Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: SS17/2013

Before: The Hon. Mr Justice Binns-Ward
sitting with an assessor

In the matter between:

THE STATE

and

GARY PETERS Accused No. 1
MOEGAMAT SHAFIEK MINNIES Accused No. 2

JUDGMENT DELIVERED 4 NOVEMBER 2013

BINNS-WARD J:

[1] This is the unanimous judgment of the court comprised of myself, as the trial judge, and the learned assessor who sat with me, Mr A. Duraan.

[2] The accused in this trial are Mr Gary Peters (accused 1) and Mr Mogamat Shafiek Minnies (accused 2). The accused were arraigned on six charges. The charge on count one was that the accused had contravened s 9(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA) in that they allegedly wrongfully and unlawfully participated in or were members of a criminal gang and wilfully aided and abetted any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang. Count two concerned an alleged contravention of s 9(2)(a) of POCA, it being alleged that the accused had performed an act which was aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity. The third count concerned a charge of murder, in that it was

alleged that the accused had murdered one Junaid McKenzie by shooting him with a firearm. The indictment indiscriminately invoked s 51 of the Criminal Law Amendment Act 105 of 1997, but it was contextually apparent from the summary of the state's case and the fact that both accused were charged with the offence that murder within the meaning of Part I of Schedule 2 Act 105 of 1997 was entailed. (On enquiry from the court before judgment was delivered, the legal representatives for both accused confirmed to the court that they had advised their clients of their exposure to the prescribed sentence of life imprisonment for murder referred to in Part I of Schedule 2 to Act 105 of 1997.) The fourth count concerned the attempted murder at the same time and place of Letecia Jacobs, also by shooting her with a firearm. The fifth and sixth counts concerned the unlawful possession of a firearm and the unlawful possession of ammunition. The accused, who were both legally represented, pleaded not guilty to all of the charges. They did not offer a plea explanation.

[3] Formal admissions by each of the accused in terms of s 220 of the Criminal Procedure Act by the accused concerning the injuries and cause of death of the deceased, Junaid McKenzie, were admitted as exhs. F and H, respectively.

[4] Shamiela McKenzie, the 24 year old sister of the deceased, Junaid McKenzie, testified that on the evening of 26 June 2012 she was at her parents' home at 5 Melody Square, Steenberg, at just before seven o'clock in the evening. She was busy dishing up food for the evening meal when she heard shots ringing out outside the house. She thought there were two or three shots, but could not be certain of the number. She and her father rushed out of the house to find out what was happening. She saw her young brother, a child of just eight years of age, lying on the ground near a spot where she knew that her boyfriend and some of her friends had been playing dominoes. Junaid had been playing with his football in the street in the immediate vicinity of where the dominoes game was being played.

[5] The witness went up to her brother and saw that he had been shot in the head. The boy was carried inside the house while transport was arranged to take him to the nearby day hospital. She learned that a woman from the neighbourhood, whom she knew only by the name Letecia, had also been shot. The woman had also been carried into the house. She heard about two hours later that Junaid had passed away at the Red Cross Children's Hospital.

[6] Shamiela McKenzie testified that the area in which she lived was plagued by gang activity. She said that her brother, Ishmael, was a gang member. He belonged to the Junky Funky Kids, known by the acronym JFK. Her brother's gang membership was confirmed by the JFK tattoo he bore on one of his arms. Other gangs operating in the area were the Mongrels and the Corner Boys. The members of those gangs were recognisable by the tattoo marks that were peculiar to each gang.

[7] The witness confirmed that accused number 2 was known to her. She knew him as 'Fikkie'. She said that his family had a house in Melody Square and said that the accused had lived there for some months during the period 2009/10. At that time he had been friendly with Ishmael.

[8] Shamiela's father, Mogamat Cassiem McKenzie, also testified. His evidence essentially confirmed that of his daughter. He thought he heard three shots; although he could not be sure. He said that the gunfire had been very rapid. He said that he had carried his son into the house from the place where he had found him lying outside the house on the pavement. He said that he had seen the injured woman lying on the sidewalk opposite the gate to his property. He and another man had carried the woman into his house and laid her on a sofa. He confirmed the appearance and position of the sofa with reference to the photographs in exh. A. He said that the woman had been transported to hospital together with his son.

[9] Warren Adams, the boyfriend of the first witness, Shamiela McKenzie, testified that he had been playing dominoes with friends outside the McKenzies' house. The game had been played on top of an electrical substation, which is visible as a green box in the photographs put in as a part of exh C. It is also visible in some of the photographs in exh A. Junaid had been playing with a foot ball nearby. At some stage, round about 7:00 p.m., one of the persons at the dominoes game, one Danville Williams, also known as 'Eye', who apparently was a Rastafarian, asked who 'those men' were. The witness said that the persons to whom Danville had referred appeared to be two persons standing behind a white bakkie on the opposite side of the street, across the road from the house of one, Trevor, who ran a shebeen. The position of the bakkie is evident on some of the photographs in exh. A. It was parked on the side of the road outside a partly constructed building that stood across the road from the place indicated as Trevor's house. As he looked up he heard shots rang out and saw what appeared to him to be flashes that he associated with the

discharge of a firearm coming from the place where the two aforementioned individuals were standing. Adams testified that there were two shots, but he could not say whether both were fired by the same weapon. It was put to him in cross-examination by counsel for accused 1 that other witnesses had made statements suggesting that there had been three or four shots. He was adamant that there had been just two shots.

[10] When the shots were fired Adams ran for cover into the McKenzie's yard. As he did so he noticed the two individuals running away up Melody Square road towards Piccolo Street. (The layout of the vicinity is evident from the Google Map put in without objection from the accused as exh. B.) He was not able to identify either of these persons, or even say whether they were male or female. They were both wearing hoods pulled low over their foreheads. As for the rest, Warren Adams essentially corroborated the evidence of Shamiela and Mogamat McKenzie. He had the same degree of knowledge or acquaintance with accused 2 as did Shamiela.

[11] The next witness called by the State was one Wayne Joseph Samuels. He lives in Piccolo Street. On the night in question he had been standing by a bench in Woodwind Crescent, which is a grassy area, rather like Melody Square. I gathered that Woodwind Crescent was about the same distance north of Piccolo Street (i.e. to the right of Piccolo Street as shown on exh. B) as Melody Square is to the south of Piccolo Street. (This impression was confirmed by the content of a further Google Map put in as exh. J.) He heard the sound of gunfire. He was not sure from where it had come, but he proceeded towards Piccolo Street to find out what had happened. While he was proceeding up the part of Woodwind Crescent that runs towards the junction with Piccolo Street three men ran past him. They had approached from the opposite direction to that in which he was headed; that is they were running from the direction of Melody Square. All three of them were wearing hooded tops with the hoods drawn over their heads. He would not be able to identify any of them. When he got to Melody Square he saw that there was something of a commotion. He noticed Junaid McKenzie lying on the ground.

[12] It was put to Samuels by counsel for accused 1 that his client had been running in the direction described with two other persons, but that he had not been wearing a hood. Accused 1's presence at that stage as one of the three fleeing persons was thereby admitted.

[13] The State then called Anwar Hendricks. This witness was warned as an accomplice in terms of s 204 of the Criminal Procedure Act 51 of 1977. The evidence of Hendricks was heard *in camera* because we were informed by the prosecutor that he might be placed in danger if proceedings were held in open court.

[14] Hendricks is a man of 35 years of age; a bricklayer by trade. His evidence was difficult to follow at times because he spoke with a very raspy voice. He explained that he was suffering from a throat infection.

[15] Hendricks said that he had previously been a member of the Mongrels gang. He had joined the gang in 1998 when he was about 20 years old, but had left it in 2000 or 2001. He explained that he had joined the gang under the influence of his peers.

[16] Hendricks testified that one could join the gang by approaching any gang member. On admission to membership a person would then be tattooed with the gang's distinctive marking. In his case, a so-called 'Under Leader' or 'Sub-Leader' of the gang, one Benny Du Plooy, had applied his tattoo. He confirmed that the gang had a rank structure, with a Leader, Sub-Leaders and soldiers. (Under cross-examination by accused 2's legal representative, Hendricks also described that Du Plooy held the rank of 'school master'. He explained that this was a position of equivalent standing to an under-leader.) There was a system of discipline in the gang. Members who failed to comply with instructions, or breached the gang's code of conduct were liable to be disciplined. This could take the form of a warning or of being assaulted.

[17] He further explained that the gangs engaged in various activities, including the sale of liquor and illicit drugs. These activities were carried on in the area dominated by the particular gang and one of the functions of soldiers in the gang was to protect the gang's territory from being taken over by rival gangs. He described how there were at times gang wars, which were typified, amongst other things, by drive-by shootings and inter-gang shoot-outs.

[18] Hendricks testified that on the evening of 27 June 2012 he was watching television in his apartment at Keppelhof in Lavender Hill when he heard shooting outside. After first going to the window to try to see what was going on, he then went outside and discovered that someone by the name of Kalokkies had been shot dead on

one of the stairwells of the nearby flats at Muirhof. Hendricks estimated that he had stood around at the scene of the shooting together with other people from the nearby apartments for about 20 minutes. He had then moved to go back to his own apartment. On his way there, and while crossing the small grassy area that divided Muirhof from Keppelhof, he encountered a group of about 10 to 15 men whom he knew to be members of the Mongrels gang. He recognised accused 2, who was known to him as 'Shaffie', amongst them. Accused 2 resided in the adjoining flats at De Waalhof and had a girlfriend who lived at Keppelhof. He knew accused 2 to be a member of the Mongrels gang. He enquired of accused 2 where the group was going and was told that they were on their way to Steenberg in search of Junky Funkies (this a reference to members of the JFK gang). He inferred that that they intended to shoot at the JFKs. He decided to go with them. Hendricks explained under cross-examination that he had accompanied them out of curiosity, but one has to suspect that he may have had a more direct interest in the apparent mission of the group than mere curiosity for he described having himself been chased away from a place known as Montagu Village by members of the JFKs in the previous week. He said that it was a time of gang warfare. Whereas Lavender Hill appears to have been Mongrels territory, Montagu Village and Steenberg appear to have been the turf of the rival JFK gang.

[19] Hendricks described that at some stage on the walk towards Steenberg, and before they reached the canal that marks the border between Steenberg and Lavender Hill, somewhere in the vicinity of that part of the M5 highway known as Prince George Drive, accused 1, who was not known to him at the time, joined the group. He had been called to do so by accused 2. (The position and course of the canal is marked by a blue line on the Google Map put in as exh. J2.) At some point Hendricks broke away from the group to approach a stranger on the street for a match to light a cigarette. When he returned from that diversion, he found only accused 1 and 2 still present, the rest of the group having gone off.

[20] He said that he and accused 1 and 2 then proceeded into Steenberg. They eventually arrived at the scene of the shooting at Melody Square. He was not familiar with the area and did not know the names of the streets. Initially all three of them took up position behind the parked white bakkie depicted in the photographs in exh. A. He said that accused 2 said that a Junky Funky lived in that circle (the

witness used the word ‘sirkel’ - which in Afrikaans denotes ‘crescent’ - to refer to a place where houses were arranged around a square as is evidently the case in Melody Square, as may be deduced from the aerial photograph, exh. B).

[21] The witness said that accused 2 had pulled a handgun from his waistband and holding it pointed upwards had peered around from the edge of the rear of the bakkie. A group of persons was visible on the corner ahead of the bakkie, on the opposite side of the road (that is outside the McKenzie’s house). He indicated the group to have been in the position where the earlier state witnesses had described the playing of a game of dominoes on the top of the electricity sub-station. He said that he then moved back up the road behind the bakkie in the direction from which he and the accused had come and then crossed the road to take up a look-out position. He said that accused 1 had done nothing active. He had merely stood next to accused 2 behind the white bakkie. He did state, however, that accused 1 knew why the three of them had come to Steenberg. He did not explain though on what basis he made this assertion and the question was not explored by counsel. He denied the proposition put to him in cross-examination by counsel for accused 1 that accused 2 had produced the firearm earlier in the evening when they were at the canal. He admitted, however, that he had been aware earlier that accused 2 had a firearm. He had deduced this from the manner in which accused 2 had held it concealed at his waist. He said that he did not see other people walking in the street in which the bakkie was parked.

[22] Hendricks said that he heard a number of shots being fired. He thought it was two or three, but could not be sure. He said the gunfire was very rapid. He turned to look back towards the bakkie when the gunshots went off and saw accused 1 and 2 running up the road towards him. Accused 2 tried to hand him the firearm, but he declined to take it. Accused 2 then handed the weapon to accused 1 who ran off with it in a different direction from that taken by accused 2 and the witness. He said that accused 2 said to him ‘Did you see how I mowed down those dogs?’.

[23] Hendricks said he could not remember how he and the two accused had been dressed on the evening in question.

[24] The witness stated that he had seen a report of the killing of a child in the shooting at Melody Square on the television news the following evening. He recognised the scene as the place that he had been with the accused the previous

night. He asked accused 2 if he had seen the news item. Accused 2 merely asked him whether he had spoken about it to anybody else.

[25] He learned later that accused 2 and one Aboobaker Kamaar had been taken in by the police. At a later stage he was also asked to report to the police, where he was interviewed by Detective Brown. During cross-examination by counsel for accused 2, the statements made by Hendricks to the police were put in as exhibits D and E, respectively. The first was made as a so-called 'warning statement' in September 2012. The latter was a witness statement, or so-called 'section 204 statement', made in February 2013. There were no material conflicts between the statements and the oral evidence given by Hendricks in court. His evidence was not shaken in cross-examination.

[26] In cross-examination by accused 1's counsel the content of the statements of other witnesses in the police docket were put to Hendriks. It was put to him that a statement by a person known as 'Leggies' (Hendricks confessed to knowing the person who went by that name) had suggested that one 'Oortjies' and one Fahiem Block, both Mongrels gang members, had left his (i.e. Leggies') house in Sullivan Street, Steenberg, at about 7 pm that evening. It was also put to Hendricks that a witness by the name Jamie Lee Vorsatz (later corrected to Jamie Joyce Vorsatz) had given a statement which suggested that she had seen two men matching the description of Oortjies and Block walking towards Melody Square immediately before the shooting. The statement of Vorsatz indicated that she had seen one of these men stopping to stand at the corner of Piccolo Streets while the other, who was wearing a black hood and a red cap took up a position outside Trevor's house, which, as observed earlier, was directly opposite where the white bakkie was parked. It was put to Hendricks that Vorsatz's statement suggested that she had seen these two men run across the grassy area of Melody Square after the shots had been fired. Hendricks was not able to offer any comment. He said that he had seen no-one moving in the part of Melody Square that ran from Piccolo Street to the corner on which the electricity sub-station stood while he was there.

[27] Under further cross-examination by counsel for accused 1, Hendricks agreed to the proposition that on the way to the scene of the shooting he had walked past a school. Counsel pointed out the Sullivan Primary School which is shown on exh. B, but the witness was not familiar enough with the area to be able to confirm that it was

the school in question. He denied that he and his companions had communicated with each other using sign language on their way to where the shooting occurred. (It is not apparent on what basis the proposition was put on behalf of accused 1 because he did not testify to the use of sign language by anyone.) Hendricks also denied the proposition put to him, apparently on the basis of the content of an extra-curial statement by accused 2, that he, Hendricks, had told accused 2 to open fire. (That accused 2 had made such an allegation in an extracurial statement was subsequently confirmed when the statement (exh. R) was later admitted into evidence after a trial within a trial.)

[28] Under cross-examination by the attorney for accused 2 it was put to Hendricks that although accused 2 was a member of the Mongrels gang at the time he had not been on the scene on the evening of 27 June 2012. It was also put to Hendricks that accused 2 had often seen him in the company of members of the Mongrels during the first part of 2012, so much so that he considered him to be a member of the gang. Hendricks denied the proposition that he was regularly seen in the company of Mongrels gang members and insisted that he was not a member of the gang.

[29] It was further put to Hendricks by accused 2's representative that accused 2 had spent the afternoon and evening at the flat of his girlfriend, Edwina, at Keppelhof. Accused 2 would say that he had heard the shooting at Muirhof and had gone out to see what had happened. After standing at that scene for some minutes he had retuned to his girlfriend's flat and remained there until about 9:30 p.m., when he had returned to his own flat.

[30] The following witness called by the prosecution was Letecia Jacobs, the complainant on count 4. Her evidence in chief was to the effect that on the evening in question just before seven o'clock she left her sister's house in Sullivan Street, Steenberg, in the company of one of her daughters, 15-year old Jamie Joyce Vorsatz. They were on their way to pay her account with a storekeeper in Mandolin Square. Their route would take them via Melody Square. As they proceeded down Sullivan St. to the corner with Piccolo St., her daughter pointed out that two men had emerged from Leggies' house. One of them was wearing a hood. By the time she and her daughter reached the corner of Piccolo St. they had overtaken the two men, who were then behind them. She noticed her daughter repeatedly looking back but took no notice.

[31] When they reached Melody Square, just after she had walked past a game of dominoes being played outside the McKenzies' house, the witness said she heard a gunshot. She wanted to run, but could take only two paces before she felt something burning on her left side and fell to the ground. She had noticed a blue Kombi and a white bakkie parked in the road. She identified the white bakkie depicted in exh. A as looking like the one she remembered having seen. While she was lying on the ground she was conscious of persons running past her and voices. She kept her head down frightened that someone might shoot her. After a while people came to lift her up and carry her into the McKenzie's house. There she lost consciousness and remembers nothing more until she woke up in the Groote Schuur Hospital. She underwent surgery and had to wear a colostomy bag for a period of five months. It was apparent from what the witness said that a bullet had passed through her lower abdominal area with an entrance and an exit wound. She underwent further surgery for the closure of her stoma in November 2012. She still suffers the after-effects of her injuries and has been told that this is likely to persist for the rest of her life.

[32] Mrs Jacobs testified to the traumatic effect the shooting had had on her and her daughter. She said that they had stayed locked up in their house afraid to go out for months after the incident. They were still fearful more than a year later. They had not received trauma counselling.

[33] Under cross-examination by counsel for accused 1 the witness pointed out that the witness statement in the police docket signed by her daughter under the name 'Jamie-Lee' was incorrect in that her daughter's name was in fact 'Jamie Joyce'. She said that she had advised the prosecutor that she did not want her daughter to testify at the trial because she was severely traumatised.

[34] Various passages from her daughter's witness statement were put to her, but she was unable to confirm them. Under cross-examination she stated that she had heard two gunshots fired rapidly in succession.

[35] The impression given by this witness was that she was unsophisticated, frank and honest, but had not been particularly observant or concerned about what was going on about her before the shooting.

[36] The State then called Constable Wesley Twiggs, a police officer who, accompanied by his colleagues, attended the scene of the shooting shortly after the

occurrence. He arrived there after the two victims had already been removed to hospital. This witness confirmed his discovery of the bullet casings and the bullet head depicted in exhs. A and D and that there had been no disturbance of the scene as depicted in the photographs from the time of his arrival until the arrival of the police photographer.

[37] Mr Martin Truter, a former warrant-officer in the police force, was then called to confirm that he had taken the photographs in exh. A and drawn up the accompanying key. He had also been responsible for the recovery of the ballistic evidence at the scene and its submission for forensic analysis.

[38] The next witness for the prosecution was Warrant Officer Desmond Lemmetjies. He testified as an expert witness on the structure and activities of gangs in the Steenberg-Lavender Hill areas. He had been involved in gang-policing for about 12 years and had attended a number of subject related training courses. He said that six gangs including the Mongrels and the Junky Funky Kids operated in the area. He was able to identify the respective territories controlled by each gang in these suburbs and confirmed that gang activities included dealing in drugs, housebreakings, robberies and murder and attempted murder..

[39] He said that the apartment block, Muirhof, was a Mongrels stronghold and that the gang's leader, Roland Jacobs, lived there. The JFK's had three leaders and that gang's headquarters were situated at 62 Robertson Street in the nearby area of Seawinds.

[40] Lieutenant Willem Prinsloo then testified to having recorded an extra-curial statement from accused 1. The statement itself, as well as a video-recording of the taking of the statement was put in.

[41] Captain Pieter Johan Brink was then called to testify to having taken a statement from accused 2. Whereas the attorney representing accused 2 had earlier placed on record that accused 2 admitted to having made the statement freely and voluntarily, and would contest only the veracity of the statement, she later indicated that upon reconsideration it would be more accurate to state that whereas the accused did not suggest that he had been threatened or induced by the police to make the statement he had made it under duress from fellow gang members. Counsel for the

state thereupon requested that a trial within a trial be held on the admissibility of the statement.

[42] It was clear from the video-recording of the taking of the statement that it was done with punctilious compliance with the applicable procedures by Capt. Brink. The video recording also showed that the accused appeared confident and relaxed when speaking with Capt. Brink preparatory to making the statement.

[43] The ambit of the trial within a trial was expanded to include the admissibility of pointings out made by accused 2. In this regard the basis for the accused's opposition to the admission of the evidence was that the pointing out had proceeded against his will from the stage when he had indicated unease while out on the exercise with a certain Captain van Niekerk, a female police officer attached to the Family Violence Unit at Mitchell's Plain. Accused 2's counsel also somewhat belatedly raised the issue that the Judges' Rules had been contravened by reason of the reading to accused 2 prior to his having made his extracurial statement of an extracurial statement made by accused 1. It was suggested by counsel that this alleged conduct resulted in accused 2 having been unduly influenced into making his extracurial statement.

[44] The pointing out exercise, including prior and subsequent interviews thereanent by the officer under whose supervision the exercise was conducted – the aforementioned Capt. van Niekerk - was recorded on video. Capt. Van Niekerk gave oral evidence concerning the exercise. Her evidence was confirmed by the content of the video which was shown to the court and put in in DVD format as exh. 'O2'. It was apparent that Capt. van Niekerk put accused 2 under no pressure whatsoever. On the contrary she was at pains to repeatedly emphasise to him that he could bring the pointing out exercise to a halt whenever he chose. Indeed Capt. van Niekerk's attitude towards the accused during the time she was with him was a notably humane and caring one. It was apparent from the video that accused 2 became concerned for his safety at a certain stage when pointing out while at the scene of the shooting at Melody square. It was apparent that his concern had nothing to do with his willingness to cooperate with the police, but rather with his apprehension for his personal safety when he noticed certain persons whom he apprehended to be potentially hostile approaching while he was engaged in the pointing out. Capt. van Niekerk did not seem to be immediately fully astute to the accused's concern about

the persons approaching the pointing out party, but it is apparent from the video evidence that that did not have the effect of putting the accused under any undue influence to make any pointing out that he unwilling or reluctant to do. It was also apparent that as soon as Capt. van Niekerk acceded to his request that they should drive away from the area the accused relaxed and continued to participate cooperatively in the pointing out by taking the police to show the areas in which the various gangs operating in Lavender Hill had their strongholds.

[45] Lieutenant Brown, the investigating officer in the case, gave evidence. He denied accused 2's allegation that he had read out to him an extracurial statement made by accused 1. He testified that when he had dealt with accused 2 in connection with the latter's preparedness to make an extracurial statement, accused 1's statement had been in the docket, which was kept in a separate office. Brown testified that he had been present at accused 2's arrest in the early hours of the morning of 4 September 2012. He said that the accused had been detained at the Nyanga police station and then brought to the Steenberg police station after his first court appearance on 5 September. Accused 2 had then indicated to him that he was willing to make an incriminatory statement. Brown had then organised for Capt. Brink to take the statement and for Capt. van Niekerk to be contacted to assist with the supervision of a pointing out exercise.

[46] Accused 2's evidence in the trial within a trial was to the effect that he had been threatened by two fellow Mongrels gang members, Andrew van Niekerk (Oortjies) and Fahiem Block, who had both admitted to complicity in the shootings, that if he said anything to the police incriminating them his girlfriend and members of his family would be placed at risk. He said that he had given into making a false statement to the police incriminating himself only after having been put under pressure day after day by Lieut. Brown and Warrant Officer Chetty to do so. It was evident that accused 2 had overlooked the fact that he made the statement on the very next day after his arrest. He conceded that he had made the statement and done the pointing out on the same day. His suggestion that Capt. Brink and Capt. van Niekerk would have falsified the date on the documentation completed by them in connection with the taking of the statement and the pointing out was fanciful. He was also unable to explain why, if he had been threatened by Andrew van Niekerk and Block, as alleged, he should have agreed to make any statement at all, instead of just

maintaining his silence. (It was in an attempt to provide an explanation that he manufactured the story that he had been placed under pressure for days by Brown and Chetty to confess to something.) In answer to a question from the court as to the significance of his allegation that Brown had read accused 1's statement to him, the accused stated with reference to exh.K (the extracurial statement made by accused 1) that only part of the statement had been read to him. He also stated that the reading of the statement had not really had any effect on his decision to make the statement that the state wished to introduce.

[47] In all the circumstances the court was satisfied that the statement and the pointing out had been done freely and voluntarily and ruled that the statement and the content of the pointing out would be admitted in evidence in the main trial.

[48] Defence counsel agreed that the evidence led on behalf of the state during the trial within a trial might insofar as it was relevant to the principal case be accepted as evidence in the principal case. This was done to avert the necessity to recall any of the state witnesses.

[49] In his extracurial statement accused 2 described that after a shooting incident at Muirhof he was provided with a weapon by one Andrew (also known as 'Urkies' (?Oortjies)). He was informed that Andrew would phone for more ammunition for his 'team', which consisted of Gary and Anwar. There was another team, three of whose members he named, and indicated that there were others whose names he did not know. He said that they – apparently referring to the two teams – split and that in Steenberg his team came across a group of gangsters standing at a corner smoking dagga. He said that he stood behind a bakkie. He felt very frustrated because 'they' could shoot anyone of the people in 'the courts' (an apparent reference to the complex of apartment buildings where the other shooting had occurred earlier that evening). He said that he still had not had an intention to shoot. Anwar told him to shoot. He said that he opened fire, but he had not actually wanted to open fire. He fired at the group of gangsters. He said that he and his companions then ran away from the scene. Gary took the gun. He was not able to say what Gary had done with the gun.

[50] He described his arrest just over two months after the incident and having been informed that he had shot dead an eight year old child. He said that he had not known of the presence of a child. He said that if he had known there was a child

present he would not have opened fire. His statement closed with the following sentences: '*Ek het seker gemaak en het geen kind daar gesien nie. Ek het nie die hart om 'n kind dood te skiet nie*.'

[51] In the pointing out exercise accused 2 took the police to the place of the shooting and made indications consistent with the evidence of the state witnesses as to where the bakkie had been parked on the evening in question and where the group of persons had been standing on the corner outside the McKenzie House. He also showed the police the places in the area where the various gangs were based.

[52] Dr Natshidengo, a surgical registrar at Groote Schuur Hospital then gave evidence as to the nature of the injuries sustained by the complainant on the attempted murder charge and the medical treatment she had received. The material content of this evidence is set out in the affidavit deposed to by the witness on 16 August 2012, which was put in as exh. S. It is not necessary to set it out. The general nature of the injuries sustained by Mrs Jacobs, as well as their *sequelae*, have been adequately described in the context of the summary of her evidence.

[53] W/O Heinney Marsh of the Ballistics Section of the SAPS Forensic Science Laboratory Western Cape then testified in conformation of the content of the affidavit that had been made by him in terms of s 212 of the Criminal Procedure Act. The most material part of his evidence, which was not challenged, was that both of the cartridge casings recovered at the scene of the Melody Square shooting had been fired from the same firearm. He described the casings as of 9mm Parabellum calibre. The fired bullet examined by him was also of 9mm calibre. The casings and bullet in question were those recovered by Mr Martin Truter, whose evidence was mentioned earlier. W/O Marsh's affidavit was put in as exh. T.

[54] The report on the post-mortem examination of the deceased was put in terms of s 212 of the Criminal Procedure Act as exh. U under the affidavit of Dr Mfolozi, a registrar in forensic pathology at the University of Cape Town. The report confirmed that the deceased had died as a result of a perforating distant gunshot wound to the head.

[55] The State then closed its case.

[56] Counsel for accused 1 then made what he described as an application in terms of s 186 of the Criminal Procedure Act for the calling by the court of two persons,

Jamie Joyce Vorsatz and Cyril Williams, as witnesses. (The statement of Vorsatz had been produced earlier as exh. G.) (Section 186 does not envisage an application. It is a provision which affords the court the discretionary power to call a witness if the interests of justice or the fair and proper adjudication of the case appear to require it.) The court declined to accede to counsel's request to call the witnesses, but assured him that having heard his concerns it would keep them under advisement for the remainder of the trial.

[57] Accused 1 gave evidence in his own defence. He is 22 years of age and has limited education having left school before completing std. 4. He can barely read or write.

[58] He said that on the day in question, 27 June 2012, he had not been feeling himself because he had been indulging in taking 'tik' (commonly known locally to be a colloquial word for methamphetamine) and dagga. He said that he had not known what he was doing. He did not know where he found himself. Despite these claims it soon became apparent from his evidence that he had a clear recollection of events and was astute to right and wrong and to the danger presented by shooting towards a group of people. I am satisfied that the accused's claim to have been under the influence of drugs to an incapacitating degree (which in any event was not put forward as a defence) may safely be rejected as false.

[59] He stated that at dusk that evening he had been sitting on a corner in Grindel Avenue close to where he lived when he was approached by accused 2 and one Anwar. The accused said he did not know who Anwar was at the time, but confirmed that the person in question was Anwar Hendricks, the accomplice witness whose evidence was described earlier. He joined them not knowing where they were headed. He explained his action saying that he thought that they would provide him with dagga. At a passageway to the M5 (Prince George Drive) they encountered a group of persons, whom he said were members of the Mongrels gang. Accused 2, who was a Mongrel, spoke with the persons in this group, while he stood aside at a short distance. He explained that not being a gang member he could not be involved in the discussion.

[60] He and accused 2, together with Hendricks, then proceeded to the canal where accused 2 produced a gun from the waist of his trousers. Accused 2 checked the

firearm to see that it was in good order. Accused 1 said he assumed that accused 2 was carrying the weapon for his personal safety as they were entering Steenberg which was dangerous territory for him. He noticed the others, that is the members of the group they had encountered earlier, following at the canal. He and his two companions took a different route thereafter, while the group went off elsewhere.

[61] Accused 1 described how he and his companions arrived at a place in Steenberg which accused 2 identified to Anwar Hendricks as a place where Junky Funkies lived. (Under cross-examination he contradicted himself on this point, saying at that stage that he could not remember accused 2 having said this.) He said that accused 2 stood behind a bakkie parked on the right hand side of the road as seen from the direction in which they had approached. He put himself a short distance behind where accused 2 took up position behind the bakkie. He said Hendricks took up a position at the corner behind them on the opposite side of the street. Accused 2 took out the gun. He said that he had wanted to tell accused 2 not to shoot but that he did not have enough time to get the words out. It was apparent that the witness's professed concern was about the apparent intention of accused 2 to fire on a group of persons up ahead who appeared to be involved in playing a game on a corner some distance ahead of the bakkie. He also said he saw a soccer ball being played with where this group of people were gathered at the corner.

[62] He said that accused 2 fired two or three shots. He and accused 2 had then run back up the road towards where Anwar Hendricks stood at the corner. Accused 2 tried to hand the firearm to Hendricks who declined to accept it. Accused 2 then gave the weapon to accused 1. Accused 1 said that he took the weapon because he felt intimidated. He said the threesome then fled the scene together for some distance before he and accused 2 split from Hendricks and took a separate route back to Lavender Hill. When they reached Lavender Hill he handed the gun back to accused 2. Under cross-examination by accused 2's legal representative the witness said, in contradiction of his evidence in chief (but consistently with Anwar Hendricks' evidence), that *he* had split from the other two while running from the scene of the shooting and that they had all joined up again together later.

[63] Accused 1 denied that he was a gang member and denied that he in any way assisted the gangs in carrying out their activities.

[64] Accused 1 then called Jamie Joyce Vorsatz to give evidence. She is currently 16 years of age and is the daughter of the complainant the attempted murder matter (count four). Her evidence essentially confirmed that given earlier during the state's case by her mother. Her evidence added nothing to or against the case concerning accused 1 and the reason for her being called was baffling. It seems that counsel for accused 1 sought on the basis of the evidence to construct some hypothesis that someone else may have been responsible for the shooting. The foundation for this came from a passage in the statement the witness gave to the police within a week of the shooting, in which she stated that she had seen one of the men who had been following her and her mother from Sullivan Str. down Piccolo Str. running past her after the shooting with a gun in his hand. She explained in her oral evidence that she had not in fact seen this and had been confused and traumatised when she made her statement. She explained that this part of her statement had been predicated on a confused reconstruction based on her having indeed seen someone running past her tucking something into his waistband. The long and the short of matter is that the witness did not see who had fired the two shots she heard going off in Melody Square that evening. Her evidence that she had heard two shots was clear and consistent. It tallied with the evidence of accused 1 himself. Accused 1 identified accused 2 as having fired those shots and as having aimed them at the group on the corner outside the McKenzie's house.

[65] Counsel for accused 1 then sought to call one Cyril Williams as a witness. Williams who had attended court in the morning, disappeared not to return by the time counsel wished to call him. He remained unavailable notwithstanding the time afforded by a luncheon adjournment and the interposing of accused 2's evidence out of order. Counsel had previously applied in terms of s 179 of the Criminal Procedure Act to the registrar for the issue of a subpoena for Williams on a costs-free basis. The registrar had been reluctant to grant that application apparently because it was considered that the Legal Aid Board should cover the costs. In the context of the registrar's unwillingness to determine the application determinatively within the time that the exigencies of the efficient conduct of the trial required accused 1's counsel applied to the court for a direction that a subpoena be issued and served on Williams without the accused being required to pay the usual fees. During the argument of that application he contended that he would not need to persist with the application if the

state were willing to agree to the production of Williams' witness statement as evidence of the content. Counsel for the state, while denying that the evidence that Williams was expected to give consistently with such statement was necessary or material to accused 1's defence, agreed to the proposal. The statement was admitted as exh. V on that basis. Williams is the person referred to elsewhere in the evidence as 'Leggies'. He lives at the address in Sullivan Str. from which the two unsavoury looking characters mentioned in the evidence of Leticia Jacobs and her daughter, Jamie Joyce Vorsatz, were seen emerging. His statement identifies the two as having been Andrew van Niekerk and Fahiem Block, both persons described by accused 2 as 'hit men' for the Mongrels gang.

[66] It is convenient at this stage to deal with the issue of the inconsistency in the evidence as to the number of shots that were fired. It was something that counsel for accused 1 sought to make something. As I understood his argument it was to the effect that if there had been more than two shots the injuries occasioned to the deceased and Mrs Jacobs could quite feasibly have been caused other than by the shooting which accused 1 testified had been done by accused 2. In this regard counsel for accused 1 appeared to put great store on the evidence that two persons identified as being Mongrels gang 'hit men' had been in the close proximity at the time of the incident. I do not think that there is anything in the point. Accused 1, who was best placed to see and hear the shooting, himself described that accused 2 had fired two or three shots from behind the bakkie. His evidence in that regard was borne out by that of Adams who not only heard two shots but was looking towards the bakkie when they were fired and identified by the flashes he saw that they emanated from where accused 1 and 2 had, according to accused 1 and Anwar Hendricks, been standing. Accused 1 did not testify to having seen or heard any other shooting in the vicinity other than testified to by himself and Adams. The point is the suggestion by accused 1's counsel that persons other than accused 2 might have been involved in shooting at the group on the corner is entirely speculative and unfounded in the context of the evidence of accused 1 himself. The indications on the evidence considered as a whole support the conclusion that there were probably only two shots fired, but in the absence of any evidence that anyone saw or heard shooting other than that which emanated from behind the parked white bakkie it really makes no difference if there were in fact three or possibly even four.

[67] Accused 1 then closed his case.

[68] When accused 2 testified he confirmed the content of the evidence which he had given in the trial within a trial concerning the making of the extracurial statement he made before Capt. Brink and the pointing out to Capt. van Niekerk. He stated that he was not able to say where he had come by the information set out in his extracurial statement. He said he had made it up himself. (*Ek het uit my eie uit gepraat.*') He explained his pointing out by saying that he was familiar with Melody Square having lived there with a relative for a while. He said that he had seen coverage of the incident on television. These explanations were thoroughly unsatisfactory. Nothing about the threats he described as having received from Andrew van Niekerk and Fahiem Block would explain his making a self-incriminatory statement. His evidence that he done so only after being put under pressure by W/O Chetty and Lieut Brown day after day with promised incentive of 'free bail' was nonsensical. The statement and pointing out was done on the very next day after his arrest. The nature of the pointing out, in particular where he had stood behind a bakkie when the shots were fired, is not something he would have been able to tell only because he had lived in the area or watched a television report. It is beyond coincidence that an allegedly fictitious account by accused 2, allegedly concocted from shreds of information available to him, should coincide so closely with the evidence of Anwar Hendricks and accused 1 and the objective observations of the police details who attended the scene of the shooting shortly after it happened. Added to this is the improbability that he would in any event have falsely incriminated himself; something he candidly admitted that he was unable to explain. He was also unable to venture any reason why Anwar Hendricks or accused 1 should have falsely implicated him as the person who had fired the shots at Melody Square. He admitted that he was a member of the Mongrels gang, but claimed not to know whether Hendricks had been a member or not. He said that his usual function in the gang was to hawk drugs.

[69] Accused 2 stated, however, that on the evening of the shooting at Melody Square he had been at the apartment of his girlfriend, Edwina Stevens, at 28 Keppelhof. He had heard shots being fired at some stage and on investigation had determined that one Kaljokkies had been shot and killed on the stairwell at a nearby block of flats known as Muirhof. After spending about 20 minutes standing around with the other persons who had gathered at that scene he returned to his girlfriend's

flat, where he remained until he went home to sleep at about quarter past nine. He said that he had not mentioned his alibi defence at his bail application hearing because it had not occurred to him to do so.

[70] Accused 2 said that he had not known accused 1 other than as a co-accused. He admitted to having known him by sight as someone who lived in the same neighbourhood, but had not known his name. He denied accused 1's evidence that he (accused 2) occasional gave small change or a cigarette to accused 1.

[71] Edwina Stevens was then called to testify in support of accused 2's alibi defence. She is accused 2's girlfriend and has two children by him. She said that it was their wish to be married to each other one day. They had known each other since their time in primary school. With only minor inconsistencies she bore out accused 2's evidence as to the manner in which she and he had spent the evening of 27 June 2012 together at her apartment at 28 Keppelhof, apart from a short period, which she estimated to have been about five minutes, when accused 2 had gone outside to investigate the shooting at Muirhof in which Kallokies had been killed.

[72] Ms Stevens cut an unimpressive figure in the witness box, even allowing for her lack of sophistication and understandable nervousness. She was demonstrably dishonest in certain respects, and probably so in others. She testified that accused 2 was not a gang member, when she knew the opposite to be true. When the untenability of her evidence in this regard became apparent to her, she relented and confessed that she had lied. She was not able to give any reason for having done so. It can only have been because she must have thought to admit to the truth might prejudice accused 2. She testified that shootings in the precinct of Keppelhof, Muirhof and De Waalhof were common occurrences, but professed not to know why. She also claimed to be unaware of wars or battles between gangs. As a longstanding resident of the area involved in an intimate personal relationship with a member of a gang active in the area, her professed ignorance in this regard is inherently highly improbable and detracted from her credibility. It was also improbable that she would have remembered the fine points of detail to which she testified as to what she and accused 2 allegedly did together that evening when, if the evidence they both gave was correct, neither of them would have any cause to have such inconsequentialities imprinted in their memories. It was only on 4 September 2012, more than two months after the shooting at Melody Square that accused 2 was arrested. Neither of

them would, on their respective versions, have had any reason to consider that they would have any cause in future to explain what they had been doing on that evening. And yet each of them purported independently to recall in pretty much the same minute detail how they had spent the evening of 27 June. By contrast, Ms Stevens could not, however, say in what month it had been that Kallokies had been shot, or in what month her boyfriend had been arrested. She wrongly guessed that it been earlier in 2013.

[73] Whether or not the alibi evidence tendered in accused 2's case could reasonably possibly be true is, of course, something that has to be determined in the context of an assessment of the evidence at the trial considered as a whole, and the question marks I have raised about the likelihood of accused 2 and Ms Stevens being able to recall the inconsequential details they both described are but part of that exercise. (Compare, for example, *S v Liebenberg* 2005 (2) SACR 355 (SCA) at para 14-15 and the other authority cited there.)

[74] The legal representative for accused 2 had procured the issue and service of a subpoena on a certain Marshall Burens so that he could testify in accused 2's case. Burens did not comply with the subpoena and an application was made for the adjournment of the trial so that he could be arrested and brought before court. That application was refused and the reasons for its refusal were provided *ex tempore*. In short, after considering the witness statement made by Burens to the police and the fact that the indicated expectation was that his evidence would accord with the content thereof, it was concluded that the evidence was not necessary or material for the accused's defence. There is no need for me to go back over that ground again at this stage.

[75] When it comes to evaluating the evidence in the case as a whole what is striking is how a broadly consistent version of events has been established in most material respects. As to what happened in regard to the shooting at Melody Square, it is evident from the evidence of Warren Adams, Hendricks and accused 1 that the shots were fired by a person or persons standing behind the parked white bakkie. Hendricks and accused 1 identified those persons as having been accused 1 and 2. Hendricks and accused 1 also testified that only a single firearm was possessed between the three of them and that it was carried by accused 2. The evidence of the aforementioned witnesses in this regard is supported by the objective evidence arising

from the police investigation immediately after the event. That evidence included the recovery of the two bullet casings from the pavement area in Melody Square just behind the parked bakkie and the forensic analysis which established that the same firearm had been used to fire the bullets. While the evidence obtained by the police from the scene does not by itself exclude the possibility of another weapon having been used, it becomes highly unlikely that was so when that evidence is assessed in the context of the direct evidence by the three eye witnesses I have named. (It is also supported by the content of accused 2's extracurial statement, with which I shall deal presently.)

[76] The court is mindful that the evidence of Hendricks, as an accomplice in the shooting incident - on his own version he kept a lookout to protect the shooter when he knew that the object of the expedition was for the Mongrels to wreak revenge by shooting a person or persons belonging to or associated with the rival Junky Funky Kids gang – must be treated with caution, and that the cautionary rule also applies to the evidence of accused 1 to the extent that regard is had to it for the purpose of determining whether the guilt of accused 2 has been established.

[77] I have already mentioned that Hendricks was not shaken in any material respect under cross-examination. He made a reasonable impression in the witness box. He impressed as a candid witness. It also appeared from the material put to him in cross-examination that his version of the events has been essentially consistent from the outset. More importantly, his evidence was also supported in all the material respects by the other evidence, including the content of the extracurial statement (exh. R) made by accused 2. In the context of their being well-known to each other the possibility of a mistaken identification does not arise. Defence counsel drew attention to the improbability of that part of his evidence in which he said he broke away from the group to approach a member of the public for a match for his cigarette. It was argued that he could have obtained a light from the people he was with. Hendrick's behaviour in this respect was indeed curious, but no-one was able to suggest that he would have had any reason to invent the evidence. It did not bear in any material way on the issues in the trial. The only evidence that contradicts Hendricks as to the involvement of accused 1 and 2 at Melody Square on the evening of 27 June 2012 is the alibi evidence adduced in accused 2's defence.

[78] Accused 1 was a weaker witness than Hendricks, but despite the weaknesses in his evidence, it bore scrutiny in respect of how the shooting happened for essentially the same reasons that I have given in respect of the evidence of Hendricks. He also knew accused 2 beforehand. The nature and extent of their acquaintance may not have been established with certainty, but in this case too there is no reasonable possibility in the circumstances of there having been a mistaken identification.

[79] As his legal representative reasonably conceded during argument, it is impossible to reconcile accused 2's alibi evidence with the content of his extracurial statement, which is self-incriminatory. The accused explained the content of the statement as an invention. He did not claim that he had been told what to say. He also could not have obtained much of the detail contained in the statement from anything that might have been read to him from the extracurial statement of accused 1. I should record that, having regard to their performances as witnesses, I would be inclined to prefer the evidence of Lieutenant Brown that accused 2 had not been exposed to accused 1's statement over accused 2's claim to have had part of that statement read to him by Brown. But even assuming in favour of accused 2 that part of accused 1's statement was read to him, nothing in the content of that statement could explain the detail he gave in his own statement. I have already sketched, when dealing earlier with the enquiry into the admissibility of accused 2's statement, the unsatisfactory nature of the explanation that he gave as to its making. In the judgment of this court there is no doubt that the extracurial statement made by accused 2 was predicated on his actual involvement in the shooting at Melody Square on the night in question. Its content is supported by the much of the other evidence in the case, which I have already summarised.

[80] And then there is also the evidence of the pointing out made by accused 2. The exercise was audio-visually recorded and the resultant DVD was admitted as exh. O2, with a transcript of the audio admitted as exh. O3. It is clear from that evidence that the accused was able to give a clear and quite detailed account of events. His account fitted in with the evidence of Adams, Hendricks and accused 1 as to where he had been standing, where the white bakkie had stood, where the group of persons outside the McKenzie's house had been standing. He also described from where he had fired towards the group. It is quite clear from the recording that the

accused was confident and certain in his pointing out of the salient features of the event in a manner that might be expected only of someone who had been there.

[81] In addition to all the other considerations I have mentioned, which on their own are sufficient to reject the alibi, there is also the feature that the accused made no reference to his alibi when he applied for bail in the lower court.

[82] In the circumstances, having regard to the evidence assessed as a whole, the alibi defence may safely be dismissed as a latter day concoction.

[83] The finding of the court therefore is that accused 1 and 2 proceeded together with Hendricks on the night in question from Lavender Hill to Steenberg and that there, in Melody Square, accused 1 and 2 took up position behind the white bakkie depicted in the photographs in exh. A, from whence accused 2 fired at least two shots in the direction of the group of persons gathered on the corner outside the McKenzies' house. It is found that the shooting caused the fatal injury sustained by Junaid McKenzie and the life threatening injury sustained by Mrs Leticia Jacobs. The shooting occurred in the context of a mission by the Mongrels gang to wreak vengeance on the Junky Funky Kids gang. The court holds that when he fired at the group of persons gathered on the corner accused 2 believed them to be connected with the JFK gang. In directing the shots at the group of persons accused 2 must have intended to kill. If he had intended anything less, such as merely to injure, one would have expected him to say so. He did not. I accept, however, that the accused, as he said in his extracurial statement, probably did not intend to kill the young boy. He probably also did not intend to kill Mrs Jacobs who was an innocent passer-by walking beyond the group at which he fired. This does not, in our judgment, detract from his direct intention to kill, for his actions in the circumstances evinced a general intention to kill (a so-called *dolus indeterminatus*); cf. *S v Nhlapo* 1981 (2) SA 744 (A) at 751.

[84] In our judgment, the murder of Junaid McKenzie was committed by accused 2 in the context of a conspiracy by the members of the Mongrels gang to kill a person or persons belonging to or connect with the Junky Funky Kids gang in revenge for the shooting or shootings that had occurred in 'the courts' area of Lavender Hill in which the Mongrels were the dominant gang. That this was so is established by the evidence that accused 2 proceeded to Steenberg on the evening in question as part of a group of

Mongrels. The object of the expedition had been clearly established when the group set out. There were further discussions between the members of the group stopped on the Lavender Hill side of Prince George Drive before splitting up and proceeding in different directions. Sufficient corroborative detail for these conclusions is to be found in accused 2's extracurial statement (exh. R), whence, amongst other matters, it appears that he was issued with a firearm and ammunition for the purpose by a fellow gang member, the abovementioned Andrew van Niekerk. The murder was therefore one falling within that defined in paragraph (d) of the categories of murder set out in Part I of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 and thus subject to the prescribed sentencing regime in s 51(1) of the said Act.

[85] As far as accused 1 is concerned, we find his evidence as to his state of mind or intention in accompanying accused 2 and Hendricks to the scene of the shooting improbable. We consider the evidence of Hendricks that accused 1 knew what the purpose of the expedition was to be probably closer to the truth. That does not mean, however, that he can be found guilty on the counts of murder and attempted murder. Counsel for the state conceded that the state had not proven any prior agreement between accused 1 and 2 concerning a joint enterprise to shoot on members of the JFK's. Counsel further conceded, correctly, that in order to secure a conviction on counts three and four the state thus had to satisfy the requirements identified in *S v Mgedezi* 1989 (1) SA 687 (A) at 705-6; viz (i) presence at the scene where the violence was committed; (ii) awareness at the time of the commission of the offences; (iii) an intention to make common cause with the person who was actually perpetrating the assault; (iv) a manifestation of his sharing of a common purpose with the perpetrator of the assault by himself performing some act of association with the conduct of the perpetrator and (v) the requisite *mens rea*.

[86] We have not been satisfied on the evidence that the state has succeeded in establishing all the aforementioned requirements beyond reasonable doubt. There is no suggestion that accused 1 is or ever had been a gang member. His involvement in the expedition appears to have occurred incidentally and, even rejecting his evidence that he accompanied accused 2 and Hendricks only in the expectation that he might procure some dagga, there is nevertheless a reasonable possibility that he went with them out of interest and curiosity to witness a shooting rather than to participate in it. Certainly his described conduct at the scene of the shooting makes that a reasonable

possibility. Apart from merely being in the company of accused 2 and Hendricks, the only act of association on which the prosecutor could rely was the taking of the gun from accused 2 when they were running away after the shooting. That argument does not stand up. It is trite that the act of association must precede or be contemporaneous with the carrying out of the offence. Merely standing next to accused 2 when the latter took up position behind the bakkie and watching him shoot does not, in our judgment, constitute an act of association.

[87] It is convenient to deal next with counts five and six. The evidence clearly established that accused 2 was in possession of a firearm and that it must have been loaded with at least two rounds of ammunition. It also established that accused 1 subsequently accepted the firearm from accused 1 and ensured its return from Steenberg to the Lavender Hill area. He was thus also in possession of the firearm. It is not apparent, however, whether there was any ammunition in the firearm after it had been discharged by accused 2 in the circumstances discussed earlier. The accused adduced no evidence to establish the lawfulness of their possession of a firearm or ammunition. In the result accused 1 stands to be convicted on count five, but acquitted on count six, while accused 2 stands to be convicted on both counts.

[88] Turning next to deal with the statutory offences of which the accused are charged in terms of counts one and two in the indictment.

[89] Section 9(1)(a) of POCA provides:

> Any person who actively participates in or is a member of a criminal gang and who-
>
> (a) wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang
>
> …shall be guilty of an offence.

[90] Accused 1 is not a gang member and it has not been established that he participated in a criminal gang. Merely accompanying accused 2 in the context discussed earlier, in other words possibly as a mere spectator or curious onlooker,

does not constitute participation in a gang. A conviction on count one thus cannot be sustained against accused 1.

[91] Accused 2 was confessedly a member of the Mongrels gang at the time. The evidence established that the Mongrels gang qualified as a 'criminal gang' within the definition of that term in s 1 of POCA. The 'criminal activity' concerned in the current matter was the shooting and the unlawful possession of a firearm and ammunition. Accused 2 was the principal perpetrator of the shooting and he possessed the firearm and ammunition. As explained in Claassen, *Dictionary of Legal Words and Phrases* s.v. 'Aid and abet' 'If a person assists in or facilitates the commission of a crime, if he gives counsel or encouragement, if, in short, there is any co-operation between him and the criminal, then he "aids" the latter to commit the crime (*R v Van Niekerk* 1944 EDL 202)'. Accused 2 therefore cannot competently be convicted of aiding and abetting in the criminal activity in which he was the principal actor. A conviction on count one thus also cannot be brought in against accused 2.

[92] Section 9(2)(a) of POCA provides:

> Any person who-
>
> (a) 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.

[93] The term '*pattern of criminal gang activity*' is defined in s 1 of the Act as follows: 'In this Act, unless the context otherwise indicates – "pattern of criminal gang activity" includes the commission of two or more criminal offences referred to in Schedule 1: 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'. Counsel for the state conceded that the evidence did not establish the existence of a pattern of criminal activity within the defined meaning, but relying on the word 'includes' in the statutory definition argued

that the term also falls to be applied in accordance with the tenor of the ordinary import of the words that make it up. He found support for this construction in an article by Professor CR Snyman, '*Die nuwe statutêre midaad van deelname in 'n kriminele bende*' (SACJ (1999) 12 213).

[94] We find considerable difficulty with the defined meaning of the term. The term is used only in s 9(2)(a) of the Act. The defined meaning would require the state to rely on the past commission of certain offences within a certain period by two or more members of a particular gang acting together to establish a pattern of criminal gang activity. It could relate only to a charge under the subsection that was predicated on the allegation that the accused had done something aimed at promoting or contributing towards the furtherance of an established pattern of activity. However, the offence created in terms of s 9(2)(a) of POCA also includes conduct aimed at causing or bringing about a pattern of criminal gang activity. Conduct which causes or brings about something is clearly conduct that occurs before that which it causes or brings about and thus must bear on criminal gang activity which has not yet occurred. The defined meaning can have no application in the latter context and thus the context can require that the term is given its ordinary rather than its specially defined meaning.

[95] We do not consider it necessary, however, to try to resolve the anomalous definition of the term. It is clear than an offence in terms of s 9(2)(a) of POCA is established only if it is proven that the act performed by the accused is performed by him with the intention of causing, bringing about, promoting or contributing towards a pattern of criminal gang activity. The test is a subjective one, not an objective one. The fact that the conduct might objectively be recognised as conduct that caused, brought about, contributed to or promoted a pattern of criminal gang activity does not mean that it was necessarily undertaken by the accused with the intention that it should have such an effect. While there was evidence suggesting that the Mongrels gang was engaged on an on-going basis in what might in ordinary language be described as a pattern of criminal activity, there was no evidence that the acts performed by either of the accused were performed with the requisite intention. It was not apparent on the evidence that either of the accused did anything with a conscious view towards the effect thereof within the broader picture of gang-related activity in the area. It was also not suggested to either of them in cross-examination

that they had done so. In our view a contravention of s 9(2)(a) of POCA has not been established against either accused.

[96] The accused are therefore entitled to be acquitted and discharged on counts one and two.

[97] The witness Anwar Hendricks is entitled to be discharged in terms of s 204(2) of the Criminal Procedure Act from prosecution for the murder of Junaid McKenzie, the attempted murder of Leticia Jacobs, the unlawful possession of the firearm and ammunition possessed by accused 2 at the time of the commission of the aforementioned offences of murder and attempted murder, and, in respect of or in connection with any of the aforementioned offences, for committing an offence in terms of ss 9(1)(a) or 9(2)(a) of the Prevention of Organised Crime Act 121 of 1998.

[98] In the result the following verdicts are returned:

<u>In respect of Accused 1:</u>

(a) The accused is found not guilty and is acquitted and discharged on counts one, two, three, four and six.

(b) The accused is found guilty on count five, namely of having unlawfully possessed a firearm without a licence.

<u>In respect of accused 2:</u>

(a) The accused is found not guilty and is acquitted and discharged on counts one and two.

(b) The accused is found guilty on counts three, four, five and six.

[99] An order is made in terms of s 204(2) of the Criminal Procedure Act 51 of 1977 that the state witness, Anwar Hendricks, is discharged from prosecution for the murder of Junaid McKenzie, the attempted murder of Leticia Jacobs, the unlawful possession of the firearm and ammunition possessed by accused 2 at the time of the commission of the aforementioned offences of murder and attempted murder, and, in respect of or in connection with any of the aforementioned criminal activity, for committing an offence in terms of ss 9(1)(a) or 9(2)(a) of the Prevention of Organised Crime Act 121 of 1998.

A.G. BINNS-WARD
Judge of the High Court