



IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Not Reportable

CASE NO: CC16/2020

In the matter between:

THE STATE

And

REVALDO KLAAS

ACCUSED

Coram: Govindjee AJ

Heard: 19 January – 27 January 2021

Delivered: 29 January 2021

JUDGMENT

GOVINDJEE AJ:

Background

1. Enrico Kasterivier (“the deceased”) was shot in Arcadia, Port Elizabeth, on 26 May 2019. He suffered multiple gunshot wounds to the head and body and died as a result of these injuries. The accused was charged with his murder, together with charges relating to statutory infractions of the **Prevention of Organised Crime Act**, 1998¹ (**POCA**) linked to gang activity, and contraventions of the **Firearms Control Act**, 2000 (**FCA**).² I do not deem it necessary, for purposes of this judgment, to repeat the contents of the seven charges in the indictment. I direct that the indictment (including the preamble thereto related to criminal gang activities and the summary of substantial facts) be treated as if specifically incorporated at this stage of my judgment.
2. For ease of reference, however, it will be useful to deal with the charges under separate heads:
 - a. **Counts 1 and 2** deal with the accused’s alleged participation in criminal gang activity in contravention of **POCA**.
 - b. **Count 3**: Murder.
 - c. **Counts 4-7**: Unlawful possession of a firearm and ammunition on 26 May and 7 June 2019.
3. Pleas of not guilty were entered for each of the charges. Various admissions pertaining to the crime scene investigation work (including forensic ballistics

¹ Act 121 of 1998.

² Act 60 of 2000.

analysis) of the police were recorded in terms of section 220 of the **Criminal Procedure Act** , 1977 (CPA).³

The State's case

4. Warrant Officer Zakhele Mhlanga testified that he was attached to the Ballistics Section of the South African Police Services (SAPS), operating from the Forensic Science Laboratory. He compared two cases emanating from Bethelsdorp Police Station with one another on 12 August 2019. Various bullets that had been fired were successfully matched against “test” bullets following microscopic individualisation of fired bullets stored in the Internal Ballistics Information System. The unique marks on bullets left by firearms made this analysis possible. The witness was able to conclude that the bullets analysed (and reflected in Exh D, which were found at the scene of the shooting of the deceased) were fired from the same firearm (a Taurus Revolver with Serial Number JD76537, as admitted in Exh E). It was not in dispute that this was the weapon found in possession of the accused when he was arrested on 7 June 2019.

5. Constable Davian Piet from the Provincial Organised Crime Investigation (Anti-Gang) Unit also testified. He had been employed by the SAPS for ten years and spent 3 years working in the Anti-Gang Unit. His duties included profiling arrested persons, gathering information in the Northern Areas of Port Elizabeth, conducting searches, photographing premises and storing data relating to gang membership and activity.

³ Act 51 of 1977.

6. According to Constable Piet, the accused had been profiled by the Anti-Gang Unit on various occasions and was a member of the “Honde Koppe” gang. This gang was in constant conflict with a smaller grouping, the “G-Stars” gang, and their long-standing interactions were described as a gang war. The history of this conflict and gang alliances and associations were detailed by Constable Piet. The reasons for the acrimony related largely to gang territory and turf, which was linked to the economy of the gang and their ability to generate funds through illegal activities such as selling drugs, abalone poaching, theft of motor vehicles, house robberies and business robberies.
7. Gang members were required to prove loyalty to their gang. They could, for example, be given a firearm to shoot a member of an opposing gang and would then return that to the owner, who would pass the firearm onto another gang member for safe-keeping at a house some distance away from a drug post. Gang members were typically vulnerable and young, seeking a sense of belonging, desiring protection or living in poverty. Firearms could, alternatively, be stored with a gang member who lived in the midst of another gang’s territory for purposes of protection.
8. Constable Piet also explained the contents of a photo album he had compiled (Exh G). In particular, tattoos on the lower right leg of the accused were photographed and highlighted because they depicted the letters “NBA”, signifying the phrase “Never Broke Again” and a gang’s intention to make money. Various other alleged gang members tattooed with the letters “NBA” were also depicted. So-called “hand insignia” and “emojis” utilised by various

gangs were also described, particularly the depiction of a dog by splitting the index finger from the little finger on one hand. Social media posts related to the Honde Koppe gang were provided, in order to demonstrate that all members of this gang used the same “dog” hand insignia when communicating or posting messages on social media. Photographs of graffiti inscriptions of “NBA” on walls and small buildings were also provided, demonstrating the territory of the Honde Koppe gang given their proximity to known drug posts in areas such as Arcadia and Bloemendal. The witness also testified that although members of gangs did not adopt a particular colour, as is the position in the United States of America, members of the Honde Koppe gang frequently wore Nike branded T-Shirts and jackets, K-Way branded beanies and branded caps. An organogram of sorts, prepared by the witness, demonstrated the alleged members of the “Honde Koppe: Arcadia (“Kaffer Boys”) group, including the accused. The members of the “G Stars and Kalawa-Bouers (affiliated to the Spotbouers)” gang, led by Garth Bustin, were also depicted, together with Levandre Louw, whose testimony is reflected below. The different gang territories, cross-pollination and shootings in different territories were explained and depicted (Exh H). Jenneker Street was shown as G-Stars territory. Drug posts and people reporting to gang leaders and their gang affiliations were also depicted (Exh I). The witness confirmed that the normal response to a gang-related shooting would be revenge and retaliation.

9. Under cross-examination, Constable Piet testified that it was not difficult to distinguish gang members from civilians. A person would be found in different

areas associated with the same gang and a person loyal to a gang would also brand himself accordingly and not tattoo himself in that fashion otherwise. It was unknown, from the witness' experience, for a non-gang member to tattoo themselves with a gang tattoo. The accused was specifically considered to be a member of the Honde Koppe gang because of his associations and his tattoo. He had been found to be present at different drug posts on various occasions, associating with other known gang members. This was a dangerous gang and young people refusing to do their bidding would not be considered trustworthy and could be labelled as traitors, possibly being injured or killed for failure to follow an instruction. It was specifically put to the witness that the accused's case was that he was not a member of the Honde Koppe gang, and that he was instructed by another person, a gang member, to keep the firearm that was found in his possession on the day of his arrest. A single photo was produced in evidence demonstrating the accused in the presence of gang members, and the witness also relied on the photographs of the accused's tattoos already described. The witness also testified under re-examination that it would never be the case that a gang member would give a gun to a civilian for safekeeping and it was also abnormal for civilians to be associating with gang members at drug posts. Recipients of firearms transferred from gang members would be other gang members. The witness' opinion was that the accused lived in an area where he may need to defend himself from G-Star members, who were dangerous, and a firearm could be necessary for protection. His evidence was based on personal observations and the study of gang activity in the Northern Areas and was clear and credible.

10. Sergeant Ulysses Mclean testified that he had been stationed at the Anti-Gang Unit for more than four years, having been employed by SAPS for 12 years. He had been on duty on 7 June 2019 in Arcadia and had been part of a convoy searching for the accused. The witness was in a Renault Duster together with Sergeant Uithaler, who was driving, and another person who was expected to point out the accused. While driving in Rensburg Street that person noticed the accused as the vehicle in which they were travelling passed him on the road. Sergeant Uithaler called Captain Kriel, who was in a "following vehicle", while driving. It was Captain Kriel who stopped first to apprehend the accused. The Renault Duster made a U-turn and the witness confirmed with the other passenger the identity of the person being pointed out. Sergeant Mclean alighted from the vehicle and searched the accused, finding a black gun placed in the front of his pants underneath a shirt or T-shirt. The accused confirmed that this was a real gun, after which Sergeant Mclean, suspecting him to be holding the firearm without a permit, arrested him for unlawful possession of a firearm, read him his rights and contacted the forensic unit to take photographs and DNA and to confirm if this was a real gun. The accused was handcuffed and placed in the police bus. Constable Ceasar arrived on the scene thereafter to safely remove the gun. He took possession of the firearm and five live rounds were observed inside the weapon. Photographs taken of the accused at the time were also submitted (Exh J), together with an affidavit from Constable Ceasar. It was admitted by the accused that the firearm and cartridges collected were correctly handled and packaged prior to submission to the Port Elizabeth Forensic Science Laboratory.

11. The witness did not see anybody with the accused at the time and testified that had there been somebody present, that person would also have been searched. He had a vague memory of the incident, being unable to remember various details. He confirmed that he only saw the accused once the Renault Duster had been turned and stopped, by which time Captain Kriel was already at the scene and holding the accused.

12. Levandre Louw testified that he was 20 years old. He had left school because of incidents of fighting at the age of 15 and was still in grade 4 at the time. He suffered from learning disabilities, was unable to read or write and was unemployed. He was a member of the G-Stars gang and lived close to the leader of that gang, Garth Busten, together with friends who were also G-Star gang members. He was friends with the deceased, who resided with him. Louw admitted using drugs during 2019, including cocaine, mandrax pills, tik and dagga, but testified that he had not used drugs and was not under the influence of drugs on the day of the incident. He knew the accused from their days at school, as they attended the same school around the same time, and the accused was in a lower grade. The accused resided at 1 Niekerk Street and was a member of the Honde Koppe gang, going by the alias "Baba". The accused walked around with members of that gang, who were his friends, and spent time with them at the drug post. The witness had last seen the accused three to four weeks prior to the incident at his home, while the witness was at the shop. Prior to that, the witness had not seen the accused for some time because he (the accused) was in prison. Prior to that, he would see the accused two to three times per week. The G-Stars and Honde Koppe gangs

were fighting about drug posts (establishments for the sale of drugs) and territory.

13. On 26 May 2019, the witness was at his home at 22 Jenneker Street. He went to Garth's place, across the road, to spend time with him after 10 am. He was asked by Garth to look for the deceased with a person named Gary, who had since passed away. The deceased was supposed to buy baked beans and was taking long to return. They knew to look for him at the shop and were unarmed. Walking around the bend in the road towards the shop the witness saw the accused standing there together with the deceased. Nobody else was observed in the street. The front of both the accused and the deceased faced the witness, with the accused standing behind the deceased, approximately 20 metres away from the witness and two metres behind the deceased. A map of Jenneker Street, demonstrating the curve in the road, the position of the witness in relation to the accused at the time of the incident and the shop towards which the witness was walking was provided (Exh K). The accused was wearing a blue hooded top, with the hood pulled up to just over the eyebrows, grey short pants and a pair of morning slippers. His face was recognisable to the witness. He was holding a black gun but the witness was unable to identify it further. The gun was held by the accused with both hands and outstretched away from his body pointing away from him. The gun was pointed at the deceased, who was two metres away from the accused. The witness heard a gunshot and he and Gary fell to the ground. The deceased had fallen, without saying anything, but holding the back of his neck with his right hand. He lay motionless. The witness lay on top of his folded arms with

his chin resting on his arms in order to observe the scene. Two more shots were heard and the accused was observed still standing and holding the gun in the same position, pointing the firearm at the deceased from a distance of approximately two metres. The accused was then observed running into Niekerk Street and the witness then went to the body of the deceased to see if he was still alive. The incident had lasted approximately seven seconds. He then returned to Garth to advise him that the deceased was lying dead in the street. He did not return to the scene as there were members of the Honde Koppe there and it was a dangerous area, which is why he had been accompanied by Gary in the first place. A few weeks prior to this, there was a shooting incident in the area of the Honde Koppe, and the deceased had been said to have been involved in shooting somebody known as "Kakker". When this occurred, revenge would be the norm, in the form of a retaliatory shooting.

14. There were various shortcomings in the testimony of Louw. During cross-examination he was somewhat hesitant about whether the second and third shots he had heard were fired by the accused holding the gun in one hand or two. He initially clarified that Garth had asked him who the shooter was and that he had advised Garth that it was the accused and that he had seen the accused shooting the deceased. He contradicted himself subsequently, stating that he had told Garth about the shooting before being asked. The witness was vague as to whether Garth had called the police himself, or whether he had requested him to do so. The witness also insisted that he had seen the police and made a statement the day after the shooting on 27 May

2019. In fact, it is clear that the statement was only made on 4 June 2019 (Exh L). Part of this statement is as follows:

“Ek sien dat @Baba (the accused) op @Tand (the deceased) skiet. Ek en Gary het toe plat geval. @ Baba hardloop toe ‘n stukkies weg vanaf @ Tand. @ Tand was toe ook reeds op die grond gewees. Ek sien toe dat @ Baba weer omdraai en weer op @ Tand skiet. @ Baba het toe weggehardloop.” (own emphasis).

The reference to the accused running away from the deceased before turning and shooting the deceased again is different to Louw’s testimony in Court.

15. Captain Kriel was the final State witness. On 7 June 2019 he had been in Rensburg Street tracing suspects. He confirmed much of the testimony of Sergeant Mclean that a witness travelling in the Renault Duster they were driving in had identified the accused and Sergeant Uithaler had called him to confirm this. Captain Kriel had not seen anybody walking with the accused immediately prior to accosting him. The accused had been between 20 to 30 metres away from him at that time and had there been somebody else present he would also have been asked to make a statement, which was standard protocol whenever somebody was arrested with a firearm in the presence of somebody else. He had secured the accused and arranged for a photographer, Constable Ceasar, from the forensic division to take photographs and undertake the necessary tests.

16. Under cross-examination, Constable Kriel was asked to comment on the distances indicated by Louw during his testimony in relation to Exh K, as he was familiar with the area in question. His evidence confirmed that the distance between where Louw had indicated he was standing in relation to the accused at the time of the shooting was approximately 20 to 30 metres.

The defence case

17. Following the closure of the State's case, the accused testified that he was 17 years old at the time he was charged with murder. He had finished grade 7 before leaving school in 2017 and lived with his grandmother, mother and two nephews in Niekerk Street, Arcadia. He denied involvement in the deceased's murder and testified that although he was not a gang member, he did associate with and sit with gang members who were his soccer friends.

18. On the day of his arrest, the accused had been in Rensburg Street with a friend named Dwayne, who was a Honde Koppe gang member and now deceased. They were walking to the Department of Home Affairs to collect an identification document. He was then asked to keep a gun for Dwayne and declined. Dwayne informed him that the police would not search him as he was a minor. The manner in which Dwayne communicated, and his body language in particular, made the accused scared and he took the firearm. Dwayne had spoken to him in an aggressive manner and he testified later that he had been forced to take the firearm. It was at this point that the police had arrived. He was still conversing with Dwayne at the time and the police let Dwayne go, without speaking to him. The accused testified that he had not

first been apprehended by either Sergeant Mclean or Captain Kriel, although these two officers had searched him. He felt shocked as he knew that he had done nothing wrong. A police officer grabbed him, asked if his name was Baba and told him that he was wanted for attempted murder. He was taken across the road and the other police officers then came closer, searched him, found the firearm and asked him if it was real. When he indicated that it was, he was handcuffed, photographs were taken of him and he was placed in custody.

19. Regarding the NBA tattoo on his leg, the accused indicated that this referred to the Young Boy rapper group and the fact that he had this tattoo was unconnected to the Honde Koppe gang. The accused had heard about the murder on the day it occurred as the story went around the neighbourhood and he lived close to the scene of the crime.

20. Under cross-examination, the accused could not explain why his reference to the link between his tattoo and the Young Boy rapper group was not put to Constable Piet. He indicated that he had not had the opportunity to mention this to his counsel, despite admitting that the Court had adjourned to afford him the opportunity to give instructions immediately prior to Constable Piet's cross-examination.

21. The accused admitted to looking up to the gang members but initially denied that the NBA tattoo was associated with the Honde Koppe gang specifically. The accused had not copied the tattoo from this gang despite this version

having been put to Constable Piet. The accused later conceded that he may have copied the tattoo if this was the version that had been put by his counsel, and admitted that the tattoo was used by the Honde Koppe gang.

22. The accused testified that he had thought twice before deciding to tattoo himself with the NBA letters, which is why the letters had been camouflaged, and had done so to impress his friends. He denied that these were Honde Koppe associates and indicated that his Honde Koppe friends had never really seen his tattoo despite the accused admitting to socialising with, visiting and smoking with these gang members. He initially denied having been with gang members at drug posts and contradicted himself repeatedly as to whether he had been found by Constable Piet on various occasions at different Honde Koppe drug posts. He could not provide a satisfactory explanation as to why this version had not been put to Constable Piet on his behalf.

23. The accused was unable to provide any details about his time with Dwayne on 7 June 2019. He had no recollection of where they had met each other that day. He indicated under cross-examination that they were not really friends, but lived in the same vicinity. At one point he indicated that all Honde Koppe gang members living in his area were his friends. He also testified, by contrast, that he was generally scared of Honde Koppe gang members because of what he heard people say about them.

24. The accused indicated that he had failed to think about the consequences of keeping the gun at the time it was given to him. He had also never mentioned this to the police because of fear of the repercussions. The accused could not offer any explanation as to when he had heard that Dwayne had passed away, although he recalled seeing a photograph with "RIP" written on it. He knew Louw since Primary School days although he did not see him regularly. He would recognise him immediately if he saw him and there was no bad blood between the two.

25. On 26 May 2019, the accused had been in Aandblom Street standing in a passage with civilians who were also soccer players. He had been drinking with these friends the previous night and had not slept. The accused could not remember a single one of their names and could not recall if he was sober on 26 May 2019, when he had left Aandblom Street, or where he had gone thereafter. He could also not remember when next he visited his home. He blamed this on being under the influence of liquor and on the time subsequently spent in prison but was unable to comment on how drunk he had been at that time. He testified that in any event these people were minors and would not come to Court to advise that he had not been involved in the shooting. He had never informed the Investigating Officer about the possibility of this alibi.

26. Elton Uithaler testified that he was a Sergeant working with the SAPS Anti-Gang Unit in Port Elizabeth on 7 June 2019, but was no longer in police service. He had been on duty when the accused was arrested and had

travelled with a witness from Jenneker Street, driving through Arcadia. While in Rensburg Street, that witness had pointed out the suspect who was walking with another unknown person. Uithaler had contacted Captain Kriel and parked his vehicle on open terrain in front of Desai's, approximately 100 metres from the suspect and able to see him and his companion. The witness contacted Captain Kriel again, who advised him that he was a minute and approximately 400-500 metres away. Another SAPS vehicle then rode past the suspect and Uithaler, which caused him to believe that the suspect might have seen this and would run away. As a result, Uithaler left his witness in the vehicle and ran across the road. The suspect had his back towards him and could not see him approach until they were eight to ten metres apart. He told the suspect to stand still and again called Captain Kriel to advise him of the situation. He took the suspect to a SAPS vehicle he had observed across the road, and handed him to Constable Mclean who searched him and found the firearm in his pants. Captain Kriel and other SAPS members had also stopped at that spot. Uithaler left the suspect with them and went back to his vehicle to take the witness home. He had at some point mentioned to the suspect that he was arresting him for attempted murder. That person's nickname was Baba, a person he later came to know as the accused.

27. Under cross-examination, Uithaler admitted that his recollection of the events in question was poor. He had been in a hurry at the time his statement was compiled and the process of arresting the accused was more hurried than usual, in part because the suspect was a minor and the police were keen to process his arrest swiftly. Various errors had been made in writing out the

statement and it was possible that he had also erred in suggesting in his statement that he had been travelling alone with the witness at the time the accused had been seen. He admitted to being confused about the events of 7 June 2019. Uithaler's version of events relating to the moment of arrest corresponds with that of the accused and stands in contrast to the evidence of Captain Kriel and Sergeant Mclean. While Kriel was a good witness, on his own version he had received the call from Uithaler at the time and may have been mistaken in thinking that Mclean was travelling with him. In my view, this discrepancy is ultimately not material to the judgment in this matter and it may be assumed to the benefit of the accused that he was first arrested by Uithaler, who was not travelling with Mclean at the time and who had seen him walking with somebody else immediately prior to his arrest.

Analysis

28. The accused faces various charges emanating from the alleged murder of Enrico Kasterivier on 26 May 2019. It is suggested that the killing was gang-related, and that the accused also contravened various provisions of the **FCA**. The test to be applied is whether the State has proved the guilt of the accused beyond reasonable doubt.⁴

29. The eye-witness account of Levandre Louw ultimately points directly to the accused being the perpetrator of the crime of murder. The accused denies the charge and these two mutually destructive versions of events require resolution.

⁴ See *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

30. The evidence of Louw, who was the single witness to testify regarding the deceased's death, must be treated with caution and its veracity subjected to scrutiny. This is particularly because Louw would hold a natural bias against the accused, because of the alleged rival gang allegiance. He also had a close relationship with the deceased, who lived with him. Special consideration also needs to be given to the issue of the identification of the shooter, given that the accused's defence focused on this and because Louw's identification of the accused was in dispute.

31. Section 208 of the **CPA** provides that an accused may be convicted of any offence on the single evidence of any competent witness. In **S v Webber**,⁵ it was held that although the evidence of a single witness should be approached with caution, such evidence ought not necessarily to be rejected merely because the single witness happens to have an interest or bias against the accused. The correct approach is to assess the intensity of the bias and to determine the importance thereof in the light of the evidence as a whole.⁶

32. Where the identity of the perpetrator of a crime depends on human observation and is in dispute, the Court must exercise further caution in carefully considering all the surrounding circumstances before deciding whether the State has proved beyond reasonable doubt that the accused is the perpetrator. Reliability of observation is also of fundamental importance. As the Court held in **S v Mthetwa**:⁷

⁵ 1971 (3) SA 754 (A).

⁶ PJ Schwikkard and SE van der Merwe (eds) *Principles of evidence* (Juta) 2016 595. Also see *Nhlapo v Rex* (AD 10 November 1952) cited in *R v Bellingham* 1955 (2) SA 566 (A) at 569.

⁷ [1972] 3 All SA 568 (A); 1972 (3) SA 766 (A) at 768A-C.

“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...”

33. Louw, although illiterate and suffering from learning disabilities, was certainly a competent witness who made a generally favourable impression as a person speaking honestly. He knew the accused well as they had grown up together and was able to recognise him immediately when entering the scene before the first shot was fired. The accused himself confirmed that he knew Louw well as they were at school together. Louw was clear that he had seen the accused shooting the deceased and denied that his testimony was a form of retaliation as part of the ongoing gang warfare.

34. The witness could not recall the clothing worn by the deceased or Gary at the time of the incident and freely admitted that he could not remember such details. He was also adamant that he had only heard three shots, even when

it was suggested to him that the police investigation revealed four bullets found in the body of the deceased. The witness only remembered hearing three shots and did not modify his version which appeared to be drawn from his actual recollection of events. When asked why he could remember the accused's clothing so well he said "Because that's what stuck in my mind and my 'bra' was shot just in front of me...he was wearing bright clothing and I could see what he was wearing".

35. Louw appeared to be a credible eye-witness to the shooting incident, and his version of events was barely shaken in cross-examination. Barring the issue of date and time, the contradictions and omissions in his testimony, detailed above, were minor and consistent with honest testimony based on his recollection of events.⁸ It was clear that the witness did not have a proper concept of time, and could not appreciate the difference between minutes and seconds. His recollection of the date on which he had made his statement to the police was plainly wrong. While this may be attributed to his level of formal education and learning disabilities, these shortcomings must be considered together with the totality of the merits and demerits of his testimony in order to determine whether his evidence as a whole may be considered to be trustworthy.

36. Louw's demeanour was certainly that of a person telling the truth and he displayed no malice or resentment to the accused while testifying, creating the impression of a person who was genuinely sad about the passing of a friend

⁸ On the relationship between certain errors and contradictions on credibility, see *S v Mkhle* 1990 (1) SACR 95 (A) at 98(f-g) and *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SEC) at 437g.

and who wanted to explain to the Court what had occurred at the time of his demise. Although he spoke softly at times, he was clear and unequivocal in relation to the accused and his actions on 26 May 2019. He stood firm in his description of the accused on the day of the shooting, and performed various demonstrations about the shooting and his physical position at the time clearly to the Court. He was also thoughtful and appeared to weigh his words with appropriate consideration before responding to any questions. His answers created the overall impression of honesty, particularly because there were few material contradictions, inconsistencies or improbabilities in his version of events.

37. Louw's evidence identifying the accused as the shooter also appears to be reliable, particularly given his proximity to the accused and opportunity for observation (also bearing in mind the time of day of the shooting and the time he had to observe the scene), coupled with his prior knowledge of the accused. As the Appellate Division noted in ***R v Dladla and Others***:⁹

“One of the factors which in our view is of the greatest importance in a case of identification, is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased...What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.”

⁹ 1962 (1) SA 307 (A) at 310.

Despite the shortcomings identified in his testimony, Louw's version that the accused was a member of the Honde Koppe gang and had intentionally shot and killed the deceased must be believed as truthful, also when considered together with the assessment of the accused's denials which follows, and the totality of evidence presented.

38. The accused's version of the material events, in contrast to the testimony of Louw, is such that it cannot be reasonably possibly true when properly tested. His version was inherently improbable in many ways, including why Dwayne would have given a firearm to a non-gang member for safekeeping while walking on a public street immediately prior to his arrest. His version was also replete with inconsistencies, omissions and lack of candour, as is evident from the summary of his testimony that has been included in this judgment. His response even to seemingly innocuous questions was constrained and his testimony was not that of a person coming forward to shed light on the truth of what had occurred and his movements at the time.

39. While Mr Schoonraad rightly conceded that he was not a good witness, it cannot be said that this was only because he may have wanted to protect other people. He appeared to be hesitant at times during his testimony, looking down occasionally. He also appeared to be flustered when contradictions in his testimony were pointed out, retorting with a sarcastic question at one point and seemingly weighing up what would appear to be best for his case before answering. The vagueness in his responses as to his whereabouts and actions on 26 May 2019 was particularly notable,

demonstrating an apparent partial recollection of events and selective memory. To the extent that the accused relied on an alibi defence, this must be considered in the light of the totality of the evidence in the case and the Court's impression of the witnesses.¹⁰ On all the evidence, particularly the absence of any credible testimony regarding such an alibi, I find that there is no reasonable possibility that this suggestion is true.

40. The shortcomings in the testimony of the accused appear to be caused by dishonesty rather than anything else.¹¹ His denials relating to the shooting and gang membership are not reasonably possibly true and must be rejected. He was caught in the act by Louw, a person who knew him well and could identify him easily, and later found to be in possession of the firearm that had been used to shoot the deceased. His version that he had received the firearm from Dwayne on 7 June 2019 must also be rejected as false given the totality of evidence available. Given the respective gang affiliations and the recent shooting of a Honde Koppe gang member, there was also a motive for the shooting.

41. In my judgment, the evidence adduced on behalf of the State accordingly proves the accused's guilt on the charge of murder (count 3) beyond a reasonable doubt.

42. It follows from the finding that the accused was the perpetrator of the murder that he has also been proven to have been in possession of a firearm and an

¹⁰ *R v Hlongwane* [1959] 3 All SA 308 (A) 311-312; 1959 (3) SA 337 (A) 340H-341B.

¹¹ On the risk of a wrong conviction being reduced where the accused turns out to be a lying witness, see *Tshiki v S* [2020] ZASCA 92 par 42.

unknown number of live rounds of ammunition on 26 May 2019. No evidence has been offered that the accused was licenced to possess the firearm and ammunition either on 26 May or 7 June 2019,¹² and he must accordingly also be found guilty on counts 4, 5, 6 and 7 in the indictment.

43. Finally, as to the gang-related charges, the evidence of Constable Piet confirms clearly that the Honde Koppe constitute a criminal gang as defined by **POCA**. The evidence, including the photographic evidence presented, demonstrates that the accused frequents the Honde Koppe gang's area and has adopted a tattoo associated closely with this gang. He admits to socialising and associating with known members of the Honde Koppe. The accused's denials about his gang affiliation must be rejected when the totality of evidence, including Louw and Piet's testimonies, his tattoo and association with gang members and Honde Koppe drug posts, is considered. When considering the provisions of section 11 of **POCA**, it is clear that the accused must be found to be a member of the Honde Koppe criminal gang at the time of the offences for which he was charged.

44. To secure a conviction for gang-related offences under POCA requires more than merely proving the underlying predicate offences.¹³ In **S v Jordaan and others**,¹⁴ the Court held that the expression 'to aid and abet' cannot apply to the principal actor, only to a person who assists him.¹⁵ As correctly conceded

¹² See s 250(1) of the CPA.

¹³ See *De Vries v The State* [2011] ZASCA 162 at par 48.

¹⁴ [2017] ZAWCHC 131 par 134.

¹⁵ See *S v Solomon and others* [2020] ZAWCHC 116 par 924. Also see SV Hooror (ed) *South African Criminal Law and Procedure Volume III: Statutory Offences* (Juta) (2011) par B4-46 on this offence constituting an extension of the doctrine of common purpose.

by Ms Landman, there was no evidence that the accused *wilfully aided and abetted* any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang activity, and the accused must be found not guilty, acquitted and discharged on count 1.

45. For the accused to be found guilty under section 9(2)(a) he must have performed “any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity.” This “pattern of criminal gang activity” is defined in section 1 of **POCA** to include “the commission of two or more criminal offences referred to in Schedule 1: Provided that...the last of those offences occurred within three years after a prior offence and the offences were committed –

a. on separate occasions...”

46. Schedule 1 of **POCA** includes murder and “any offence the punishment whereof may be a period of imprisonment exceeding one year without the option of a fine”. It is common cause that the **FCA** offences for which the accused are to be convicted are Schedule 1 offences, and the accused’s murder of a rival gang member and unlawful possession of a firearm and ammunition on at least two separate occasions must be considered to be acts aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity which is the offence described in section 9(2)(a). The accused is accordingly found guilty of count 2.

Order

47. I make the following order:

- a. The accused is found not guilty, acquitted and discharged on count 1.
- b. The accused is found guilty on counts 2, 3, 4, 5, 6 and 7.

A. GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

Appearances:

Obo the State:

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