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REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: SS12/2019

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED: NO

18/03/2022

In the matter of:

THE STATE

and

DAVIDS JERMAINE LLOYD

Accused 1

SHIMIDZU OTTIE

Accused 2

JUDGMENT

STRYDOM J:

[1] The two accused were arraigned on a count of murder read with section 51(1) of Act 105 of 1997; two counts of attempted murder; a contravention of section 3 read with sections 1, 103, 117, 120 and 121 of Act 60 of 2000, i.e. unlawful possession of a firearm, and on a count of contravening section 90 read with sections 1, 103, 117, 120 and 121 of Act 60 of 2000, i.e. the unlawful possession of ammunition.

[2] Ms Z Peck appearing for the State applied for an amendment of the charge sheet to include the reference to section 51(2) of Act 105 of 1997 to the attempted murder counts, 2 and 4.

[3] Mr Jermaine Lloyd Davids ("Accused 1") and Mr Ottie Shimidzu ("Accused 2") pleaded not guilty on all counts.

[4] Mr Spies appearing for Accused 1 indicated to the court that Accused 1 will deny all allegations against him. He has an alibi.

[5] Ms Muir, appearing for Accused 2, in terms of section 115 of the Criminal Procedure Act ("CPA"), placed on record that Accused 2 will admit that he had a shop in S [...]3 Street. He will deny that he shot anybody or had a firearm or ammunition in his possession. He will deny all allegations against him.

[6] In terms of section 220 of the CPA, admissions were made by both accused as per exhibit A. These admissions relate to the identity of the deceased in count 1, to wit, H [...]1 P [...]1; that she died on 27 September 2018 as a result of a perforating gunshot wound to the chest which she sustained at or near Westbury in the district of Johannesburg, that the body of the deceased sustained no further injuries until a post mortem examination was conducted thereupon; the findings as recorded in exhibit B pertaining to the post mortem examination; the contents of the crime scene photographs taken by Warrant Officer CL Wood as per exhibit C; the findings of a ballistic report, exhibit D, and the correctness of the facts and findings of the competency report which was compiled on 30 September 2019 by Captain I [...] van der Merwe who interviewed the complainant S [...]1 B [...], marked exhibit G.

[7] It should be noted that the accused were not prepared to make the admissions as contained in paragraphs 9 to 12 of exhibit A. These admissions would have pertained to primary residue tests conducted on L [...] M [...]1 and S [...]2 M [...]2.

[8] The accused were warned of the applicability of the minimum sentences pursuant to section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[9] In terms of the summary of substantial facts provided to the accused and the court, the State indicated that it is going to prove that on 27 September 2018 at about 10h00, the accused arrived in Westbury. They were both armed with firearms. They acted in concert and engaged in a shooting spree that appears to be gang related. During this shooting, the complainants mentioned in count 2 and 3, who appears to be an opposing gang, was shot whilst the deceased in count 1, together with a minor child, the complainant mentioned in count 4 were also hit by bullets. The complainant in count 3 was also shot on the side of his chest.

[10] To prove the State's case, it called eleven witnesses.

[11] S [...]2 M [...]2 (" M [...]2" or aka "Eezo") testified that on 27 September 2018, he went to buy cigarettes in S [...]3 Street. He was with L [...] M [...]1 (hereinafter referred to as "L [...] M [...]1" or "L [...]" or "Bitsy"). L [...] stayed on the other side of the road whilst he crossed the road and went to the shop. He knew the two accused and also that accused 2 had a shop in S [...]3 Street. He referred to accused 1 as "Ray" and accused 2 as "Otties". When he crossed the street to another shop he could see Accused 1 and 2 and one D [...]1 D [...]2 ("D [...]2") in front of the shop. There was also a black Audi A3 which he previously saw was driven by Accused 1. When he came out of the shop he crossed the street and met up with L [...]. Ms I [...] A [...] (" I [...] A [...]") was standing in front of house [...]. Whilst he and L [...] were walking down the passage he heard many shots. Initially he said he could not remember how many, but later he said there were three shots. When he turned around he heard more shots and saw Accused 1 and Accused 2 with guns firing at them. He saw H [...]1 P [...]1 also in the passage with children. He also noticed that P [...]2 H [...]2 was in the passage. He and L [...] started to run away and turn in different directions. When he saw Accused 1 and Accused 2 firing shots they were 3

to 4 paces away from them. He testified that he was hit by one of the bullets and was taken to hospital. At hospital he again saw L [...] who was handcuffed. At the hospital gunshot residue tests were conducted on them by Sergeant Naidoo. He and L [...] were arrested and accused of attempted murder and murder. The matter was later withdrawn after the gunshot residue tests conducted on them came back negative.

[12] During cross examination, he denied that he was part of a gang. He said that he saw Accused 1 and Accused 2 with firearms but cannot say who shot him. It was put to him that Accused 1 had incriminated him in the murder matter of M [...]3 C [...] and that is the reason why he now falsely incriminate accused 1. He denied this.

[13] He was confronted with a statement that he had made to the police in which he said that when he crossed the street he saw Accused 1 and 2 standing in front of the shop with Liza, the girlfriend of one of the accused. He said he made a mistake in his statement.

[14] It was put on behalf of Accused 1 that he will deny that he possessed a black Audi vehicle.

[15] On behalf of Accused 2 it was put to this witness that he was involved in the murder of M [...]3 C [...]. Accused 2 made a statement against him and that is the reason why he now falsely implicates him. This was denied by the witness. He was never arrested for that case. It was put to him that there was not a black Audi in front of the shop but a black Polo belonging to Accused 2's girlfriend and a silver grey Audi. He persisted that he saw a black Audi. It was put that two people with "hoodies" were firing the shots. This he denied. It was put to him that there was some kind of relationship between him and one Leroy Brown (aka "Finch") the leader of the Varados gang. Also with Warrant Officer Steyn who was siding with the Varados. This he denied. It was further put that Accused 2 will say that he was at the shop and only heard the shots. He was not responsible for firing these shots. It was further put that this witness after the incident bragged that he is the person who shot H [...]1 P [...]1. This he denied.

[16] The next witness called by the state was Ms I [...] A [...]. She stated that Accused 1 was like family to her. She used to greet Accused 2 as well. She grew up with Accused 1's grandmother.

[17] On 27 September between 12h30 and 13h30 she went to buy a cold drink. She saw L [...] sitting on a concrete block in the passage. The next moment whilst she was on the side of the road, a black Audi vehicle came speeding and turned across the street and came to a standstill. Accused 2 got out of the vehicle holding a gun and started to shoot down the passage called Tamboekiehof. She saw that D [...]1 D [...]2 was the driver of the vehicle. She indicated where H [...]1 P [...]1 and the children with her were when the shooting started. H [...]1 P [...]1 shouted for L [...] to watch out. She went to lay flat and she saw L [...] with S [...]2. They ran down the passage. More shot were fired.

[18] She heard that H [...]1 P [...]1 was shot. She only saw Accused 1 after the shots were fired with a firearm in his hand. She never saw him shooting. After the shots were fired he came down the passage and got into the car and the car drove off. She saw two firearms and stated that she did not see any firearms in the possession of L [...] and S [...]2.

[19] After the incident she was contacted by Accused 1 who told her not to testify. She told him that she was not going to testify. She only spoke to L [...] or Ezzo when they were released from custody some months later.

[20] When she was confronted during cross examination that her testimony was not the truth, she said that after she fell down she activated the video function on her cell phone and took a video of the persons who fired shots. She indicated that she would bring the phone and show it to the court.

[21] Once she realised that H [...]1 P [...]1 was killed, she decided to go to the Sophia Town police station to give a statement.

[22] Warrant Officer Steyn came to her and told her that W/O Saunders said that she changed her statement. She indicated to him that she does not want to testify.

During cross examination she was confronted with her statement. She said that she never saw Accused 1 getting out of the car or shooting in her statement. She said that the statement was never read back to her and the statement is wrong.

[23] The State then called L [...] M [...]1 as a witness. On 27 September 2018 he went with S [...]2 M [...]2, who he referred to as Ezzo, to buy cigarettes at a shop in S [...]3 Street. He however stayed on the side of the road where they came from and M [...]2 went across the street to the shop. He went to sit down. From his position he could see the two accused, Ray and Ottie in front of D [...]2 Takeaway. Liza, Ottie's girlfriend, was also present. He gained the impression that they were discussing him. In front of the business a black audi and a red golf vehicle were parked. According to him the black audi belonged to D [...]1 Doons.

[24] He knew both accused for some time and he never had any problems with them. When M [...]2 returned they started to walk up the passage called Tamboekiehof. There were also at different stages other people walking in the passage. He did not see I [...] A [...].

[25] As they were walking he heard Auntie H [...]1 shouting " L [...] watch". He heard two to three gunshots and when he looked around he saw Ray (Accused 1) and Ottie (Accused 2) were shooting towards him and Ezzo. Auntie H [...]1 was with two children. They were behind him as he was walking away from S [...]3 Street. Accused 1 and 2 were about 10 metres away from him and both had firearms in their hands shooting at them. They started to run and when he looked back he could clearly see accused 1, standing on the drain, shooting at Ezzo. At the end of the passage he turned right and M [...]2 turned left. He saw P [...]2 H [...]2 in front of the house of deceased. He jumped from his chair as the shots were fired.

[26] Later he met up with Ezzo who was shot. He was taken to the hospital.

[27] He went back to the scene and met with two policemen called Steyn and Keet. He told them that he wanted to give a statement that Ray and Otties shot at them. Auntie H [...]1 was lying in the passage. She was dead.

[28] Later he went to the hospital and was arrested. He was told that there was cross fire and that he was also involved. He was charged together with M [...]2 in this case but the cases against them were withdrawn. A gun powder residue test was conducted on him but it delivered negative results. After 3 months in custody he was released.

[29] During cross examination, he admitted he was part of the Varados gang at the time of the shooting. He said Ezzo, his friend, was not part of the Varados group.

[30] When this witness gave his testimony he was in custody on another charge.

[31] It was put to him that the accused will deny that they fired shots and that this witness was part of a conspiracy to falsely implicate them. This was denied.

[32] He testified under cross examination that he never saw the black audi at the entrance at the passage. He saw that someone was sitting in the drivers' seat of the black audi whilst it was still stationary in front of D [...]1 Doons' shop.

[33] It was put to him on behalf of Accused 2 that he was involved in the shooting of one M [...]3 C [...] and that he falsely implicated Accused 2 so that the latter can be locked preventing him to testify against L [...] M [...]1. He denied this and also denied that Accused 2 stayed at his shop during the shooting and never came to the passage. It was put to him that he was a hitman but this was denied. He also denied that Steyn was friendly with the Varados gang. He further denied that I [...] A [...] was a professional witness.

[34] The next witness was P [...]2 H [...]2 who testified that on this day he was seated in front of Auntie H [...]1's house facing the passage called Tamboekiehof. He said that if he turned his head he could look left and right up and down the passage. At some stage he was confusing his left from his right but after pointing out his position on exhibit H1, it transpired that if he was looking to his right he would be able to see down the passage towards S [...]3 Street.

[35] While sitting there at approximately 13H00 he heard two shots being fired. Later he said it was only one shot. Thereafter he saw Ezzo and L [...] running past him. They did not have guns in their possession. When he looked to his right he saw Ray (Accused 1) shooting three shots from a position where there was a drain. He fired in the direction of Ezzo and L [...] who were running away.

[36] He took a dive and then could see no more of what transpired. Later he saw three spent cartridges lying on the drain. He asked a boy to see that no-one touches these cartridges. He later picked them up and put them in a plastic potato chips bag and handed them over to an unknown policeman. The place where these cartridges were picked up were marked. He then saw Auntie H [...]1 lying down in the passage. He heard about a child that was injured and he arranged for an ambulance.

[37] He never saw the two policeman Steyn and Keet.

[38] He knew accused 1 as he used to “hang out” with him. He previously was a member of the Varados gang with him.

[39] He testified that he knows Accused 2 but never saw him that day. He is still friendly with him.

[40] During cross examination on behalf of Accused 1, it was put to him that he is a professional witness and that he falsely implicated Accused 1. This was denied outright by the witness. It was put to him that Accused 1 will deny that he was involved at all and that he will deny that he was part of the Varados gang.

[41] The witness said Accused 1 was lying through his teeth.

[42] It transpired that he made his statement months after the incident. He denied that he was requested by the Varados to make a statement.

[43] LT Colonel Mangema then testified that he was employed by the SAPS for 26 years and he is currently stationed at the Forensic Science Laboratory in Pretoria. He testified as an expert witness to reconstruct crime scenes. He attended the crime scene and compiled a report, submitted as Exhibit “K”. Most importantly his report

concluded that the shooters stood at the entrance of the passage southern side firing a number of shots towards the northern side. He concluded that the deceased died from a bullet fired from the southern side consistent with the post mortem report wherein it was indicated that the bullet entered from the back of deceased. Of further importance is that he concluded that he could not find any bullets or holes on the southern side which is the entrance to the passage and on the side of the shops. This is indicative that shots were not fired by the people running away in Tamboekiehof. The Ballistic report Exhibit “**D**” compared the fired cartridge cases collected from the scene and concluded that two (2) different fired cartridge cases were found to have been fired from two (2) different firearms both semi-automatic firearms.

[44] W/O Naidoo then testified that on 27 September 2018 he conducted primer residue tests on state witnesses M [....]² and L [....] at Helen Joseph Hospital. The tests were conducted between 15H25 and 15H35. His report was submitted as Exhibit “**E**”.

[45] W/O Mehlahe then testified that he is a police officer with 8 years’ experience and currently a forensic analyst stationed at the Forensic Science Laboratory in Pretoria. He examined the gunshot residue tests conducted and concluded that all the test samples tested negative for gunshot residue. His report was admitted as Exhibit “**F**”.

[46] Dr Thandi Mahuluhulu testified that she conducted the post mortem examination and found that the entry wound was from the back of the deceased and the exit wound to the front. Her report was received in evidence as Exhibit “**B**”.

[47] S [....]¹ B [....] was then called by the state. This state witness testified in camera through an intermediary. She was only 10 years old when she was shot from the back in her leg at Tamboekiehof on 27 September 2018. She was collected from school by the deceased together with her 2 other siblings. She testified that on entering the passage her Aunt greeted a short, thin lady. The lady was at the entrance of the passage, she always sees her in the area. She noticed 2 guys in the passage. She recalls them as Bitsy and Eezo. Whilst walking into the passage she

heard 3 gunshots and saw Eezo and Bitsy running. She thought it was the sound of crackers. The sound was coming from the back. Bitsy and Eezo were in front of her. When she looked back she saw two men. She noticed one of them had a gun holding it down. She looked so quick she did not look at their faces. She only noticed them wearing caps. She thinks they were coloured men. She noticed a car near the houses. She did not recall the colour of the vehicle. After she noticed the one man had a firearm she started to run. Her sister L [...]1 fell, she helped her up. She felt her foot vibrating and blood dripping from her left knee. She ran to the nearest house which was Aunt Toenkie`s house. She did not notice in which direction Bitsy and Eezo ran after she entered the house. She had a gunshot wound to her left knee, it entered from the back of her knee and exited at the front of her knee.

[48] Constable Gabriel Rudolph testified that he is a constable with 16 years` experience in the SAPS and currently based at crime intelligence. His duties are to gather information and to assist with investigations. They utilise registered informants and tip offs to assist warrant officer Saunders to trace and arrest accused 2 in East London. Accused 2 was arrested on 18 November 2018. He was found hiding underneath a bed. He was informed of his rights and that he was being arrested for murder. He was thereafter transported back to Sophiatown Police Station.

[49] The last state witness was W/O Saunders who is employed by the SAPS in the Anti-Gang Investigative Unit. He had 28 years` experience. He was previously based in Cape Town working with serious violent crimes and gang related incidents in Cape Town. In 2014 he was requested at national level to transfer to Johannesburg. In 2018 the then Minister of Police, Bheki Cele, created a task team to deal with gang related matters. The community of Westbury prior to this incident staged protests as rival gangs in the community were causing havoc in the area. Innocent bystanders were killed and mostly children were affected. It was within this context that he and 10 other members were tasked to investigate these cases. He was appointed the investigating officer after Sgt Mthetwa. He never attended the scene on the day of the incident. He attended the scene to accompany Col Mangena to reconstruct the scene. He found P [...]2 H [...]2 seated in front of the deceased house. He enquired whether on the day in question he saw the shooting of the deceased to which P [...]2

told him he did. P [....]2, later made a statement to him. He also took down I [....] A [....] statement as well as L [....] M [....]1`s statement. He confirmed that both M [....]2 and L [....] were not arrested for the murders of M [....]3 C [....] and of B [....] O [....]. He confirmed that he had both dockets at court with him. The suspect arrested for the death of M [....]3 was in fact R[....]1 N[....]1 aka Nadie. The matter was withdrawn by the senior public prosecutor of Johannesburg as accused 1 stated he would not testify in that matter. In the B [....] O [....] case no suspects were identified as the witness said they did not see who shot at the deceased. He reiterated that L [....] M [....]1 and S [....]2 M [....]2 were not suspects in the matter nor were they ever arrested for these cases. He further confirmed that I [....] A [....] and P [....]2 H [....]2 never made statements or provided alibis in these matters or any other cases that he is aware of. He further testified that he was involved in the arrest of accused 1. He was arrested on 14 October 2018 whilst attending a wedding in Krugersdorp. Accused 1 was informed of his rights and the reason for his arrest and taken to Sophiatown police station. Saunders explained that the reason for the arrest of L [....] and S [....]2 was because the previous investigating officer received information that there was a cross-fire. He stated that as they obtained more evidence and statements it became clear that there was no cross -fire and that L [....] and M [....]2 were victims. The charges were withdrawn against them. He denied that he had conspired with any witnesses to falsely implicate the accused. He had no reason to do so. He denied that a witness attended the police station when accused 1 was arrested. He only became aware of R [....] M [....]4 when representations were made by the accused 1 to the state through Advocate Lekgotoane of the legal-aid. He contacted Mr M [....]4 who acknowledged that he knew accused 1 and that he did a property evaluation for him but he could not recall the date when he visited the house in Quellerina. He testified that he tried to contact Mr M [....]4 again but he would not answer or return his calls. He confirmed that he went to his alleged place of business to verify if Accused 1 was a property agent. He was informed by the other tenants of the building that the business had moved and the premises was now occupied by an NGO. He confirmed that he was requested to trace a cellular phone of I [....] A [....] and after numerous attempts he managed to obtain the phone and sent it for analysis. The analyst had stated that he could not download the video footage. The phone was damaged and had scratches. I [....] identified the phone as hers. He confirmed that the person who originally had the phone did not download

anything from the phone on to a laptop. He disagreed that accused 2 went to East London because he was threatened by "Finch".

[50] W/O Saunders confirmed that according to his information both accused were Varados members, until the death of M [....]3, when things changed and the relationship turned sour. He confirmed booking the cell phone of accused 1 into the SAP 13 but did not obtain a section 212 statement. He denied working for any members of a gang to conspire to implicate the accused. Saunders confirmed that warrant officer Steyn was arrested by him and currently standing trial in the High Court. He further confirmed that whilst the country was in lockdown due to coronavirus the witness L [....] M [....]1 was also arrested by him and was currently in custody for another matter. He therefore denied that he worked for the Varados as he was responsible for the arrest of these persons.

[51] The state then closed its case

[52] Accused 1 then testified in his own defence. The accused relied upon an alibi in respect of the events on 27th September 2018. Accused 1 defence is that on the 27 September 2018 he resided with his wife L [....]3 D [....]3 at [....] D [....]4 Street W [....]. He was employed as an estate agent at Urban Links at [....] [....] B [....]2 Hertzog Street, Emmarentia. He denied being a member of the Varados gang. He knew the state witness I [....] and her sister. According to him I [....] resided in Pedestrian which is an area in Westbury. He does not know uncle Frikkie or aunty Pam. He denied that she grew up in his grandmother's house or with any other family member. He further testified that I [....] told him at Johannesburg prison that Veronica made the statement for her. He asked I [....] what the reason for her visit was, and she told him she is a witness in this case. She came alone and was not in the company of anybody else. He denies Ishodeen was his cousin or that she was with I [....] at the prison. He believed I [....] falsely implicated him to protect L [....] because L [....] had a child with her sister. He testified that the witnesses conspired with police officers to falsely implicate him in this matter. He testified that L [....] M [....]1's father was shot and killed by his uncle who is currently serving a life sentence for that offence. This is yet another reason why L [....] would falsely implicate him in this matter. He also made a statement implicating L [....] and R[....]1

N[....]1 aka Nadie in the murder of M [....]3 C [....]. He disputed the contents of the statement he made to Sgt Mthetwa and said that things were deliberately put in the statement and other information left out. He denies that he told Sgt Mthetwa he was unemployed or that he resided at [....] C [....]2 Flats Westbury. He does however admit that he read and signed the statement. He denied that he informed the prosecutor that he refused to testify in the M [....]3 case. He was adamant the prosecutor lied and disputed the entry on the docket that he refused to testify. He would travel with Saunders in his vehicle and would see him in possession of the M [....]3 C [....] docket even though he was not the investigating officer. He testified that he concluded that Saunders worked for the Varadors and would take orders from Leroy Brown aka "Finch". He testified that all police officers at Sophiatown Police station were corrupt including Saunders. They removed statements in the B [....] O [....] matter because according to him I [....] was an alibi for L [....] in that matter. He further denied that he was friends with accused 2. He denies that he was at D [....]2 takeaways on the day in question. He was with his wife L [....]3 at [....] M[....]5 street Quellerina between 12H00 and 14h00 for a viewing that took place for potential clients to the rent the property. He brought two clients to the house for viewing. He arrived at the house of Mr R [....] M [....]4 who was present together with other family members in the house. The clients viewed the property and thereafter they went straight home to [....] Dover Street, W [....]. He cannot provide proof of the emails between him and the clients as his Samsung phone was given back to his aunt. He says he could not access work emails from any other device. His aunt informed him all the contents of her phone were deleted. He said Saunders lied that M [....]4 had not gone to the police station. He kept in contact with M [....]4 in prison and would often phone him from prison. L [....]3 and he would discuss this case and she informed him that another police officer was also present when M [....]4 spoke to Saunders. He was told by M [....]4 that Saunders made appointments to meet but it did not materialise. He believed Saunders did not honour these appointments because he did not want him to be released. He estimated that the driving distance from Westbury to Quellerina is approximately 30 minutes drive, although he was not sure and never drove from Quellerina to Westbury. He could not dispute that according to google maps it showed a distance of 5.9 kilometers and 11 minutes driving time with a vehicle. He also admitted that he mentioned L [....]3 being with him on the day in question for the first-time during evidence in chief. He testified that

he had not mentioned her in his representations to the Director of Public Prosecutions nor had he mentioned it to anybody else.

[53] R [...] M [...]4 testified that he knew accused 1 through a letting agency to assist in letting out the property where he resided at the time. He was residing at [...] M[...]5 Avenue Quellerina. Charlene was the personal assistant who arranged for the meeting that day. On 27 September 2018 at about 12h00 accused 1 arrived in a Toyota vehicle with a female. He cannot say who the female occupant was. After five to ten minutes the first client pulled up. They were shown the property and there after the second client arrived. Accused 1 was at the property for over an hour.

[54] He met warrant officer Saunders on the day he was requested by accused 1`s wife to accompany her to Sophiatown police station. He does not recall the date. Saunders asked L [...]3 a few questions he did not ask him much. After this incident, months later the specific date the witness could not recall Saunders called him but he was on holiday. Saunders tried to contact him but he missed his call and he tried to call Saunders but they kept missing each other and that was the last interaction he had with Saunders. The witness had to look at his lease to recall the date of viewing when he was contacted by L [...]3.

[55] Under cross examination he admitted that he vaguely remembered the time he asked his helper who told him it was at twelve midday but that he had no independent recollection of the time. He could not remember when he spoke to L [...]3 or when he accompanied her to Sophiatown police station. When he spoke to L [...]3 he was not sure why he was needed at the police station but he went. At the police station L [...]3 asked him to say that accused 1 was together with her for a viewing at the house. He told her he could not say that because he did not see her. When they entered a room at the police station, Saunders introduced himself and started asking L [...]3 questions. She responded to the questions and they continued talking at no stage did she introduce him or state the reason for him being at the police station. He tried to explain to Saunders that L [...]3 asked him to explain how he knew accused 1. He further testified that a few months ago L [...]3 had asked him if he could give a statement. They agreed he would type a statement and forward it to her which he did and emailed it to her. He admitted to being forgetful, he

sometimes would forget to fetch his own kids at school. His family would often fight with him of how forgetful he was. He testified that he cannot recall exact dates and times as he was pre-occupied with a million things. He conceded that he could have been mistaken about the time. He admitted that he personally had no recollection of the time accused 1 came to the house. He testified that he was certain that the day accused 1 came to the house was a Wednesday. He was certain of this because he looked at the calendar as he could not remember what transpired 2 years ago. He testified he looked at the lease and then he looked at the calendar and saw that it was a Wednesday that accused 1 came to the house. His lease was about to expire on 30 September he looked at the calendar and then from his own memory and recollection he concluded that accused 1 came to the house on the Wednesday. He further said that the reason why he was certain that it was Wednesday is because he called Charlene that exact day to ask her if they could not extend the lease as the lease would expire in 4 days. He had to be out the Saturday and his belongings were literally outside as he had to accommodate the new tenants. He further remember the day being a Wednesday because he was waiting for Mariana to hand over the keys for the new place. It was then put to him that 26 September 2018 fell on a Wednesday and that 27 September 2018 fell on a Thursday. He then changed his version and said then he was mistaken and it was a Thursday. He reiterated that he was not good with dates and times. He was not certain of the date.

[56] L [....]3 D [....]3 is accused 1 wife. They have been married for two years and reside together at 7 D [....]4 Street, W [....]. She recalls accused 1 was arrested on a Sunday, he was attending a wedding in Krugersdorp but she was not present. After being informed about his arrest she went to Sophiatown Police Station at about 17H00 but could not see accused 1. When she went on the Monday to visit her husband she met Saunders. She was informed that accused 1 was arrested for the murder of H [....]1 Pietersen. She told Saunders that accused 1 was employed at Urban Links in Emmarentia. She informed Saunders that the day of the incident on 27 September 2018 he had appointments with clients to view a property. She testified that she became aware of the date the shooting took place through social media in relation to when the riots took place in Westbury. She recalls on that day accused 1 collected her from Wits University and they drove to Quellerina. She testified she went through his work files and confirmed the date. She checked the

date after she spoke to Saunders. She testified she knew the previous witness R [...] M [...]4. The first time she spoke to him was the day after accused 1 was arrested. She testified that she had told R [...] specifically that he was there because he was present at his property on the day the incident occurred. She took him to Saunders office and told Saunders that accused 1 conducted a viewing at his house on the day in question. They further discussed the times of the viewing and nothing further. R [...] told Saunders it was between 12H00 and 14h00. She denied that R [...] emailed his statement to her. She testified that she did not inform her current lawyer that she was at the viewing because she was the wife of accused 1 and she did not consider herself as an alibi, because there would be a perceived bias. She confirmed that accused 1 had at least 3 other attorneys before Mr Spies and that she also chose to only tell one of them and not the others that she was also present at the viewing. She was in possession of an administrative file of accused 1 but was not sure whether the document she consulted was in that file or not. She further confirmed that she had no independent recollection of their whereabouts on that day and had to go and look for the information. She admitted being present during the entire trial in court and listening to the evidence of witnesses and that she was asked by the current lawyer to give evidence.

[57] Accused 1 then closed his case.

[58] Accused 2 then testified in his defence which came down to a bare denial. According to him he was falsely implicated by police officers and witnesses who colluded and worked for the leader of the Varadors Leroy Brown aka Finch. He testified that he resided at 56 S [...]3 Street Westbury. He was the owner of D [...]2 takeaway which was situated at the same address, approximately 20 metres from Tamboekiehof. He would not venture into the passage as there were many people in that passage with firearms and one could sustain injuries. The Varadors sold drugs in that passage. On the day of the incident he was at his shop busy peeling potatoes for pre-fry. In front of his shop was a black polo which was his wife`s car and a silver audi A1 at the barbershop. A red golf was parked inside the yard but was not running. He confirmed the black audi belonged to his cousin Lilly D [...]2. He testified that according to his knowledge the Audi was sold in the year 2016 or 2017. A document of registration of the Audi was handed in as Exhibit “**L1 and L2**”.

[59] The information he had about the murder of H [....]1 P [....]1 was that Bitsy, Eezo and Tavey, who works for Finch, shot at each other including a fourth unknown person. He said I [....], Bitsy and Eezo were liars and that they acted in cahoots with Finch to falsely implicate him in this matter. He testified that W/O Steyn took a firearm from Eezo who was wearing a hoodie top and had a firearm in his hands on the day H [....]1 P [....]1 was shot. He heard in prison Eezo bragged about killing H [....]1 P [....]1.

[60] He testified in detail about the M [....]3 C [....] murder. In short, he was outside his shop with accused 1 and M [....]3. He noticed Bitsy, Eezo and Waagiet approach in a combi. He heard gunshots and M [....]3 was shot. He and accused 1 took M [....]3 to the hospital. At the hospital Steyn and Keet arrived, aunt Gladys told him they were sent by Finch. She told him to say he did not see anything. She was aware of high-ranking police officers whom she will contact. He was introduced to a policeman called Rassie. He told Rassie what had happened to M [....]3 and Rassie said he should not trust Steyn. Rassie did not return to take their statements. He relayed the story to Mthetwa as well but two days later he saw Mthetwa with Finch and Bitsy walking in Tamboekiehof and he realised that they were all in cahoots with the police and drug dealers. He was never asked to attend court to testify in the M [....]3 matter.

[61] He admitted he was arrested in East London on 18 November 2018 with his wife and children. He was in East London because he felt his life and that of his wife and children were in danger. Finch sent Tavey with a phone to him so he could speak to him. Finch told him M [....]3 was a Fastgun boy and if he should testify he would shoot his wife and children. He testified that he heard in prison and the whole of Westbury knew that Saunders was paid by the Varadors an amount of R250 000 to make this case go away. According to him Saunders was paid this amount to release Bitsy and Eezo. He further testified that Saunders had informed him whilst driving back from East London when he was arrested that Finch offered him R 500 000. He further testified that Saunders told him he would be placed under witness protection. He admits to having a tattoo of the Majimbos group as he was a car thief many years ago and was part of that group. He denies that he was ever a member of the Varadors. He admitted he knew P [....]2 H [....]2 as a person who would frequent

his shop. They were not friends. Lastly, he testified that he does not have or like firearms. He called no witnesses and closed his case.

[62] The correct approach to evaluate evidence in a criminal trial was enunciated by the Supreme Court of Appeal as follows in *S v Chabalala* 2003 (1) SACR 134 (SCA) at paragraph 15:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

[63] The defence raised by accused 1 is one of an alibi. He testified he was not at the crime scene at the relevant time. He called two witnesses to corroborate his version. In *S v Malefo and others* 1998(1) SACR 127(W) at 157j to 158 a-d the court set out five principles which should be considered when an alibi defence is assessed as follows:

63.1 There is no burden of proof on the accused to prove his alibi;

63.2 If there is a reasonable possibility that the accused’s alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt;

63.3 Every “alibi” must be considered against the totality of evidence and the impression formed by the court of the witnesses;

63.4 If there are identifying witnesses, the court should be satisfied, not only that they are honest, but also that their identification of the accused is reliable;

63.5 The ultimate test is whether the prosecution has furnished proof beyond reasonable doubt – and for this purpose a court M [....]1 take into account the fact that the accused raised a false alibi.

[64] On a consideration of the evidence as a whole it has become common cause that the deceased was shot and killed, and S [....]1 was shot and injured, as a result of a shooting which took place on 27 February 2018, between 12h00 and 14h00, whilst walking in a northern direction down a passage called Tamboekiehof. It was also not disputed that M [....]2 was shot and taken to hospital. The evidence of Col Mangena confirmed the direction of the shooting and his evidence was not seriously challenged. The only question for this court to decide is who was responsible for the shooting. The ballistic evidence indicated that two semi-automatic firearms were used. This, on the probabilities, would indicate that there were two people who fired shots.

[65] The state argued that the evidence of the state witnesses should be accepted and that the state has proven, beyond reasonable doubt, that the two people who fired the shots were accused 1 and 2. It was argued that identity could not really be disputed once the court accept the evidence of M [....]2, L [....] M [....]1, I [....] A [....] and P [....]2 H [....]2. They knew the accused and would not have wrongly identified them. The state argued that the alibi of accused 1 was proven to be false beyond reasonable doubt.

[66] On behalf of the two accused it was argued that the state witnesses contradicted each other and themselves. It was argued that the witnesses colluded with each other and with the corrupt police, particularly with W/O Steyn and W/O Saunders to frame the two accused. The witnesses were referred to as professional witnesses to protect M [....]2 and L [....] M [....]1. Finch, the leader of the Varados was the person behind all of this corrupt activity. He, as leader of the drug smuggling Varados gang, was paying the police to act according to his wishes.

[67] The court was informed about other murder cases, particularly the matter of M [....]3 C [....] where the accused allegedly made statements against M [....]2 and M [....]1 but they were never arrested. It was argued that because of wide spread police

corruption, evidenced by the arrest of W/O Steyn stationed of Sohiatown Police Station, the evidence of the state witnesses were tainted with the flavour of corruption and should not be accepted. The court was asked to draw an adverse inference against the state for not calling W/O Steyn to testify. He and Keet was the first policemen on the scene after the shooting.

[68] It was argued that the police protected L [....] M [....]1 and M [....]2 and that they might have been the persons who shot the deceased, alternatively that they were involved in crossfire with other people. This possibility, so was it argued, was supported by the fact that they were arrested but failed to immediately make statements proclaiming their innocence. Only after the negative gun powder residue test became available some 3 months later did they make statements implicating the accused. Coupled with this the fact that P [....]2 H [....]2 only, quite incidentally, came forward as a witness about a month after the shooting incident.

[69] It was argued that the issue of the video evidence that disappeared is an extremely important aspect. It was confirmed in court on record that the material existed and that Cst Modise could confirm that two people are clearly seen on the video. Later it appeared that the video footage could not be retrieved as the phone was damaged. The question was rightfully asked why it was then not properly explained to court what has happened to the footage.

[70] On behalf of accused 1 it was argued that above all his alibi defence is reasonably possibly through and should be accepted.

[71] To deal with the issue of W/O Steyn first. There is a suspicion that W/O Steyn acted corruptly and sided with gangs. For this he was arrested according to W/O Saunders. There is however, no acceptable evidence placed before this court that he influenced witnesses in this matter. There is also no evidence or indication that he tampered with evidence or influenced witnesses when he arrived at the crime scene shortly after the shooting.

[72] As far as W/O Saunders is concerned there is no evidence whatsoever implicating him of any corrupt activities. He in fact was deployed from Cape Town to

assist in this gang related crimes. This court should not base its findings on vague allegations of corruption and open ended allegations that the police sided with certain gangs. To do this the court will have to rely on hearsay evidence, speculate and give credence to conjecture. The court must deal with the evidence led in this court and evaluate the evidence to consider whether the state has proven its case against the accused beyond reasonable doubt. In my view, there is nothing sinister to be found in the fact that Saunders, who was investigating gang related crimes, took the statements of I [...] A [...] and other witnesses in this matter.

[73] The court considered the evidence of M [...]2 and find him to be a reliable witness who related what has transpired on that day in a logical and clear manner. He did not contradict himself on material aspects. The fact that he did not see the vehicle parked at the entrance to the passage is not affecting is credibility or observation ability. Things were happening fast and he was moving down in the passage.

[74] The contradictions pointed out in his own testimony when compared with the evidence of I [...] A [...] relating who stood where outside D [...]2 take away, the type of cars parked, the way in which the black Audi travelled and where it came to a standstill is not material issues affecting the credibility of the witnesses. It is rather an indication that these witnesses did not collude to come up with a version.

[75] I [...] A [...] has testified that she had no axe to grind with the accused and that accused 1 was like a brother to her. She also gave her evidence in a logical manner and she did not contradict herself. The court gained the impression that she related to court exactly what she saw. She made her statement to the police a day after the shooting and would not have had a chance to collude with anybody about her version of the events. The contents of her statement, dated 28 September 2018 which was handed in as exhibit "J" was materially the same as her evidence in court. The court could not find any reason why she would lie about her friendly relationship with accused 1 which go back to her youth. The fact that she late in her evidence brought up the issue of her cellular phone and the video she took is not affecting her credibility. She said the phone was damaged. What transpired thereafter and what the court was told from the bar about video footage is not evidence although the

court expected from the state to clarify this issue through evidence. The matter was postponed on a few occasions for the video footage to be presented in court. The court was led to believe that video footage was retrieved from the cellular phone onto a hard drive and will be made available. Despite these statement the court was told on 19 August 2020 that there was no video footage. To leave it at that was unacceptable. The question however remains whether it affected the credibility of I [....] A [....]. In my view it did not.

[76] The court also find L [....] M [....]¹ to be a credible witness. He admitted that he was part of the Varados gang. He related his version without contradicting himself. The fact that he only made a written statement after his release does not point to any wrongdoing. It is not uncommon and in fact in happens more often than not that suspects do not provide the police with statements.

[77] The witness P [....]² H [....]² impressed the court as a witness although it is strange why he only came to the fore when the police revisited the crime scene about a month or so after the incident. His explanation was that H [....]¹'s husband told him, Saunders was looking for him to take a statement. When Saunders asked him if he saw something he was prepared to give a statement. Furthermore, it is understandable that people do not want to get themselves involved in these gang related shootings. His presence on the scene and position in front of the house in Tamboekiehof was corroborated by the other witnesses. They saw him there. At some stage during his testimony he became confused. In my view, this came about as a result of the intimidating style of cross examination by Mr Spies. He raised his voice and asked one question after the other affording the witness limited time to reply. The court had to ask Mr Spies not to shout and intimidate the witness.

[78] The evidence of S [....]¹ B [....] remains uncontested and should be accepted. Her evidence cannot be criticised, she was coherent and an honest witness. Although this witness could not identify the shooters, she did corroborate every other state witness`s evidence in material aspects. She even confirmed the vehicle that was parked near the houses that was mentioned by I [....] A [....]. This witness also gave a description of the thin short lady whom the deceased greeted which the court

accepts to be I [....] A [....]. L [....] also testified that he recalls that accused 1 wore a black cap.

[79] Considering the eye witnesses' evidence holistically it becomes clear that they corroborate each other on material aspect but still each one gave his or her version of the events. There is no evidence of collusion, as if this happened and they discuss how they would implicate the two accused, the court would have expected all the witnesses to implicate, in some detail, both the accused and the role they played. This did not happen. If P [....]2 H [....]2 was part of this conspiracy he would have given his statement at a much earlier stage. Moreover, there was no time for I [....] A [....] to conspire with anyone before she gave her statement.

[80] As far as the identity of the accused as the two perpetrators are concerned the evidence is overwhelming. The state witnesses M [....]2, L [....] M [....]1, I [....] A [....] and P [....]2 H [....]2 were familiar with the area of Westbury. They were familiar with accused 1 and accused 2. M [....]2 and L [....] knew accused 1 for a number of years and would often see him in Westbury at accused 2 shop. They knew them to be friends. L [....] and M [....]2 often bought food at D [....]2 take away and were familiar with accused 2 and his family members.

[81] Accused 1 and 2 were identified in broad day light and over a relative short distance. The deceased shouting " L [....] watch out" was also heard by all 3 witnesses I [....], M [....]2 and L [....].

[82] The deceased and the children were walking behind M [....]2 and L [....] when the shots were fired. Shots were fired from the front of the passage. The evidence of Col Mangena corroborates the witness's evidence that there was no cross – fire on the day in question. Shots were only fired from the entrance of the passage towards the witnesses. This evidence put pay to the suggestion that M [....]2 and M [....]1 were the persons who fired the fatal shots. First, how would M [....]2 end up being shot if he was shooting from the entrance and second, they did not fire from inside the passage as this would be contrary to the evidence of Col Mangena and the post mortem report indicating the entry and exit wounds found on the deceased's body.

Further, there is now evidence that the shooters were different people shooting at M [....]2 and L [....] M [....]1.

[83] The suggestion of police corruption which caused witnesses to testify against accused 1 and 2, either to falsely implicate the accused or to protect themselves hold no water. There is no acceptable evidence of collusion and there are no probabilities that favour such a conclusion. For instance if the police and state witnesses colluded one would have expected S [....]1 B [....] to also identify the shooters. Her evidence was rather of a witness who was not influence to blindly support other witnesses. Her version is clearly what she saw under stressful circumstances, but it support the other witnesses on material aspects as to the vehicle at the entrance of the passage, the presence of the thin lady as well as that Bitsy and Ezzo were running down the passage whilst shots were fired towards them. This thin short lady the deceased greeted that afternoon could only have been I [....] A [....]. She saw Eezo and L [....] in the passage sitting on the drains. She also noticed a car parked on the side of the houses corroborating I [....] Adam's version of a vehicle parked at the entrance of the passage.

[84] Both accused raised issues of corruption by the police members of Sophiatown and witnesses colluding with each other to falsely implicate them in this matter. One of the main reasons for that was because accused 1 and 2 implicated M [....]2 and L [....] M [....]1 in the murder of M [....]3 C [....]. Yet accused 1 only mentioned Nadie R[....]1 N[....]1's name in his statement and the name Valentino.

[85] Accused 1 testified that L [....]'s father was killed by his uncle and this could also be a reason for falsely implicating him. Yet, L [....] was not even aware that the person who killed his father was accused 1's uncle.

[86] Accused 1 was adamant that he wanted to testify in the M [....]3 matter. Yet, the entry by the Senior Public Prosecutor Johannesburg on the docket indicated that he refused to testify and therefore the matter was withdrawn.

[87] Accused 2 only made his statement on 18 November 2018 in the M [....]3 matter when he was arrested for the murder of H [....]1 Peterson. I [....], P [....]2 and

other statements were already in the docket identifying him and accused 1 as the shooters on the day in question.

[88] The two accused testified that they were not friends. Despite this they, on their own versions, were also in each other's company when the shooting of M [....]3 took place. They took him to hospital. This is an indication that they were much closer connected as what they wanted this court to belief.

[89] Both accused testified that I [....] and P [....]2 were professional witnesses for the Varadors and created alibis for L [....] in other matters. Yet, in both dockets in the M [....]3 C [....] and the B [....] O [....] cases were brought to court by W/O Saunders who testified that neither I [....] nor P [....]2 were alibis or made statements in those dockets.

[90] Both accused specifically mentioned W/O Steyn, Keet and Mthetwa as corrupt police officers who worked for Leroy Brown. Yet, the only statement Steyn provided in this case was that of attending the crime scene as the officer on duty. He did not incriminate the accused in any way. Keet had no relevance in this case. Mthetwa was removed as the investigating officer and Saunders took over.

[91] Accused 2 testified that everybody knew that M [....]2 wore a hoodie top on the day in question and that Steyn took a firearm from him. This version is based on hearsay and conjecture.

[92] Accused 2 further testified that Saunders was paid by the Varadors an amount of R250000 to release M [....]2 and L [....] in this matter. He admitted he had no proof and that he heard this in prison and the entire Westbury knew this to be true. Yet, this was never put to the witness when he testified which was crucial seeing that this was also part of the collusion with the Varadors.

[93] Accused 2 further testified that whilst driving back from East London. Saunders also told him that Finch offered him R500 000 for this case. This version was also not put to Saunders.

[94] Accused 2 testified for the first time about a suspect Tavey who was involved in the shooting of H [....]1 P [....]1. Failure to canvass this evidence with Saunders is indicative of fabrication whilst testifying.

[95] After the murder of H [....]1 P [....]1 accused 2 fled to East London. He testified that he and his family were threatened by Finch. Yet, he left one of his other children to work in the shop as he felt only the children he had with Lisa were in danger. The indication is rather that he fled because of his involvement in the killing of H [....]1 P [....]1.

[96] The evidence both accused provided about the collusion between witnesses and the police with members of the Varados gang to falsely implicate them in the death of H [....]1 P [....]1 amounts to hearsay and gossip stories amongst the community of Westbury. The court cannot base its findings on speculation and conjecture.

[97] The two accused testified that they are working people and have nothing to do with this gang related violence. If that is in fact the case the court finds it hard to understand why the state witnesses, either under pressure of Leroy Brown or on their own, would have single out the accused of all people to blame for the killing of H [....]1 P [....]1. They said they had no problems with the Varados. They were not part of this gang violence yet prosecutors, the police and witnesses, with whom they had no trouble before, gang up against them to exonerate M [....]2 and L [....] M [....]1. This is highly improbable and should be rejected as false beyond reasonable doubt. This evidence is baseless, and lacks substance.

[98] The court must regardless its rejection of the allegations that the state witness colluded amongst themselves, with the assistance of the police, still consider whether the alibi defence of accused 1 is not reasonably possibly true. This should be considered in light of all the evidence.

[99] In **R v Hlongwane 1959(3) SA 337(A) para 340 H-341B Holmes AJA** in dealing with an alibi said that an accused must be acquitted if the alibi M [....]1 reasonably be true "*But it is important to bear in mind that in applying this test, the*

alibi does not have to be considered in isolation. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the court's impressions of the witnesses."

[100] Accused 1 has relied upon such an alibi defence. His alibi defence and evidence tendered in support thereof must not be considered in isolation but must be considered with the evidence in its totality. R [....] M [....]⁴ and his wife L [....]³ D [....]³ testified as alibi witnesses.

[101] Mr R [....] M [....]⁴ a self-confessed forgetful witness, admitted and correctly so, that he was not certain of the dates and times when accused 1 came to property.

[102] Firstly, he testified that he was without a doubt certain that the accused came on a Wednesday to view the property from his own recollection of his memory. He confirmed this by stating that he looked at his calendar and concluded that his lease was about to expire in 4 days and that is how he recalled it being a Wednesday. Correctly so, the lease expired on 30 September and Wednesday was the 26th of September which was 4 days apart.

[103] He further recalled that on the exact day the viewing took place was the Wednesday the day he telephonically called Charlene who was the personal assistant who arranged for the viewing that specific day.

[104] He further testified that he also recalled that on that Wednesday he was waiting for Mariaan to hand over the keys to the new place and he specifically remembered his things were literally standing outside to allow the new tenant to move in.

[105] When confronted with the fact that the 27th was on a Thursday, he changed the date and admitted that he was not certain of the date or time. He said do not hold me to the date or time. He sometimes would forget to fetch his own kids. His own family can testify to how forgetful he was.

[106] He testified L [...]3 called him and asked him to come to the police station and that it was in connection with the day accused 1 came to view the property, no dates or times were discussed.

[107] His evidence became blurred on the crucial issue on whether accused 1 was at this property between the hours of 12h00 and 14h00 on the 27th of September 2018. The court finds that his evidence does not support accused 1's version that he was at this property at the time when the shooting took place in Westbury.

[108] The evidence of the wife of accused 1, L [...]3 D [...]3 also created more questions than being corroboration for the version of accused 1 that he was not in Westbury when the shooting took place. First, she is not an independent witness being the wife of accused 1, second she only became an alibi witness during the course of the trial and third Mr M [...]4 did not even see her at the property. Her evidence what transpired at the police station after the arrest of accused 1 is also unclear placing a question mark over her version that she was there with Mr M [...]4. There are contradictions between her evidence and that of M [...]4.

[109] L [...]3 testified that she had referred to the administrative file of accused 1 after she spoke to Saunders and realised that he had a viewing on that day. Yet, she testified that during the first conversation with Saunders she already told him accused 1 was at a viewing and that he had an alibi of which she would provide evidence.

[110] M [...]4 testified that L [...]3 contacted him to provide a statement in this matter, he agreed to type out a statement and emailed it to her. Yet, L [...]3 testified that M [...]4 handed a statement to the Legal representative Advocate Lekgatoane from the Legal Aid. M [...]4 denied this and L [...]3 denied that she received his statement.

[111] She had the file in court but did not refer to it or the document that she said had scribbles on. In fact her evidence was she was not sure if that evidence was in that file she would need to check it. The court finds it highly improbable that she would not have previously looked at the file and if it could support her husband's alibi she

would have produced it to legal representatives long before the trial started. The state was criticised for not cross examining the witness on the file she brought to court. In my view, it was the state's prerogative not to do that as this file should have been produced and referred to earlier in her evidence and not as an afterthought.

[112] M [...]4 testified that he was confused as to why he was called to the police station because Saunders had asked L [...]3 some personal questions but was not interested in him. L [...]3 did not tell Saunders who he was or the reason for him being there. He told Saunders how he met accused 1 and that L [...]3 had asked him to come to the police station but Saunders was not interested in him. Saunders was only interested in L [...]3 and he asked her more questions and he then asked to be excused. Yet, L [...]3 testified Saunders specifically asked M [...]4 about the date of the incident and the viewings time and M [...]4 responded with the date and time of the viewing. M [...]4 denied this happened.

[113] In the view of the court both alibi witnesses were unreliable and adapted their versions when confronted with various discrepancies in their evidence. Both their versions were tested and their answers were contrary to each other pertaining to dates and times of the viewing of the property which was crucial to the defence of accused 1. The court finds that the alibi defence of accused 1 is not reasonably possibly true particularly in light of the M [...]4's evidence that the viewing took place on the Wednesday.

[114] Moreover, even if accused 1 was at the viewing at 12h00 on the 27th of September 2018 he could have been in Westbury after 13h00 when the shooting took place. The uncontested evidence was that it will only take between 11 and 30 minutes to travel the distance from Quellerina to Westbury.

[115] On the totality of evidence and considering the reliable and credible identification by the state witnesses compared to the poor quality of accused 1 defence and alibi evidence the court rejects the alibi defence as not being reasonably possibly true.

[116] The same apply to the bare denial of accused 2. His denial cannot be reasonable possibly true in the face of reliable witnesses identifying him as one of the persons who fired shots that killed H [....]1 P [....]1. His defence of a conspiracy has been pointed out to be false.

[117] The court finds that accused 1 and 2 acted in concert on 27 September 2018 to shoot and kill L [....] M [....]1 and S [....]2 M [....]2. They were both armed with firearms and actively participated in the shooting. As a consequence of their direct intent they foresaw that other persons will be injured by their actions. They reconciled themselves to this fact and as a result directly caused the death of H [....]1 P [....]1 and injured S [....]1 B [....] as a result of their actions. The Ballistic report confirms that the fired cartridge cases obtained at the scene were fired from two different semi- automatic firearms.

ORDER

[120] **Consequently, the two accused are found guilty on the following counts as charged:**

1. **Count 1, murder read with section 51(1) of Act 105 of 1997.**
2. **Counts 2, 3 and 4 attempted murder.**
3. **Count 5 the unlawful possession of a firearm.**
4. **Count 6 the unlawful possession of ammunition.**

**RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Appearances

For the State:	Adv. Z. Peck
For Accused one:	Adv. R. Spies
For Accused two:	Adv. J. Muir
Instructed by:	Mr. D. Greef

Date of Hearing:	24 February 2020
Date Judgment Reserved:	12 February 2021
Date of Judgment:	18 March 2021