

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

Case No.: CC 22/2019

Date Delivered: 15 June 2020

Date Heard: 11 June 2020

In the matter:

**THE STATE**

and

**WALTER WILLIAMS**

Accused

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**JUDGMENT**

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**MOODLIAR AJ:**

[1] The accused is charged with ten offences arising from the events which occurred on 9 December 2018 and 10 December 2018 in Helenvale, Port Elizabeth.

[2] Counts 1 and 2 relate to both events and counts 3 to 7 (three counts of attempted murder, unlawful possession of a firearm and unlawful possession of ammunition) relate to events which are alleged to have occurred in the afternoon on 9 December 2018 at Anita Drive, Helenvale. The State alleges that the accused is a member of a gang called the Nice Time Bozzas ('NTBs'), and that he pursued Benito Bosch who is a witness in a murder charge against a gang member, affiliated to the NTBs,

pointed a firearm at him with the intention of killing him and the shots intended to kill Benito injured two teenagers, Cassidy and Calvin Dolph who received treatment for their wounds at Livingstone Hospital. It is alleged that the accused was in unlawful possession of a firearm and ammunition.

[3] Counts 8 to 10 (murder, unlawful possession of a firearm and unlawful possession of ammunition) concern events which are alleged to have occurred on 10 December 2018 at the home of Buren Jordan ('Buren or Dumpie') at 172A Kobus Road, Helenvale. The State alleges that the accused arrived at Buren's home where Richard Marius Stuurman ('the deceased'), an informant for a rival gang was playing cards with Veronique Jacobs, Shevonne May and Buren. The State alleges that the accused sat with them, drank a glass of cool-drink and thereafter took out a firearm, pointed it at the deceased and fired a shot at him. It is alleged that the deceased fell to the ground and that the accused left the premises. The State alleges that the accused murdered the deceased who died a few days after the shooting as a result of a head injury due to the gunshot wound. It is alleged that the accused was in unlawful possession of a firearm and ammunition.

[4] The accused pleaded not guilty to all charges.

[5] In respect of counts 1 to 7, the accused denies belonging to the NTBs, pleads that he has friends who are acquaintances of the NTBs and denies being in the vicinity at the time of the shooting, averring that he was at work.

[6] In respect of counts 8 to 12 the accused pleaded an alibi. The accused denied involvement in the commission of the offences pleading that he was never at the house in Kobus Road. He was asleep in the early hours of the morning, woke up a bit later and went to work.

[7] The State led the evidence of several witnesses.

[8] At the commencement of the trial the accused made various formal admissions in terms of section 220 of the Criminal Procedure Act<sup>1</sup> which narrowed the ambit of the issues in dispute significantly.

[9] Based on these admissions, it was established that the deceased in count 8 was Richard Marius Stuurman who died on 13 December 2018 as a result of a head injury due to a gunshot wound. The body was removed from 172A Kobus Road on 10 December 2018 and taken to Livingstone Hospital for treatment and he did not sustain any further injuries from the time of removal to the hospital where the deceased remained until he was declared dead on 13 December 2018. The accused was arrested on 21 January 2019 in Gelvandale. Other formally admitted evidence includes photograph albums of the scene, plan and keys including aerial photographs depicting the proximity of various locations relevant to the crimes and exhibits recovered from the crime scenes. I refer to these later where relevant to the evidence presented by the main witnesses.

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<sup>1</sup> No 51 of 1997

[10] The principal eye witness Jacobs, Warrant Officer Wesley Mclean and Dr Prudent Mgobo testified in relation to counts 8 to 10 viz. the murder, unlawful possession of a firearm and unlawful possession of ammunition charges.

[11] I turn now to deal with the evidence which the State presented in respect of counts 3 to 7 which incident occurred on Sunday, 9 December 2018 and thereafter, the evidence in respect of counts 8 to 10 which incident occurred less than 15 hours later on Monday, 10 December 2018,

### **The events at Anita Drive**

#### **Benito Bosch (Counts 1 to 7)**

[12] Benito testified that he is an 18 year old, resident at 115A Reginald Road who has lived in the area from birth. On 9 December 2018, at about 14h30 or 15h30, his friend's mother sent him to buy cheap cigarettes for her. He bought a cigarette for himself and as there were no cheap cigarettes, he walked in the direction of Reginald Road, passed Scholtz Street and went to a second shop in Reginald Road. On the way, he saw his friend's brother whom he referred to as a small child who then accompanied him. When they had bought the cigarettes, he saw 2 suspicious looking men coming out of Scholtz Street. One walked on the sidewalk and the other in the middle of the road. He gave R3.00 to the boy and told him to buy noodles and wait inside the shop. He then walked to the opposite side of the road in the direction of Anita Drive and as he crossed the street, he noticed the one male walking faster than the other. When he walked into the gravel road and was about 10 to 12 metres away from the accused, he recognised the man walking faster as the accused whom

he knows as Twallie. He looked at him for about four (4) seconds. He then continued walking along a gravel road or path between Reginald road and Anita Drive, turned around and looked behind and saw the accused pulling out a grey firearm from his right side. At this stage he was about 4 metres away from him. He looked at him for about 2 (two) seconds. Benito stated that he thought that whatever happened at that moment, he had made peace with himself. He continued walking up the gravel road and when he got closer to the corner of the wall, he started running. The accused also walked faster and the accused followed him on the gravel road until he reached the top of the road where Benito turned the corner at Anita Drive. He then heard about 4 or 5 shots behind him emanating from the direction of the accused and he continued running and screaming to people in the street to get out. He thereafter ran straight to his house.

[13] The South African Police Services came to his house and he related what had happened and that the accused had shot at him. He stated that he had been suspicious of the two men pursuing him as he was a witness in a case against an accused who belongs to the NTBs and because they kept looking back. He knew the accused prior to the incident because he went to Fontein Primary School with him. He knew that the accused belonged to the NTBs as he saw the accused about 2 to 3 times a week when he purchased electricity at "the Stoep" which he explained was a reference to different shops in one building in Kobus road where the NTBs and Blink Boemelaars gangs hang out. He often saw the accused with other people who are also NTB members viz. Maxwell Muller, Nunu, Damian, Martin, Noel and Claudio. He, Benito is not a gang member and he knows that the accused lives in Voisen Road as he has seen him there. He had never had any prior problems with the ac-

cused. He stated that witnesses in these kind of cases in the area get threatened. He knew that it was the accused who shot at him as it was only the accused who had a firearm who had come up with him on the gravel road until he reached the top of the road. The defence contended that Benito was mistaken when he says the accused is the shooter and Benito stated categorically that he was walking alone behind him on the gravel road and that he had seen him with the firearm a few minutes before the shots were fired which ultimately injured the teenagers.

[14] I turn to deal with the contradictions raised by Ms Coertzen in respect of Benito's evidence in court compared to his statement to the police. The first related to Benito saying in his statement that he was walking from his friend's house with a small boy. Benito conceded that this was not correct as he had not walked with the boy from his friend's house right from the start. Ms Coertzen pointed out that in his evidence before court; he had said that he had *"found him after he had left the shop"*. Benito then described the position as being that the first shop is a house away from his friend's house and the child was in the street in front of this house. The witness conceded that the statement did not correctly reflect this point. My view is that the confusion seems to be between the house and 'the house shop' and Benito described this house as a shop which is located in a house. It is apparent that this relates to a communication and language barrier. The second contradiction which the defence raised in relation to his police statement was that Benito said that he was walking from his friend's house with a small boy and gave him R3 when they were at the shop and he bought noodles for himself. When he was about to leave the shop he saw two males coming out of Scholtz Street in his direction. He then got suspicious when he saw these two males and he told the small boy to remain in the shop. In his

evidence before court however, he had testified that he gave R3 to the boy to buy noodles after he knew that they were suspicious and it was intended to keep the boy at the shop for his safety. Benito's reply was that the constable wrote the word 'before' and got the sequence wrong. His evidence was that he had corrected this. Benito explained the discrepancy by saying that he told the constable *"I was giving him the money, when I saw there comes two suspicious men then I told him to wait there in the shop and he must buy him something. That is why I see the detective write this in front of this paragraph"*. This to my mind, is a reasonable explanation which again appears to be a result of inelegant articulation, and colloquial expression which does create ambiguity. It does not however impinge on his honesty as a witness. His explanation for the confusion does not cast doubt on his version that he had given the money to the boy when he noticed the two suspicious men. He also explained that at the time of making the statement, his mind was on the two children who had been shot and he was in shock.

[15] In *S v Bruiners en Ander*<sup>2</sup> it was stated that *"the purpose of an affidavit was to obtain the details of an offence, so that it could be decided whether a prosecution should be instituted against the accused. It was not the purpose of such affidavit to anticipate the witness's evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in his evidence as he would in his evidence in open court"*.

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<sup>2</sup> 1998 (2) SACR 432 (SE) quoted in the case of *S v Khoza* 2014 JDR 200 GP

[16] Applying this reasoning to the present matter, it is apparent that Benito's police statement must be viewed in that context particularly because the differences are not destructive of the honesty of his *viva voce* evidence.

[17] The second witness in respect of the events at Anita Drive on 9 December 2018 was William Dolph ('William'), an 18 year old pupil who testified that Cassidy and Calvin Dolph are his cousins. He remembered the date well as it was his sister's birthday and that they were shot between 14h00 and 15h00 in Anita Drive as they had been coming from the top shop walking on the pavement. He was walking with Calvin and Cassidy when he saw Benito running past them and then he saw a man 'tramping on the side of the pavement'. He saw the man's hand lift and then heard between five and eight shots go off. He looked around him to make sure that the two he had been walking with, were still with him but Calvin was not with him, only Cassidy was. He grabbed Cassidy and dived with him to the wall. They did not hear any shots thereafter and "Cassidy's blood was cooling down" and Cassidy told him that something was paining in his stomach. He pulled Cassidy's sweater up and saw a hole in his stomach. He did not see Calvin until later when he saw him coming out of his father's house. Calvin's hand was full of blood and there was a bullet in his hand. An ambulance took them away. The man who trampled on the pavement according to William, started shooting but he was unable to identify who that man was as everything happened too quickly. When Benito had passed him, he was proceeding from the front. The person who was doing the shooting came out of the passage on the gravel road. William testified that he is not friends with Benito but he is familiar to him as he is from the area. William presented as a reliable and credible witness. His evidence is corroborative of Benito's evidence that he (Benito) was running past him in

Anita Drive, fleeing from the shooter as William described how immediately after he saw Benito run past, the person on the side of the pavement lifted his hand, then shots were fired which injured his cousins.

### **Counts 1, 2 and 8 to 10**

#### **The events at Kobus Road, Helenvale**

[18] Veronique Jacobs is a 24 year old woman who lives in Voisen Street, Gelvandale and has a Standard 2 education. She had visited the house of Buren at 172A Kobus Road at about 21h30 on the evening of 9 December 2018 with a view to seeing her friend whom she discovered was out with her boyfriend. She then stayed and played cards on a crate used as a makeshift table with the deceased and Jordan whilst Shevonne was asleep. There was a knock on the door and the accused known to her as Twallie entered after announcing *"It's me, Twallie"*. He came inside and sat next to the deceased and Buren. The accused asked for a glass of cool-drink which she gave to him. He drank the cool-drink, put the glass down, stood up and shot the deceased. The deceased fell to the ground, as did she. Prior to the shooting, the accused said to Buren *"Forgive me for what I will do now"*. The accused then walked out of the house as if nothing was wrong. Buren closed the door behind him and she told Buren that she wanted to go home as she was scared. The incident occurred in the early hours of the morning of 10 December when people were on their way to work. She thereafter went home.

[19] She testified that the colour of the firearm was grey and that it was partly covered with black cello-tape. There was light coming from the back of the electrical box

on the wall in the room. The light was on when the shooting occurred and the accused had nothing obscuring his face. She knew the accused as Twallie as she used to visit her friend Britney in Kobus Road and she saw him as frequently as every second day. The accused was usually talking to his friends when she visited her friend. She testified that she knows one of the accused's friends OJ who is now deceased and that OJ was a member of the NTBs. Other than seeing the accused on the corner, she did not speak to him prior to the incident but she does know his mother through her grandmother. The accused's mother, Judy often visits her house. She described the accused's facial expression prior to the shooting as being angry. It was the first time that she had witnessed an incident like this and she was taken to the Gelvandale Police Station where she made her statement to Constable Yali.

#### **Warrant Officer Kelvin Swartboo**

[20] Based on the admissions, it was established that Warrant Officer Kelvin Swartboo of the SAPS, a crime scene investigator, technician and forensic fieldworker attended on the two crime scenes, collected four cartridge cases at Anita Drive and at 172A Kobus Road and he recovered one fired bullet collected on the floor inside the house and one fired cartridge case on the floor behind the crate. The accused formally admitted that these cartridge cases and bullet were collected and sealed and placed in tamperproof forensic evidence seal bags. The accused also admitted the subsequent dispatch of these exhibits for ballistic analysis and the correctness of the findings made in respect thereof set out below.

**Warrant Officer Wesley McLean**

[21] The admitted evidence of McLean, a warrant officer in the South African Police Services (SAPS) and forensic analyst in the Forensic Science Laboratory in respect of his ballistic analysis conducted on 12 December 2018 establishes the following in relation to the exhibits retrieved from both crime scenes: From the Anita Drive scene, McLean identified four 9mm Parabellum calibre fired cartridge cases designed to be fired by a centre-fire firearm and after conducting a comparison, he found that all 4 cartridge cases were fired in the same firearm (Exhibit "F").

[22] From the crime scene at Kobus Road, there was one fired bullet of 9mm calibre, one fired cartridge case of 9mm Parabellum calibre and the cartridge case was manufactured to be fired by a centre-fire firearm (Exhibit "J").

[23] McLean compared the above bullets and cartridge cases from both crime scenes with each other using a comparison microscope and established that the one 9mm Parabellum calibre fired cartridge case above and the four 9mm Parabellum calibre fired cartridge cases were fired in the same firearm (Exhibit "K"). McLean testified that the five (5) cartridge cases (4 from the one crime scene and 1 from the other) were all fired from a semi-automatic firearm as he had found firing pin marks indicative of a dropping breech which is only found in semi-automatic firearms. Only a semi-automatic firearm would leave cartridge cases, a revolver would not. *"The same firearm was used on the one scene and also on the other scene"*. It was not possible for two (2) firearms to make identical marks on a cartridge case.

**Dr Prudent Mgobo**

[24] The post mortem was conducted by Dr Mgobo on 19 December 2018. His report including findings and conclusions was also admitted in terms of section 220. The report records his findings that the deceased had a 1cm x 1cm gunshot entrance wound in the frontal area of the head. Dr Mgobo confirmed in his evidence that the deceased died as result of a head injury due to a gunshot wound.

**Constable Davian Piet**

[25] The next State witness was Constable Davian Piet who is employed by the SAPS in the Anti-Gang Investigative Unit. He had qualified in 2011 and had been based at the Gang Intervention Unit from 2015 and from 2017, his specific focus was on the Northern areas which includes Gelvandale and Helenvale where these incidents occurred. In summary, Constable Piet profiles arrested suspects; conducts searches of premises with uniformed members; photographs persons vacating these premises; gathers information on how gangs expand to enable the police to identify new faces in a gang and creates a database which he later uses to associate members of a particular gang with other members of the gang. He compiled a document handed in as exhibit "T". A map on "T1" entitled Gang Turf was prepared by him in which he identified the various territories occupied by gangs with the top centre marked in red being that of the Nice Time Bozzas. They were rival gangs with the Upstand Dogs and Nice Time Kids who are associated with each other. The Room Rats are associated with the Upstand Dogs and that the NTBs, the Upstand Dogs, the Nice Time Kids, and the Room Rats and Dondollas formed a huge association

which broke up. The Nice Time Kids broke away from the NTBs and they sided with the Upright Dogs. This split then precipitated a huge gang war during 2018 which is the context within which these events occurred. He identified the NTBs as occupying the biggest territory in Helenvale and stated that they were striving for bigger territory.

[26] He identified the place where the NTBs pack their drugs and store their firearms. He identified the area known as the Stoep in Kobus Road as the place where the NTBs frequently spend their time during the day. This was also referred to earlier by Benito Bosch as the place where he regularly saw the accused with NTB members. The NTB gang members were seen in Exhibit "T4" with their typical clothing brands. Their most dominant piece of clothing is Nike. He then identified on Exhibit "T5", the accused with a gang tattoo which is the loyalty tattoo from the 26 prison gang. He also identified Luciano Claasen, who had a tattoo on his arm and a haircut with NTB engraved on his head as a friend of the accused.

[27] He stated that he had personal knowledge of the accused's association with known NTB members through his work at the Gang Intervention Unit. Whilst patrolling the area he had observed the accused standing on the corners of Olifant and Voisen Roads where he would accompany fellow NTB members such as Elvardo Francis ('aka Viro or Tone'), Claudio Carelse 'aka Clobber') and Damian Brooks.

[28] He knew the accused prior to this case as he had received information about drugs and firearms being used by the NTBs and he went to three addresses that were given to him viz. 39, 45 and 56 Voisen Road. The police had spilt into three (3)

groups in order to avoid arriving at an address and finding that the drugs or firearms had already been disposed of at one of the other addresses. His group went to 56 Voisen Road, a known NTB drug post where he found three teenagers on the premises, one of whom was the accused. The eldest person at the premises was the accused who was with Diego Waits and Renaldo Roberts. Constable Piet stated that the homeowner was Johnny Bosman who was a member of the Upstand Dogs and the house was being used as a drug post. The accused replied that they were just sleeping at the house. He asked him why they were sleeping at the house and the accused answered that they could not sleep at their houses which are in the gang territory of rival gangs and that there are two different gangs. If they slept at their parent's premises, the rival gang would kill them. Constable Piet did not find any drugs or firearms there on that occasion but the group at 49 Voisen Road found drugs and loose ammunition. He took a photograph of the accused on this occasion.

[29] In response to Ms Coertzen, he stated that not everybody found on the premises is a gangster or that there is an assumption that everybody there belongs to a gang. Constable Piet reiterated that the accused mentioned that he cannot live at his parents' house due to the fact that he may be killed by the rival gang. This, he said, was an indication that the accused belongs to a certain gang.

[30] He identified various members of the NTBs including Claudio Karelse, Nunu Brooks who is the brother of Damian Brooks, Elvardo Francis and Maxwell Muller a convicted NTB member under the Prevention of Organised Crime Act. He described 172A Kobus Road where the deceased was killed as being in the area of the Nice Time Kids and Reginald Road and/or Anita Drive as the area of the NTBs (I mention

that this is where Benito was pursued and the shooting of Cassidy and Calvin Dolph occurred) He described it as being in the middle of the area. He referred to a Cheslyn McCabe whose alias is Chicklets and said that he was associated with the Honde Koppe Gang situated in Arcadia, who are in turn associated with the NTB gang.

[31] Constable Piet testified that the gang violence in the area is traditionally a fight for territory. The value of the territory was the fact that members of the gangs deal in drugs and extort money from business owners to expand the gang businesses. Once a person is arrested or charged with an attempted murder or murder, the gang itself would eliminate witnesses to set the accused free.

[32] Ms. Coertzen put it to the witness that the accused did not have the other markings and clothing of the NTBs, only the 26 tattoo and he confirmed that those were automatically obtained in prison. The accused's version is that he denies that he mentioned a rival gang and that he had told Constable Piet that the reason why he could not sleep at home is because he had an argument with his mother. She also put it to him that the accused denies being friends with Luciano Claasen but knows him by sight because they live in the same street. I found that Constable Piet's evidence was clear, reliable and credible as it was based on his personal observations and studying of gang activity over a period of time. His evidence of the accused's association with other NTB members and the place that the accused frequented is consistent with that of Benito and Veronique's evidence which I deal with later.

### **The defence case**

[33] The accused relies upon an alibi in respect of both events. He testified in his defence. Accused's defence is that on the 9<sup>th</sup> and 10<sup>th</sup> December 2018 he resided with his Aunt Ilse at 42 Reginald Road, Helenvale. He was employed by Uncle Elo as a hawker selling fruit and vegetables from Monday to Friday at Greenacres, Four Ways in Cape Road. He denied being a member of the NTBs. He does not know why Constable Piet testified that he saw him with Elvardo Francis. He denies knowing other NTB members such as Damian Brookes and denies hanging out on the corner of Voisin Road and Olifant Street with these persons. He has no idea whether these persons belong to any gang. The accused called no witnesses to support his evidence as to his alibi. The only tattoo he has is that of the 26 gang which only exists in prison and which he joined in order to survive in prison.

[34] He denies killing the deceased, Richard Stuurman but knew him from the area. He denies knowing the witnesses Benito Bosch and Veronique Jacobs.

[35] In relation to the Anita Drive shooting on 9 December 2018, the accused testified that he was at Greenacres in Cape Road selling fruit and vegetables after Uncle Elo had fetched him from his home between 07h00 and 08h00. He worked until after 17h00. Uncle Elo normally arrives at the location at 15h00 to bring him food and/or more goods to sell. He earned R100 per day. On the day in question, Uncle Elo collected him after 17h00 and before 18h00. He did not leave Four Ways at all on that day. He could not think of a reason for the witness to implicate him in the shootings. He remembers the date well as it was two (2) days subsequent to the day of 9 De-

ember 2018, and it would have been his younger sister's birthday. On 9 December 2018, he went to his Aunt Ilse's house where she lives with her 2 daughters and 2 sons. He did not leave the house on the evening of 9 December 2018. Had he left the house, the other residents would have known.

[36] In relation to the murder of the deceased Richard Stuurman, he was never at the Kobus Road house. He stated that the 10<sup>th</sup> December is his resting day. He denies having a firearm in his possession and never handled one. He was arrested on 21 January 2019 at Inyala Street. At that stage he was no longer staying with his Aunt Ilse but was staying at 44 Aandblom Street in Arcardia at the house of his Aunt May. He had left Aunt Ilse in January 2019 due to animosity between his mother and Aunt Ilse arising out of his failure to inform his mother that he would be residing at Aunt Ilse's house.

[37] He had never been approached by a gang member to shoot for them or eliminate a witness in a case. He was never instructed to kill Benito Bosch or Richard Stuurman.

### **Evaluation and Assessment of the evidence**

[38] It is trite that the State bears the onus to prove the guilt of the accused beyond reasonable doubt and conversely that there is no duty on the accused to convince

the court of the truthfulness of his explanation.<sup>3</sup> In *S v T*<sup>4</sup> Plasket J stated the following:

“The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof - universally required in civilised systems of criminal justice - is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. ...”

[39] In order to avoid conviction, an accused is not required to prove his innocence but merely has to provide an explanation that is reasonably possibly true.

[40] The State must not deal with every instant of doubt but prove its case beyond a reasonable doubt. In *S v Mavini*<sup>5</sup> it was said:

“It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the accused. Though the notion of 'moral certainty' has been criticised as importing potential confusion in jury trials, it may be helpful in providing a contrast with mathematical or logical or 'complete' certainty. It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction - in our case, the rules of evidence interpreted within the precepts of the Bill of Rights - remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.”

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<sup>3</sup> *S v V* 2000 (1) SACR 453(SCA) at 455b

<sup>4</sup> 2005 (2) SACR 318( E) para (37]

<sup>5</sup> 2009 (1) SACR 523 (SCA) para [26]

[41] In *R v Hlongwane*,<sup>6</sup> Holmes AJA in dealing with an alibi said that an accused must be acquitted if the alibi may reasonably be true.

“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.”

[42] The accused has relied upon such an alibi defence. His evidence as to the alibi must not be considered in isolation as it will not meet the required standard of proof but must be considered with the evidence in its totality.

[43] What is clear is that the witness Veronique in the Kobus Road shooting of the deceased, knew the accused and his mother by name, and she had frequently seen him and as such was able to identify the accused. Her close proximity to the accused (less than 2 metres away) at the time of the offence, and the light source in the room are factors which did not impeach this witness. Veronique was a credible and reliable witness although she has a Standard 2 education and presented her evidence rather simply. When relaying the sequence of events she did not hesitate and testified that there was no prior history between her and the accused. Ms Coertzen submitted that there were a few contradictions between her evidence in court and the statement made to Constable Yali.

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<sup>6</sup>1959 (3) SA 337 (A) Para 340H-341B

[44] In *S v Mkhohle*<sup>7</sup>, Nestadt JA held that:

“Contradictions per se do not lead to the rejection of a witness’ evidence ... They may simply be indicative of an error. (*S v Oosthuisen* 1982 (3) SA 571 (T) quoting from 576G-H)

... it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance and the bearing on the other part of the witness’ evidence. No fault can be found with his conclusion that what inconsistencies and differences there were, were of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observance and reconstruction.”

[45] Similarly in other decided cases regarding the statement made to the police it was held in *S v Mafaladiso*<sup>8</sup> that:

“... the juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce*, evidence and a previous statement) is, in principle (even if not in degree) identical. Indeed, neither case is the aim to prove which versions is correct, but to satisfy one’s self that the witness could err, either because of a defective recollection or dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by the court. Discrepancy in statement caused by one sentence only - can be interpreted in one of two ways - must be read in the context of the whole statement. First the court must ascertain what the witness meant to say in order to determine whether there was a discrepancy and the extent of the discrepancy. The court must take into account the following: the fact that a statement to the police

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<sup>7</sup> 1990(1) SACR 95 (A)

<sup>8</sup> 2003 (1) SACR 583 (SCA) 593e - 594a-h

was not subjected to cross-examination, language and colloquial manner of expression between the witness and the person who took the statement, and the fact that the police did not require any explanation of a statement. Secondly, not every error by or discrepancy in the statement affects the witness' credibility. Thirdly, the different versions must be evaluated holistically. This evaluation includes the circumstances in which the versions were given, reasons for the discrepancies, the effect of the discrepancies on the witness' credibility and whether the witness had sufficient opportunity to explain the discrepancy. Lastly, the witness' statement to the police must be weighed up against the witness' *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide the truth has been told despite any shortcomings".

[46] The contradictions which the defence counsel raised are firstly that in her statement to the police, she says that she left her house at 19h30. During cross-examination, the witness reiterated that she left her house at 21h30 as she had testified in her examination in chief. She had told the constable but he did not correct it. The second contradiction in her statement was that she stated that Shevonne went to sleep in her room and she continued to play cards. Veronique conceded that this was incorrect as Shevonne had slept in the same room where they were playing cards. Again Veronique stated that she did tell the policeman but it was not corrected. The third contradiction is that in her evidence before court, she had said that the incident occurred in the early hours of the morning when people were on their way to work and in clarification she said this was about 5am. In her statement to the police however, she states that the incident occurred when there were taxis outside and birds were singing and that it may have been 4am. She clarified this discrepancy by saying that the incident did not occur at 4am and that she did not hear this when the constable read the statement back to her and therefore she did not tell him that it

was incorrect. This in my view is a reasonable and plausible explanation for the discrepancy. Lastly, in her statement to the police, the firearm was described as being silver, and that when the accused came inside the house he had a firearm in his hand wrapped with cello-tape.

[47] Under cross-examination Veronique stated that she was confused when she gave the statement and that she was not listening when he read the paragraph and that she knew it was wrong. She stated that she was not herself when she gave the statement. In her statement she also said that the owner Buren closed the door and she saw Ricky bleeding in his face and then she went to wake up Shevonne. Veronique denied waking up Shevonne. She agreed that this too was incorrect. She was confronted with various omissions in her statement such as why she did not tell the detective that the accused looked angry when he came in. She stated that it was because she was confused. When asked why she failed to tell the detective that the accused had told Buren to forgive him for what he will do prior to the shooting, she stated that it was because it did not come to her mind but that she did tell the police this before she came to court. In my view, the nature of the contradictions are relatively trivial on close scrutiny such as the incident happened when taxis were heard as opposed to people going to work or 4am as opposed to 5am. The omissions referred are manifestly excusable as she was relaying a statement after a traumatic evening and she had not slept well and had witnessed a shooting at close quarters.

[48] I am satisfied in the circumstances that the contradictions between Veronique's *viva voce* evidence and the police statement are firstly not material and secondly, they are to be understood in the context of a young woman who did not waiver from

her evidence in chief and readily conceded the omissions in her police statement. They can be reasonably explained by her standard of education, the language barrier between her and the policeman and the fact that she is not able to read. Whilst the court has taken into account these contradictions with circumspection, I found Veronique to be a reliable and credible witness.

[49] Ms. Coertzen referred me to *S v Mthetwa*<sup>9</sup> wherein Holmes, J.A said *“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities”*.

[50] The effect of Veronique’s evidence on the accused’s alibi is to be examined. He states that he was asleep at that time and woke up and went to work. The accused has not provided direct evidence to gainsay Veronique’s evidence despite his testimony that he was at his Aunt Ilse’s house when this happened. Notwithstanding the application of the cautionary rule which is applicable to a single witness, Veronique

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<sup>9</sup> [1972] 3 All SA 568 (A)

provided sufficient evidence of her familiarity with the accused, his family and associates and places he frequents and her evidence should therefore be accepted as credible and reliable. Moreover, the caution I am required by the rule to exercise is satisfied by the corroborating evidence of Constable Piet as to the accused's associates and places he was seen with NTB members. Benito's evidence also corroborates Veronique's version with regard to his friends and where he commonly associated with his friends. The accused's denial that he knows either Benito or Veronique is not reasonably possibly true. There is no room for doubt as to her identification of the accused less than 15 hours after the shooting at Anita Drive. Benito also placed the accused whom he knew well in possession of a firearm of an identical description to that provided by Veronique. The forensic and ballistic evidence established that the cartridges and bullet were fired from the same firearm used at both crime scenes. Both Veronique and Benito unequivocally identified the accused as the shooter and both had sufficient prior knowledge of the accused, adequate time to observe the accused, adequate lighting and proximity to the accused to be certain as to his identity.

[51] It follows from the evaluation of evidence that I find Veronique a reliable and credible witness in relation to the shooting of the deceased at 172A Kobus Road. Her evidence was satisfactory in every material respect. Her evidence is also dispositive of the alibi defence upon which the accused relies. The accused's denial is not reasonably possibly true. The denial is rejected. Based on the proved facts, it follows that the accused's killing of the deceased was pre-meditated and that he had entered the Kobus Road home with the requisite intent of killing the deceased. I ac-

cordingly find that the State has proved beyond reasonable doubt that the accused is guilty of murder. Based on Veronique's evidence counts 8, 9 and 10 are established.

[52] Constable Piet's evidence on his profiling of gang members and his identification of the accused as a member of the NTBs based on his observations of him including the accused's association with other known NTB members, including Maxwell Muller who was convicted of a POCA offence, the accused's frequenting of the Stoep which is a NTB area with other known NTB members and his discovery of the accused at a NTB drug post where he admitted being concerned about a rival gang provides cogent evidence of the accused's involvement with a gang. Benito corroborated this by his evidence that he frequently saw him in the company of NTB members viz. Maxwell Muller, Nunu, Damian, Martin, Noel and Claudio. Veronique's evidence strengthened this as she testified that she had seen him in the company of the late OJ, a known NTB member. If the accused's membership and association of the NTBs is established, then one can draw the inference that the State's allegation that the accused was instructed to eliminate Benito as a witness in the forthcoming criminal trial is consistent with the proved fact that it was the accused who was identified as the shooter in possession of a firearm at both crime scenes and actively participated in a criminal gang. I find them all honest, credible and reliable witnesses. For the reasons that follow, it is also established that the accused's involvement in the commission of the offences below, means that he has performed or participated in a pattern of criminal gang activity. Counts 1 and 2 are accordingly established.

[53] The accused's alibi in relation to the Anita Drive shooting is not reasonably possibly true. Whilst the accused stated that Uncle Elo, his employer would not testify on

his behalf as he did not want to be involved in gang related matters, he could have called Aunt Ilse or one of her 4 children whom he claimed were present at the house and would have seen him leaving the house. Mr Ahmed for the State correctly submitted that when the accused was arrested, he failed to raise the alibi defence which would have enabled the State to investigate its veracity. Mr Ahmed submitted that the accused's mendacity was apparent from two statements to the police where he stated to Constables Yali and Peta that he was unemployed. This he argued was destructive of his alibi that he was at work on 9 December and asleep at home on 10 December then he went to work. In his examination in chief, the accused described how he spent the entire day on 9 December 2018 at work. Mr Ahmed submitted that the 9 December 2018 was however a Sunday and the accused had stated under cross examination that he did not work on a Sunday as it was his day of rest. The accused also stated that he was home on 10 December 2018 and went nowhere as it was his rest day. When confronted with these contradictions, the accused feigned confusion as to the dates and days.

[54] He submitted further that the accused lied in this court about having only one child as he had deposed to an affidavit in his bail application that he has a four year old child residing with his mother (Exhibit "U", page 2, lines 19 and 20). The accused's explanation under cross examination that he was referring to his aunt's daughter's child who lived at Aunt Ilse's house was nonsensical, so Mr Ahmed argued. Mr Ahmed submitted that the accused also lied when he told the court that he was staying at 44 Aandblom Street in Arcadia at the time of his arrest. This was borne out by the affidavit in the bail application by Wendy McCabe, the owner of the home at this address when she stated that the accused does not reside at her prem-

ises but that she had seen him visiting Cheslyn McCabe (Exhibit “U”, page 17, line 23).

[55] I found the accused to be an unreliable, evasive and argumentative witness who frequently and expediently adapted his evidence when confronted with these discrepancies. His versions put to the witness Veronique were contrary to his answers under cross examination and his employment status which was critical to his defence is not reasonably possibly true in light of his statement at the time of his arrest that he was unemployed. He was dishonest and not credible. Ms Coertzen conceded that he was a poor witness but argued that this did not mean he was guilty.

[56] In *R v Blom*<sup>10</sup> Watermeyer JA observed that:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

[57] Ms Coertzen submitted that although the shots at both crime scenes were fired from the same firearm, the shooter was not necessarily the same person. The infer-

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<sup>10</sup>1939 AD 188 AT 202-203

ence that should be drawn that it was the second person who initially walked with the accused is rejected as the facts viewed as a whole exclude this inference. Benito's certainty about the accused pursuing him with a firearm when he walked faster and ran, shots being fired from behind him where he had last seen the accused and William's corroborative evidence that Benito ran past him and then the man on the pavement fired shots which hit his cousins excludes the defence's suggested inference that it was the second man originally on the scene. The accused's version that he was at work on 9 December 2018 contradicts his own version that Sunday was his rest day. Based on an evaluation of Benito's evidence whom I found to be credible, reliable and spontaneous in relation to the accused's identity viewed with the evidence of William Dolph whom I also found to be honest and forthcoming, the accused's reliance on an alibi is destroyed.

[58] Benito's evidence that the accused attempted to kill him is consonant with Veronique's evidence which placed the accused at Kobus Road within 15 hours of the shooting at Anita Drive. Both Benito and Veronique's identification of the accused as the shooter at both crime scenes seen with the same firearm is consistent with the ballistic and forensic findings that the shots at both crime scenes were fired from the same firearm.

[59] Mr Ahmed submitted that the accused should be convicted of attempted murder on the basis of *dolus eventualis* in respect of the shots which injured Calvin and Cassidy. He submitted that the accused ought to have known that in discharging shots at Benito who was fleeing, other people in the vicinity could be injured.

[60] In *S v Siwahla*, Holmes JA said <sup>11</sup> *“The fact that objectively the accused ought to reasonably have foreseen such possibility is not sufficient. The distinction must be observed between actually went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the foreseeability must not become blurred. The factum probandum is dolus, not culpa. These two different concepts never coincide”*.

[61] It is not is dispute that there were people in the street at the time the shots were fired including William, Calvin and Cassidy. The accused had the direct intention to kill Benito and he should have foreseen that by shooting him, the bullets might strike other people yet he went ahead. That he had such intention to shoot Benito is clear from the evidence and when he fired four (4) shots in a crowded area, I find that he was aware and considered it a reasonable possibility that by shooting Benito, he might miss him and hit others but he recklessly proceeded with the shooting. When all of the evidence is considered in its totality, the conclusion is inescapable that the accused was in possession of a firearm and ammunition at both Anita Drive and Ko-bus Road and that he fired the shots which killed the deceased and the shots intended to kill Benito which injured Calvin and Cassidy. His bare denial of being there and his version is not reasonably possibly true. In the circumstances, counts 3 to 7 are established.

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

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<sup>11</sup> 1967(4)SA 566(A) AT 570B-F

The accused, Walter Williams, is found GUILTY on COUNTS 1, 2, 3, 4, 5, 6, 7, 8, 9 AND 10.

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**S MOODLIAR**

**ACTING JUDGE OF THE HIGH COURT**

**COUNSEL FOR THE STATE:**

Adv Ahmed instructed by the National  
Director of Public Prosecution, Port  
Elizabeth

**COUNSEL FOR THE ACCUSED:**

Adv Coertzen instructed by Legal Aid,  
South Africa