

**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: A246/2023

In the matter between:

MARCO CANTERBURY

First Appellant

HEINRICH POTGIETER

Second Appellant

And

THE STATE

Respondent

Heard: 17 May 2024

Delivered electronically: 22 July 2024

JUDGMENT

LEKHULENI J

1. Introduction

[1] This is an appeal against conviction and the resultant sentence imposed against the two appellants by the Parow Regional Court. The appellants were charged in the Parow Regional Court as follows:

Count 1: Contravening section 9(1)(a) of the Prevention of Organised Crime Act 21 of 1998 (*'POCA'*) – (wilfully aiding and abetting any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang).

Count 2: Contravention of section 9(2)(a) of POCA – (performing any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity).

Count 4: Murder.

Count 5: Attempted Murder.

Count 6: Unlawful Possession of a Firearm, and

Count 7: Unlawful Possession of Ammunition.

[2] The allegations on the first count are that the appellants, who are purportedly members of the criminal gang called the Terrible Jesters, wrongfully and unlawfully aided and abetted in criminal activities conducted for the benefit of the Terrible jesters gang in Bishop Lavis as set out in counts 4 to 7 of the chargesheet. In count 2, it was alleged that the two appellants made themselves guilty of the crime of having contravened the provisions of section 9(2)(a) of POCA in that they wrongfully and unlawfully performed acts which were aimed at causing, promoting or contributing towards a pattern of criminal gang activity by committing offences set out in counts 4 to 7. Regarding count 3, the State preferred a charge of contravening section 9(2)(b) of POCA; however, this count was withdrawn against the appellants before they could plead to the charge.

[3] In count 4, the State preferred a charge of Murder read with the provisions of section 51(1) of Part 1 of Scheduled 2 of the Criminal Law Amendment Act 105 of 1997 (*'the Criminal Law Amendment Act'*) against the appellants. It was alleged that the appellants in the furtherance of a common purpose or conspiracy did unlawfully and intentionally kill an adult male, Gavin Barnes, by shooting him with a firearm. As far as count 5 is concerned, it was alleged that on 29 May 2019 and at or near V[...]

Street Kalksteentein in the regional division of the Western Cape the appellants unlawfully and intentionally attempted to kill Will Smith a male person by shooting him with a firearm.

[4] In Count 6, it was alleged that on the same date and time as in Count 5, the appellants unlawfully had in their possession a firearm capable of firing 9mm ammunition without holding a license, permit or other authorisation issued in terms of the Firearms Control Act 60 of 2000 (*the Firearm Control Act*) to possess such firearm. Regarding count 7, it was alleged that on the day in question, as stated in count 5, and in the regional division of the Western Cape, the appellants did unlawfully have in their possession ammunition of an unknown amount of 9mm parabellum Caliber rounds without being the holders of a license in respect of a firearm capable of discharging that ammunition or a permit to possess such ammunitions.

[5] The appellants who were legally represented throughout the trial proceedings, pleaded not guilty to all the charges levelled against them on 31 January 2023 and invoked their constitutional right to remain silent. However, they made formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (*the CPA*) in respect of count 4. In their formal admissions, they admitted the identity of the deceased; they admitted that the deceased died because of gunshot wounds to the chest and arm sustained in an incident that occurred on 29 May 2019. The appellants also admitted that the deceased suffered no further injuries from the time of the incident until a postmortem examination was carried out on his body. In addition, the appellants admitted the accuracy of the findings stated in the postmortem report, the ballistic report, and the medical report regarding the complainant in the attempted murder charge.

[6] Before the trial could commence, the sentencing provisions prescribed in section 51(1) and 51(2) of the Criminal Law Amendment Act were explained to the appellants, and they understood. After evidence was led, the appellants were convicted on 31 January 2023. The first appellant was convicted on counts 2 to 7 and was found not guilty in respect of count 1. The second appellant was convicted of all the charges levelled against him (counts 1 to 7). On 14 March 2023, the first

appellant was sentenced to six (6) years imprisonment in respect of count 2; life imprisonment in respect of count 4; Seven (7) years imprisonment in respect of count 5; Seven (7) years imprisonment in respect of count 6 and three (3) years imprisonment in respect of count 7.

[7] The trial court ordered that the sentences in respect of counts 2, 5, 6, and 7 would run concurrently with the life sentence in count 4. Similarly, the court *a quo* imposed a similar sentence to the second appellant in respect of counts 2, 4, 5, 6 and 7. In addition, the court imposed a sentence of six (6) years imprisonment against the second appellant in respect of count 1. The trial court also made ancillary orders against the appellants in terms of section 103(1) of the Firearms Control Act and ordered that the appellants were unfit to possess a firearm.

[8] The appellants now appeal against the conviction and sentence, leave to appeal having been granted by the trial court.

Summary of Facts

[9] The State relied on several witnesses in its quest to prove its case against the appellants beyond a reasonable doubt. The two appellants testified, and the first appellant called a witness in support of his case. For the purposes of this judgment, I will summarise the evidence of the witnesses relevant to this appeal and I will not repeat their evidence verbatim. The State called W[...] T[...] as its first witness. Ms T[...] testified that the first appellant is known to her very well. They grew up in the same area. It was her testimony that she had been residing in the area for about 38 years. According to her, the first appellant is known to her ever since she can remember.

[10] The witness testified that on 29 May 2019, she was at her house at 1[...] v[...] Street, Kalksteefontein between 13h00 and 14h00 in the afternoon. She was together with her brother and her ex-boyfriend. She was lying on her bed in her bedroom and her brother was in the lounge. While lying on her bed, a person named Morcom (*‘the deceased’*) and Will Smith entered her room and asked if they could smoke tik there. Ms T[...] testified that the two gentlemen came into her bedroom,

and Will Smith lay behind her on the bed. The deceased sat on the corner of the bed against the wall. Just before they could start smoking, the first appellant entered through the front door. She mentioned that from the bedroom, one can see directly at the front door.

[11] Her view of the first appellant was unobstructed. The witness testified that she knew the first appellant for many years and that he belonged to the Terrible Josters gang that was operating in the area. The witness observed that the first appellant had a firearm in his hand and had pointed it to the room entrance. She then jumped up and moved past the first appellant as he was entering the room. As the witness was about to exit the front door, she had a gunshot coming from the room. She then ran outside and went to sit on a stone outside the property in the road which was about six meters away. As she was approaching the gate, the witness heard the second shot and after that she did not hear any further shots.

[12] While seated at the said stone outside her yard, she saw the first appellant and Will Smith exiting her house. The two of them were wrestling for possession of the firearm that the first appellant had in his possession. Ms T[...] testified that when they reached the gate, Will Smith managed to escape from the first appellant and ran down the street, away from him. The first appellant pursued Will Smith and wanted to shoot him, but the firearm jammed as nothing happened. Will Smith ran around the corner, and the first appellant came to a standstill. At that moment, the witness noticed the second appellant coming down the road from the direction where Will Smith ran.

[13] The second appellant was approaching the direction of the witness. When the second appellant reached the first appellant, she saw the first appellant handing the firearm to the second appellant. The second appellant took the firearm and gave it back to the first appellant. She then ran into her house and did not see anything further. The witness testified that she had known the second appellant for a long time and that he also lived on the same street as her. The witness knows the second appellant by the nickname Hannes. According to her, the second appellant belongs to the Terrible Josters gang. It was her evidence that she had a clear view of both appellants at the time of the incident and her sight of them was in no way obstructed.

[14] During cross examination, it was put to hear that the first appellant was nowhere near the house or in Kalksteentein on the day of the incident. In response, Ms T[...] disputed this version and asserted that the first appellant was at her house. When she was asked how she saw the first appellant entering her house while she was lying on her bed in the bedroom, she explained that the door of her bedroom was open, and from her vantage point on the bed, she had a clear view of the front door. She further asserted that she had sufficient opportunity to identify the first appellant as the person who entered her house with a firearm and the person who chased Will Smith in the street.

[15] It was further her testimony that the lighting inside her house was good enough for her to identify the first appellant. During cross-examination, it was implied that the second appellant was at his residence on the day of the incident and refuted being present at the crime scene or receiving a firearm from the first appellant. In response, Ms T[...] contradicted this assertion. She testified that during the altercation between the first appellant and Will Smith over the possession of the firearm, the second appellant approached from the opposite direction, took the firearm from the first appellant, and subsequently returned it to the first appellant shortly thereafter. She was distraught and devastated to see the deceased lying dead in her house after the shooting and she questioned herself why the first appellant would do such a thing in her house.

[16] Sergeant Tshabalala was the second witness to testify. His testimony was that he was employed in the South African Police Services ('SAPS') since 2009. He is a Sergeant, and he was stationed at the Provincial Organized Crime Investigation Unit until 2019 when he joined the Anti-gang Unit. On 29 May 2019, the day of the incident, he was instructed to attend the scene at V[...] Street Kalksteentein where the deceased Gavin Barnes was shot and killed. At the scene, he met Captain Myaiza who took him to the shack where the deceased was lying face down on the ground.

[17] There was another male person being treated in the ambulance outside the premises. This person became known to him as Will Smith. He spoke to this person

who told him he was shot by members of the Terrible Josters. The witness provided hearsay evidence, which the trial court provisionally accepted, stating that Will Smith informed him that he was shot by the first and second appellant. He later arrested the first and second appellants with the assistance of Will Smith, who directed him to the location of the appellants upon their arrest.

[18] The State also relied on the evidence of Warrant Officer Arendse. He has 21 years of experience in SAPS and is based in the Anti-gang unit. He went to the crime scene on 19 May 2019, where one victim was declared dead, and the other victim (Will Smith) was taken to Tygerberg Hospital. He went to the hospital, interviewed and took a statement from Will Smith. At that stage, the victim was still in the emergency section of the hospital but was in his full senses. He spoke to the witness in Afrikaans.

[19] The relevant part of Will Smith's statement that Warrant Officer Arendse took was that while the deceased and Will Smith were in the room, the first appellant came to the bedroom, kicked the door open and had a 9mm star black firearm in his hand. The first appellant fired shots at the deceased twice and the latter fell to the ground. The first appellant turned to him (Will Smith) and shot him once in the left side. The first appellant shot for the second time and the firearm jammed. They started fighting until they ended up in the street. The second appellant approached, took the firearm from the first appellant, cocked it and one cartridge fell on the ground. He then ran and he does not know why the appellants shot them as they all belong to the Terrible 28 gang group.

[20] Sergeant Wayne Malcolm Leukes, the investigation officer of the matter who took over from Sergeant Tshabalala, also came to testify. He retold Will Smith's statement on 9 July 2020 as the prosecutors instructed him. When he took the statement, Will Smith spoke to him in Afrikaans, and he read the statement back to him. According to the statement of Will Smith, the first appellant shot the deceased and thereafter shot him (Will Smith) and then the firearm jammed, and they wrestled for the firearm. Will Smith further stated in his affidavit that he pointed the first appellant to Sergeant Tshabalala. Sergeant Leukes accompanied Sergeant Tshabalala to arrest both appellants.

[21] The State also called Clement Peterson who is a Sergeant employed in the SAPS for 18 years. He is currently stationed at provincial Organised Crime Unit. He previously worked at Bishop Lavis at the Serious and Violent Crime Unit for about 6 years. Sergeant Petersen testified that he knew both appellants while he was investigating gang related cases. He had interactions with them. According to Sergeant Petersen, the appellants are part of the Terrible Josters gang that is affiliated to the 28 gangs. He arrested one Marco Jansen who was involved in the gang related murder of Cheslyn Ceaser at the premises of the first appellant. According to him, the second appellant was the second in command to one Taliep Isaac the leader of the Terrible Josters in Kalksteengefontein. He testified that Taliep Isaacs was also involved in the murder of Cheslyn Ceaser.

[22] He was part of a raid at the home of the second appellant where photos of the second appellant and his tattoos were taken. He did not know if the first appellant had tattoos. However, he testified that the second appellant had a tattoo of a joker on his left upper arm. Sergeant Petersen also stated that the second appellant also had a tattoo written "*thug life*" on his left arm. This is how he knows that the first and the second appellant are members of the Terrible Josters gang. He also knew the deceased Will Smith as a member of the Terrible Josters and aligned himself to the 28 gang of Bishop Lavis. That was in short, the evidence of the State.

[23] However, before the State could close its case, the state made an application in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (*the Law of Evidence Amendment Act*) for the admission of the two statements of Will Smith as evidence. It was established that Will Smith passed away before he could testify. His death certificate was handed into the record as an exhibit. The trial court found that indeed the said witness is deceased and therefore unable to testify. The court weighed the probative value of the statements and the prejudice that may be suffered by the appellants if it should admit the two statements. After considering all the factors listed in section 3(1)(c) of the Law of Evidence Amendment Act, the court found that it was in the interest of justice to allow the said statements into the record as evidence. The court eventually accepted the two statements of Will Smith.

[24] The two appellants also testified. The first appellant denied in his testimony that he killed the deceased and that he attempted to kill Will Smith. The first appellant denied that he was on the scene where the incident happened. Instead, the first appellant told the court that on 29 May 2019, the day of the incident, he was not in Kalksteenvontein but he resided with his brother Vernon Canterbury in Parklands. He was released from the hospital on 01 May 2019, after being stabbed with a knife. Following his discharge, he went directly to his brother's place in Parkland. On 22 May 2019, he visited Du Noon hospital to have his stitches removed.

[25] The first appellant denied that he chased Will Smith and that he gave a firearm to the second appellant. The first appellant asserted that he knew the deceased however, he does not know why the witness is implicating him falsely. He also knows Ms T[...] and referred to her as "V[...]". He is not aware of anything that Ms T[...] has against him. According to him, Ms T[...] thinks he is a member of a gang because, in the past, he belonged to the "*Bad Boys*" gang, but that was years ago. He decided to leave the gang after meeting a woman and having children with her. The first appellant asserted that he also had no idea why Will Smith would make these allegations against him in his declaration of facts.

[26] He was not a friend with Will Smith, however when they saw each other, they would greet each other and chat for approximately 10 minutes and then move on. The first appellant denied that he shot the deceased. He asserted that he did not point a firearm at anyone. The first appellant also refuted Ms T[...]’s evidence that he handed a firearm to the second appellant. The first appellant called his brother, Vernon Canterbury, to support his claim that on 29 May 2019, when the incident took place, the first appellant was living with him in Parklands and was not involved in the murder and attempted murder of the victims. Mr Vernon Canterbury indeed testified that the first appellant was with him from 1 May 2019 until the 02 June 2019. However, during cross-examination it was put to him that the first appellant was arrested by the police on 01 June 2019. He could not give a plausible explanation of this discrepancy.

[27] The second appellant also testified. His evidence in brief was that he was not at the scene when the crime was committed. According to this witness, on the day of the incident, 29 May 2019, he was all morning at home watching TV and waiting for his children to return from school. At 12h00 in the afternoon, he washed and dressed before his children came from school. It was then that his mother came in from outside where she was busy with the laundry and told him that there was a shooting up in the road. He finished dressing and went outside. He walked with other people up to the corner and stood there. He saw many people in the community walking up the street to the scene.

[28] The witness indicated that he only knew Ms T[...] from seeing her when she purchased goods at their tuck shop, and he does not know why she would say she saw him receiving a firearm from the first appellant. There is no bad blood between him and Ms T[...]. The second appellant confirmed that Ms T[...] knew him and that he also knew her as they resided in the same area. He does not know why Will Smith stated in his statement that he (the second appellant) chased him with a firearm. It was his testimony that he was not a member of a gang and that he had never interacted with Detective Peterson before. The witness denied having a joker tattoo on his left arm, as claimed by Mr Pietersen. He stated that he has a tribal tattoo like that of Dwayne Johnson. He denied that he belonged to or had been a second in command of the Terrible Josters gang. He emphatically denied that he was on the scene at all and asserted that the house of Ms T[...] was a drug house. He does not know why Ms T[...] is falsely implicating him. In summary, which was the evidence presented before the trial court.

The findings of the trial court

[29] After considering the conspectus of the evidence, the court below made favourable credibility findings regarding the evidence of Ms T[...] and the evidence of Will Smith, which was presented through an affidavit. The court accepted that the identification of these witnesses of the two appellants could be accepted as accurate and reliable as both witnesses testified that they had previous knowledge of both appellants. The court *a quo* found that their prior knowledge of both appellants substantially increased the accuracy of their identification of the appellants. The trial

court was critical of the appellants, saying they did not disclose their alibi defences to the police or the prosecution immediately. It only became apparent in court nearly three years after the incident. The court noted that only during cross-examination of the state witnesses was their alibi defence put to the witnesses as they remained silent at the plea stage.

[30] The trial court found that the evidence of the appellants was not truthful and was unreliable and rejected it in so far as it was inconsistent with that of the State. The court *a quo* concluded that both appellants were at the crime scene and acted in common purpose in shooting the deceased and at Will Smith with the intent to kill him. The court below accepted that the deceased was shot by the first appellant, who acted in common purpose with the second appellant. Concerning count 1, the court found that the first appellant was the principal actor in respect of the murder of the deceased and that the second appellant wrongfully and unlawfully aided and abetted the first appellant in such criminal activity.

[31] For this reason, the trial court acquitted the first appellant on count 1 and returned a guilty verdict against the second appellant, finding that the second appellant assisted the first appellant in committing the criminal activity. The court concluded that, on the totality of the evidence, in the attempted murder of Will Smith in court 5, both appellants performed an act aimed at causing or contributing to a pattern of criminal gang activity. The court eventually returned a guilty verdict against both appellants for all the remaining counts.

The grounds of appeal

[32] The applicants raised various grounds of appeal on conviction and sentence. The grounds of appeal as discernible from the notice of appeal may, in a nutshell, be summarised as follows: The trial court erred in finding that the State had proved the appellants' guilt beyond reasonable doubt. That the trial court erred in finding the appellants guilty of the alleged offences. The appellants also contended that the court *a quo* erred in finding that there were no improbabilities in the State's version. Further, that the trial court misdirected itself by failing to approach Ms T[...]s evidence with critical scrutiny when considering the application of the cautionary rule

for a single witness. The appellants contended that the trial court misdirected itself by not considering that there was no corroboration of Ms T[...]’s evidence and that the available witnesses were not called. The appellants also asserted that the court *a quo* erred in not finding that the appellants’ version was reasonably possibly true.

[33] As far as sentence is concerned, the appellants contended that the trial court erred in overemphasising the degree of seriousness of the specific case. The appellants also asserted that the court *a quo* erred in not finding substantial compelling circumstances in the appellants’ personal circumstances to warrant the imposition of a much lesser sentence.

Principal Submissions by the parties

[34] At the hearing of this appeal, Ms De Jongh, who appeared for the appellants, submitted that the court below had misdirected itself in finding that the appellants acted in common purpose. According to Ms De Jongh, the State failed to prove common purpose in respect of the appellants especially regard being had to the fact that the appellants only met each other after the shooting. Counsel strongly argued that it could not be characterised as aiding and abetting, as the evidence unequivocally demonstrated that the second appellant did not provide any assistance or cooperation to the first appellant.

[35] Ms De Jongh strongly argued that the trial court had disregarded the appellants’ defences. She contended that the court *a quo* had erred in admitting the two statements of Will Smith as hearsay evidence, which was prejudicial to the appellants. Ms De Jongh further submitted that the appellants’ version of events, as presented in their evidence, was reasonably possibly true.

[36] On the other hand, the State advocate, Ms Stone, conceded at the hearing of this appeal that common purpose was not established in this matter. However, Ms Stone submitted that Ms T[...] clearly identified the appellants and that her evidence in this regard was unimpeachable. Ms Stone contended that the trial court was correct in accepting the hearsay evidence as there was no prejudice against the appellants and that it was in the interest of justice to admit the hearsay evidence.

Counsel further submitted that the hearsay evidence of Will Smith that the court a *quo* admitted corroborated Ms T[...]’s evidence as to the identity of the person who shot the deceased and Mr Will Smith. Counsel implored the court to dismiss the appeal.

Issues to be decided

[37] The key issue for determination in this appeal is whether the appellants’ guilt was established beyond reasonable doubt and, if so, whether the court a *quo* was correct in finding that there were no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. Simply put, whether the trial court was correct in imposing a life sentence against the appellants.

Applicable Legal Principles and Discussion

[38] It is settled law that in a matter such as the present, this court’s powers to interfere on appeal with the trial court’s findings of fact are limited in the absence of demonstrable and material misdirection. Where there is no misdirection on the facts, the presumption is that the trial court’s findings are correct, and that the appellate court will only interfere with them if it is convinced that they are wrong.

[39] It is against this background that I turn to evaluate the merits of this appeal.

[40] It is well established in our law that the duty to prove an accused’s guilt rests fairly and squarely on the shoulders of the State. The accused need not assist the State in any way in discharging this onus.¹ In assessing whether the State has discharged the onus of proving its case against the accused beyond a reasonable doubt, the court must consider all the evidence in concluding whether to convict or acquit an accused. In other words, a court’s conclusion must account for all the evidence presented before it.²

¹ *S v Mathebula* 1997 (1) SACR 10 (W).

² *S v Van der Meyden* 1999 (1) SACR 447 (WLD) at 449h.

[41] It is common cause that Ms T[...] was a single witness, and thus, her evidence had to be evaluated with utmost caution. Section 208 of the CPA provides that an accused person may be convicted of any offence on the single evidence of any competent witness. The testimony of a single witness should be clear and satisfactory in all material aspects. The exercise of caution must not be allowed to displace the exercise of common sense.³ In addition, in matters involving a single witness the court is enjoined to consider the merits and demerits of the witness's evidence, having done so, decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, the court is satisfied that the truth has been told.⁴

[42] The appellant in this case refuted being present at the scene when the shooting of the deceased took place, resulting in his death. Specifically, the first appellant contested the testimony of Ms T [...], who claimed to have witnessed him entering her bedroom while brandishing or pointing a firearm at them. This begs the question of whether Ms T[...] correctly identified the person who entered her bedroom and fired shots that killed the deceased.

[43] In considering this question, it is perhaps apposite to remind ourselves that one of the elements of a crime that the State must prove is the identity of the perpetrator. A court must always approach the evidence of identification with caution. However honest and credible a witness may seem, his evidence about the identity of an accused may be unreliable.⁵ In other words, a witness's honesty and own conviction as to the correctness of his or her identification can never be allowed to take the place of an independent enquiry into the reliability of the identification itself.⁶

[44] In the present matter, the State relied on the direct evidence of Ms T[...] to prove that the appellants, particularly the first appellant, shot the deceased and Will Smith. It is common cause that the appellants and Ms T[...] knew each other very well. They grew up in the same area. Ms T[...] has been residing in the same area for about 38 years. According to her, the first appellant has been known to her ever

³ *S v Artman and Another* 1968 (3) SA 339 (SCA).

⁴ *S v Webber* 1971 (3) SA 754 (A) at 758).

⁵ *S v Ngcina* 2007 (1) SACR 19 (SCA) at para 16.

⁶ *S v Miggel* 2007 (1) SACR 675 (C) at 678E.

since she can remember. The appellants also conceded that they are not strangers to Ms T[...]. They had known each other for an exceptionally long time. The first appellant admitted that Ms T[...] knew him very well and testified that he called her V[...]. The first appellant took their relationship a step further in cross-examination when he admitted that Ms T[...] knows him to such an extent that when she sees him closer, she will not make a mistake of identifying him.

[45] The incident took place in the afternoon. The witness had ample opportunity to observe the appellants. Ms T[...]’s evidence was that she saw the first appellant entering her bedroom where the deceased and Will Smith were with a firearm in a pointing position. Significantly, at the time of the incident, Ms T[...] was very close to the first appellant and had a clear view of him. She had ample time to identify the first appellant. It was daytime, and the door of her bedroom was wide open. She could see the first appellant’s entire body as he approached because he was facing her.

[46] Ms T[...]’s view of the first appellant was unobstructed. The witness saw the first appellant when he proceeded towards her bedroom and took up a position in the doorway of the bedroom, still pointing the firearm at the three of them. As these events unfolded, she jumped up from her bed, moved past the first appellant at the door of her bedroom, and ran out of the house. It is worth noting that the incident took place during the day, so visibility was good. The first appellant was two and a half meters away from her when she got to the front door of her house. She heard a shot go off and then heard a second shot when she got to the gate leading to the street.

[47] In my view, Ms T[...] had ample time to identify the first appellant. She correctly identified the first appellant as the person who entered her house and fired shots at the deceased. I am of the firm view that her evidence in this regard is unimpeachable. Furthermore, what adds to the reliability of her observation is that she observed the first appellant well before the shots were fired at the deceased. It must be stressed that one of the factors which are of great importance in a case of identification is the witness’ previous knowledge of the person sought to be identified.

If the witness is familiar with the person or has seen him frequently before, the probability of accurate identification is significantly increased.⁷

[48] As previously stated, Ms T[...] knew the first appellant very well. In my view, the court *a quo* was correct in finding that the first appellant entered Ms T[...]’s bedroom and shot the deceased and Will Smith. The version of the first appellant that he was not at the scene is a sheer fabrication contrived by the first appellant to avoid liability. In my view, it was correctly rejected by the trial court.

[49] The appellants also impugned the court’s acceptance of Will Smith's two statements. The appellants’ Counsel argued that the interest of justice cannot override the prejudice suffered by the appellants. It was further submitted that the fact that the appellants could not cross-examine this witness on his two statements is prejudicial to the appellants. Ms De Jongh argued in her written submissions that it was not in the interest of justice for the trial court to admit the two statements of Will Smith. I do not agree with this argument.

[50] In my view, the trial court carefully considered all the factors listed in section 3(1)(c) of the Law of Evidence Amendment Act and concluded that the statements of Will Smith were reliable. The court *a quo* found that Will Smith’s statements were corroborated by Ms T[...]’s evidence in material respect. I firmly believe that this conclusion is unassailable and cannot be criticized. It is underpinned by sound reasoning and objective facts. Will Smith’s two statements align with Ms T[...]’s evidence, providing significant support regarding the sequence of events and the identity of the person who shot the deceased and at Will Smith.

[51] Will Smith stated in his statement that he was with the deceased (Morsom), and they went to Ms T[...]’s house and sat in her room. The first appellant came and fired two shots at the deceased and, after that, shot him in his left side. The first appellant tried to shoot him again, and the firearm jammed. They wrestled over the firearm until they ended up in the street. While in the street, the second appellant came, took the firearm from the first appellant, cocked it, and a cartridge fell on the

⁷ *R v Dladla* 1962 (1) SA 307 (A) at 310 C-E.

ground. Will Smith then ran away. In my view, this version corroborates Ms T[...]’s version in a material respect. Ms T[...] witnessed the first appellant entering the bedroom where the deceased and Will Smith were, and she heard two shots being fired while she was outside.

[52] Notably, the two statements of Will Smith accord in significant detail with the medical report on his injuries and the findings of the post-mortem report concerning the body of the deceased. The post-mortem report undergirds, to a greater extent, Will Smith’s version and lends credence to him being at the scene during the alleged shooting of the deceased. The findings of the post-mortem report regarding the number of gunshot wounds observed on the body of the deceased is consistent with the version of Will Smith. This lends credibility to Will Smith’s honesty and reliability in witnessing who attacked him and who shot the deceased. The only instance in which Will Smith’s statement is not directly supported by other evidence is the fact that the second appellant allegedly chased Will Smith with a firearm after the second appellant allegedly got the firearm from the first appellant. Ms T[...] did not observe this. However, that piece of evidence is inconsequential in impeaching the trial court’s finding.

[53] In my view, the trial court adopted a holistic approach in assessing whether overall the two statements of Will Smith were of adequate probative value when they were considered with all other evidence taken together. I am of the firm view that the trial court was correct in its finding that the first appellant was guilty on the charge of murder and of attempting to kill Will Smith. The argument that the appellants were prejudiced because they could not cross-examine Will Smith is fundamentally flawed and of no moment. In *S v Kapa*,⁸ the Constitutional Court quoted with approval the Supreme Court of Appeal (‘SCA’) case of *S v Ndhlovu*,⁹ in which the SCA considered whether the admission of hearsay evidence violates the constitutional right to challenge evidence as entrenched in section 35(3)(i) of the Constitution and, consequently, the right to a fair trial. The SCA held that the criteria in section 3(1)(c) – which must be interpreted in accordance with the values of the Constitution and the norms of the objective value system it embodies – protects against the

⁸ 2023 (1) SACR 583 (CC).

⁹ 2002 (6) SA 305 (SCA).

unregulated admission of hearsay evidence and thereby sufficiently guards the rights of an accused. To this end, Cameron JA, writing for the unanimous court stated:

'[24] The Bill of Rights does not guarantee an entitlement to subject all evidence to cross examination. What it contains is the right (subject to limitation in terms of section 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed.' (my underlining)

[54] Significantly, the SCA stated that a just verdict, based on evidence admitted because the interest of justice requires it, cannot constitute prejudice. The court further observed that where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified.

[55] From the conspectus of the evidence, I am of the view that the conviction of the first appellant on the charge of murder and attempted murder is irreproachable. The first appellant shot the deceased and Will Smith with a firearm. The ballistic report, admitted by consent, described the cartridges found at the scene of crime as 9mm parabellum calibre, designed for a centre-fire firearm. It follows that the conviction of the first appellant on unlawful possession of a firearm without a licence and possession of ammunition was correct and to the point. The trial court's finding on these counts is precise and should not be altered, in my opinion.

[56] However, the second appellant's position on the counts discussed above stands on a different footing. The court *quo* relied on common purpose and found the second appellant guilty of murder and attempted murder. In my view, the court a

quo erred in this regard. In *S v Thebus*,¹⁰ the Constitutional Court gave recognition to the fact that common purpose ('a joint criminal enterprise') has two forms:

'The first arise[s] where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.'

[57] In the instant matter, the second appellant was not there when the first appellant entered Ms T[...]’s house. The second appellant was not present when the first appellant fired two shots at the deceased and Will Smith in Ms T[...]’s bedroom. The evidence does not support a conclusion that the second appellant acted in concert or in association with the first appellant when the latter fired shots at the deceased and Will Smith in his absence. It cannot be said that he knew what happened inside Ms T[...]’s bedroom. There is no evidence to confirm that he conspired with the first appellant to shoot the deceased and Will Smith.

[58] Instead, the evidence suggests that the second appellant was not involved in the crime committed by the first appellant. Ms T[...] asserted that the first and the second appellant only met each other after the shooting took place outside the yard and in the street. Ms T[...] further stated that the second appellant took the firearm from the first appellant and immediately returned it. Based on the evidence of Ms T[...] and the two affidavits of Will Smith, the second appellant was not at the scene when the shooting took place. Upon consideration of all the evidence, I am unequivocally convinced that the trial court erred in finding the second appellant guilty of murder and attempted murder.

[59] Equally, the same reasoning applies regarding the charge of unlawful possession of a firearm and possession of ammunition. On the evidence of Ms T[...], the second appellant took the firearm from the first appellant, cocked it and gave it back to the first appellant. From there, Ms T[...] did not see what happened further.

¹⁰ 2003(2) SACR 319 (CC) at para 19.

The evidence of what happened thereafter, as presented by Will Smith, is not corroborated by any independent evidence. In these circumstances, the State did not prove the guilt of the second appellant beyond a reasonable doubt for the unlawful possession of a firearm and ammunition. Thus, the court *a quo* was mistaken in returning a guilty verdict against the second appellant on these counts.

[60] This leads me to the two gang-related counts based on POCA. The court *a quo* found the second appellant guilty on count 1 (contravention of section 9(1)(a) of POCA). In my opinion, the trial court's decision was predicated on an incorrect interpretation of the law. The trial court found that a conviction in terms of section 9(1)(a) of POCA can only be established if it is proven that the accused did wrongfully and unlawfully aid and abetted in any criminal activity committed for the benefit of a gang. According to the court *a quo*, the proven facts, in this case, indicated that the first appellant was the principal actor in respect of the murder of the deceased and that the second appellant wilfully aided and abetted the first appellant in that criminal activity. To this end, the trial court found that the first appellant could not be convicted on count 1 as he was the principal actor and that the second appellant should be convicted because he aided the first appellant in killing the deceased. In my opinion, the trial court completely misunderstood the issues.

[61] For completeness, Section 9(1)(a) of POCA provides as follows:

“Any person who actively participates in or is a member of a criminal gang and who-

(a) wilfully aided and abetted any criminal activity committed for the benefit of at the direction of or in association with any criminal gang;

(b) threatens to commit, bring about or perform any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang;

(c) threatens any specific person or persons in general, with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence, shall be guilty of an offence.”

[62] Aiding and abetting envisaged in POCA in my view, refers to assisting in the performance of a crime either before or during its commission and not after it has been committed. Aiding typically involves providing tangible assistance, such as supplying tools or resources for the commission of a crime. On the other hand, abetting entails offering lesser assistance, such as acting as a lookout or driving a car to the crime scene. Mere presence at a crime scene cannot be regarded as aiding and abetting. It is unnecessary to have a criminal motive to be guilty of aiding and abetting. However, the knowledge that one is assisting the criminal is sufficient.¹¹

[63] Gang membership or active participation are essential elements in proving a contravention in terms of chapter 4 of POCA.¹² The determination of gang membership is guided by section 11 of POCA. Among others, in considering whether a person is a member of a criminal gang for purposes of POCA, the court may have regard to the fact that such person admits to criminal gang membership or is identified as a member of a criminal gang or resides in or frequents a particular criminal gang area and adopts their style of dress, their use of hand signs, language or their tattoos and associate with known members of a criminal gang.

[64] In my view, it was not proven beyond a reasonable doubt that the appellants were part of a gang. The evidence presented by the state was insufficient and lacking. The evidence presented by Mr Petersen regarding the appellants' alleged membership in the Terrible Josters gang was speculative. In fact, in his evidence he stated that the second appellant had a “*Thug life*” tattoo on his left arm. The second appellant contested these allegations, and when he testified, he stripped his upper body in front of the court, and the alleged tattoo referred to by Mr Pieterse was not found.

¹¹ See Oxford Dictionary of Law (2001) at 22.

¹² *S v Davids and Others* (CC103/2019) [2022] ZAWCHC 216 (31 October 2022) at para 128.

[65] Furthermore, based on the reasons provided above, it cannot be concluded that the second appellant was aiding or abetting the first appellant, as he was not present during the shooting of the deceased and Will Smith. The first appellant acted alone when he shot and killed the deceased. The first appellant also acted alone when he shot Will Smith and attempted to kill him. The second appellant did not encourage, give counsel, or cooperate with the first appellant when the latter shot at the deceased and Will Smith. Upon a careful consideration of the evidence, it is evident that the assertion that the second appellant abetted the first appellant in the assault on the deceased is fundamentally flawed. This claim is incompatible and incongruent with the established objective facts. Thus, the court *a quo* misdirected itself in returning a guilty verdict against the second appellant on count 1.

[66] This brings me to the last count based on section 9(2)(a) of POCA. Section 9(2)(a) of POCA provides that any person who performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity shall be guilty of an offence. The term 'a 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 (mainly serious violent crimes): Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed (a) on separate occasions; or (b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang.

[67] In my view, the phrase criminal gang activity must be given its ordinary meaning. It involves a repeated or habitual pattern of criminal conduct (a gang culture) committed within a certain period by two or more gang members acting in concert, causing systemic fear and harm in a specific area. In the present matter, based on the findings above, it is evident that the evidence did not establish the existence of a pattern of criminal gang activity as defined.

[68] Simply put, it was not established that the two appellants were acting in concert or association. It was not conclusively proven that the two appellants were part of the Terrible Josters gang. The court below relied heavily on the evidence of

Mr Petersen in finding that the two appellants were gang members. In my opinion, Mr Pietersen's testimony appeared to be more speculative than based on personal knowledge. Consequently, the court *a quo* erred in its finding against the appellants in this regard. Accordingly, the trial court should have acquitted the second appellant of all the charges against him. I turn to deal with the sentence imposed on the first appellant.

[69] Concerning the appeal on the sentence, it is trite law that sentencing is pre-eminently a matter for the discretion of the trial court. The power of a court of appeal to interfere with a sentence imposed by the trial court is circumscribed. Interference with a sentence on appeal is not justified in the absence of a material misdirection or irregularity or unless the sentence imposed is so startlingly inappropriate as to create a sense of shock.¹³ Thus, an appeal court will only interfere with a sentence on appeal if it appears that the trial court has exercised its discretion improperly or unreasonably.¹⁴

[70] Gleaning from the record of proceedings, the trial court conducted the sentencing of the appellants in a perfunctory and desultory fashion. As previously stated, the murder charge against the appellants attracted life imprisonment. Although the trial court was presented with limited and incomplete evidence, the court proceeded to sentence the appellants to life imprisonment. This decision was taken even though the information provided to the court was scanty and did not adequately support the decision to impose such a severe penalty. For completeness, the following was placed on record as the personal circumstances of the first appellant. The first appellant had one previous conviction of assault and possession of a dependence-producing substance and one previous conviction of murder committed on 07 February 2006. He was 34 years old at the time of sentencing and was not married. He had five minor children who resided with their mothers at the time of sentencing. He did not know the ages of his children. He informally maintained his children.

¹³ *S v Moosajee* [1999] 2 All SA 353 (A) para 8.

¹⁴ *S v Gerber* [1998] 4 All SA 315 (NC).

[71] From the personal circumstances of the first appellant placed on record by his legal representative, it is not known who his parents are and who raised him. It is also not known where he went to school and how far he progressed with his schooling. It is not known how he was brought up or socialised. Circumstances that could have influenced his behaviour were not placed before the court. The impact of the deceased's death on his family remains unknown. Furthermore, a genuine expression of remorse can be done through evidence under oaths in mitigation of sentence. I am mindful that the first appellant had a prior conviction for murder. However, in my opinion, due to the paucity of information available to the court, there was no factual basis to make an informed decision on the presence or absence of substantial and compelling circumstances.

[72] It must be stressed that the accused's right to a fair trial in terms of section 35 of the Constitution does not take a leave of absence during sentencing proceedings. The court must be vigilant at all trial stages to ensure fairness and justice. During sentencing proceedings, the trial court must not simply defer to the prosecution and the defence attorney but must actively engage in the process. The trial court is responsible for gathering all relevant information before sentencing, even if the legal representatives have omitted to do so. Where an accused is unrepresented, the court must question the accused thoroughly and objectively in connection with possible mitigating circumstances.

[73] It is important to remember that sentencing proceedings are inquisitorial in nature. At this stage of the trial, formalism and excessive adherence to prescribed rules must take a back seat. A trial court must adopt an inquisitorial approach to gather all the relevant information to enable it to impose a fair and just sentence. Moreover, the trial court itself carries the responsibility of ensuring that legal representatives fully and properly represent the best interests of their clients especially at the stage of sentence. That responsibility applies equally to the interests of victims especially of sexual violence. In *S v Oliver*,¹⁵ the Supreme Court of Appeal stated:

¹⁵ 2010 (2) SACR 178 (SCA) at para 8.

‘It is trite that, during the sentencing phase, formalism takes a back seat and a more inquisitorial approach, aimed at collating all relevant information, is adopted. The object of the exercise is to place before the court as much information as possible regarding the perpetrator, the circumstances of the commission of the offence, and the victim's circumstances, including the impact which the commission of the offence had on the victim. The prosecutor, defence counsel and the presiding officer all have a duty to complete the picture as far as possible at sentencing stage. Material factual averments made during this phase of the trial ought, as a general proposition, to be proved on oath.’ (footnotes omitted)

[74] I would state it as a matter of principle and precedent that in cases attracting life or long-term imprisonment a thorough Probation Officers’ report must be obtained with regard to the accused’s background and psycho-social circumstances for consideration by the court. Such report may either be admitted into evidence with the consent of the accused and the state, or the probation officer may be called to testify in support of the report or to clear up any uncertainties. In my view, an accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court. If there is insufficient evidence before the court to enable it to exercise a proper judicial sentencing discretion, that court must call for such evidence.¹⁶

[75] My conclusion is unequivocally fortified by the statutory injunction in section 274 of the CPA, which firmly states:

‘(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any evidence received under subsection one, as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.’

¹⁶ *S v Siebert* 1998 (1) SACR 554 (SCA) at 559A.

[76] It is quite clear from this provision that before a court can be addressed on sentence; there is a duty upon the trial court to invite the parties, in terms of section 274(1) of the CPA, to present evidence to inform itself as to the proper sentence to be passed. This intended invitation is consistent with the right to a fair trial envisaged in section 35 of the Constitution. In addition to the viva voce evidence that may be adduced by the accused, such may include a Probation Officer's report, Correctional Officer's report, Victim impact statement, etc. Unfortunately, in this case, the trial court did not call for any evidence from the defence and the state as envisaged in section 274(1). The fact that the appellants were legally represented did not absolve the court from this judicial injunction.

[77] Evidently, the trial court bypassed section 274(1) and directly proceeded to invoke section 274(2). In my opinion, it is improper and irregular for a trial court to deny an accused person the chance to present evidence under section 274(1) of the CPA. I am further of the firm view that failing to consider the application of section 274 of the CPA undermines the legislative intent of Parliament. It is crucial to uphold the injunction for presenting evidence in all criminal cases where a sentence is to be imposed. Perhaps it is apposite to remind ourselves that the presentation of evidence in terms of section 274(1) places the court in a better stead to weigh the competing interests of the triad and to achieve a proper balance between the aggravating and mitigating factors.

[78] While I appreciate that an accused person has the right to remain silent, the court must diligently gather evidence and pertinent facts to ensure that a just and fair sentence is imposed. Furthermore, the usage of the word '*may*' in the section should not be construed as a limitation on the right to call for evidence, which has been established as the correct procedure through usage and judicial practice.¹⁷

Conclusion

¹⁷ *S v Vukeya and Others* (unreported case number A15/2015) [2015] (01 September 2015).

[79] In the circumstances, given the nature of the misdirection as described above, I would propose that the matter be remitted to the trial court to receive the evidence required to enable it to exercise its discretion properly and pass sentence afresh.

Order

[80] Given all these considerations, I would propose the following order:

80.1 The conviction of the first appellant on count 2 is hereby set aside.

80.2 The conviction of the first appellant on counts 4, 5, 6 and 7 is hereby confirmed.

80.3 The sentence imposed on the first appellant on counts 4, 5, 6 and 7 is hereby set aside.

80.4 The conviction of the second appellant on all the counts levelled against him is hereby set aside.

80.5 The sentence of the first appellant is remitted to the trial court for sentence proceedings to start afresh.

80.6 The trial court shall comply with section 274(1) and 274(2) of the CPA.

80.7 The State and the defence shall be invited to lead evidence in aggravation (if any) and in mitigation of sentence.

80.8 The first appellant shall be brought before the trial court for sentencing within fifteen days (15) from the date of this judgment.

LEKHULENI JD
JUDGE OF THE HIGH COURT

I agree and it so ordered:

SALDANHA V
JUDGE OF THE HIGH COURT

APPEARANCES

For the appellants: Ms De Jongh
Instructed by: Legal Aid South Africa

For the Respondent: Adv Stone
Instructed by: Office of the Director of Public Prosecutions:
Western Cape