street, a single witness. In my view, his evidence was satisfactory in every material respect.

⁹ Mandolise, Deon Matthys' partner who was scheduled to testify in this matter was herself shot and killed.

Acceptance of his evidence is destructive of the claimed alibis of accused 1 and 6. As already indicated they do not, in fact, raise by way of an alibi, evidence which tends to establish that they were not present other than their denial. I am satisfied that their denials are not reasonably possibly true.

[84] Mr Sandan conceded that there is no evidence which establishes that accused 6 was at any time in possession of a firearm or ammunition. He must accordingly be acquitted of those charges. Kiddo's evidence establishes that accused 1 was in possession of a firearm. There is, however, no evidence that he was, in the presence of Kiddo, in possession of ammunition.

[85] On the strength of his testimony it must be accepted that count 1 is established and count 3 (as against accused 1) is established. It must also be accepted that the deceased, Mielie was removed from the house at Gideon Street against his will and that he was deprived of his freedom. Accordingly, count 2 is proved.

[86] In respect of count 5, it is admitted that the body of the deceased, Mohammed Abdullah aka Mielie was recovered from alongside a roadway in Malabar on the morning of 19 November 2016. His body was discovered at about the time that the police were on the scene of the fires at Riverside. His body was identified by Luciano Kiddo. The post mortem report admitted into evidence establishes that he died as a result of gunshot wounds to his head and blunt force trauma to his chest. The fired bullets were recovered during the post mortem examination.

[87] On the facts found to be proved by the state, the deceased was last seen alive by Luciano Kiddo at the time that he was being loaded into the back of white Corsa bakkie. Accused 1 and 6 were present with one Pokkel. This was shortly after sunrise. His body was found a few hours later. Accused 1 and 6 provide no explanation other than a denial that they were present. That denial is rejected. At the time that the deceased was transported away from his house Accused 1 and 6 were acting in concert.

[88] In my view, the proven facts allow for only one reasonable inference to be drawn, viz that Accused 1 and 6 unlawfully and intentionally killed the deceased and disposed of his body where it was found. I am satisfied therefore that the state has proved, beyond a reasonable doubt, that the accused are also guilty of murder.

[89] In the result, and based upon a careful consideration of the evidence in its entirety, I make the following orders:

Accused 1, Damian Kammies, is found GUILTY on COUNTS 1, 2, 3 and 5 and is ACQUITTED AND DISCHARGED on COUNTS 4, 6, 7, 8, 9 AND 10.

Accused 2, Deilon Makkopa, is ACQUITTED AND DISCHARGED on COUNTS 6, 7, 8, 9 AND 10.

Accused 3, Kurt Bosman, is ACQUITTED AND DISCHARGED on COUNTS 6, 7, 8, 9 AND 10.

Accused 6, Warren Steyn, is found GUILTY on COUNTS 1, 2 and 5 and is ACQUITTED AND DISCHARGED on COUNTS 3 AND 4.

G. GOOSEN

JUDGE OF THE HIGH COURT