Republic of South Africa

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

Case No. CC20/2017

Before: The Hon. Mr Justice Binns-Ward

Hearing: 9, 11-12,-16-19, 23-26, 30-31 October 2017,
1, 6, 13-14 November 2017
Judgment delivered: 16 November 2017

In the matter between:

THE STATE

and

NIZAAM JORDAAN	Accused 1
SHALOMODIEN DOLLIE	Accused 2
MANZAN MAART	Accused 3
ROZARIO LOTTERING	Accused 4
YUSRIE BENTING	Accused 5

Firearms Control Act 60 of 2000: *Accused charged with unlawful possession of firearm and ammunition in contravention of the Firearms Control Act 60 of 2000 – weapon and ammunition not recovered – charge brought on the basis of deduction, the accused having shot and injured the complainant in related charge of attempted murder. Accused's legal representative, relying on* ***S v Filani*** *2012 (1) SACR 508 (ECG), argued that charges under the Firearms Control Act not proved in the absence of expert evidence to establish that firearm had complied with the technical criteria in the definition of 'firearm' in s 1 of the Act. Held that on the facts of the case, in particular the nature of the complainant's injury, sufficiently established that the firearm used by the accused must have had a 'muzzle energy' exceeding 8 joules.* (**Paragraphs 94-106.**)

Criminal Law Amendment Act 105 of 1997: *Murder – 'Planned or premeditated' – meaning of term –* ***S v Raath*** *2009 (2) SACR 46 (C),* ***Kekana v S*** *[2014] ZASCA 158 (1 October 2014) and* ***Montsho v S*** *[2015] ZASCA 187 (27 November 2015) discussed;* ***S v PM*** *2014 (2) SACR 481 (GP) disapproved.* (**Paragraphs 123 - 130.**)

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JUDGMENT

BINNS-WARD J:

[1] The indictment served on the accused set out 11 charges, but the prosecutor indicated at the commencement of the trial that the state was not proceeding on the two counts of money laundering. Counts 6 and 11 consequently fell away.

[2] The charge in terms of count one was brought against all five of the accused. They were charged on the main count of contravening s 9(1)(a)[1] read with s 10(1)(a) and 10(3) of the Prevention of Organised Crime Act 121 of 1998 with having aided / assisted and abetted in criminal gang activity in respect of the activity that was the subject of counts 2 to 5 and counts 7 to 10 in the indictment. In the alternative thereto, they were charged with having contravened s 9(2)(a)[2] of the Act by having contributed towards a pattern of criminal gang activity in the particulars set out in counts 2 to 5 and counts 7 to 10.

[3] Accused 1, 2 and 3 were charged in terms of counts 2, 3, 4 and 5 in connection with offences allegedly committed on 24 December 2015 at or near Gamka Street, Manenberg. Counts 2 and 3 related to the allegation that the aforementioned accused had attempted to murder L J and Keegan Solomon by shooting at those complainants with a firearm. Counts 4 and 5 were related charges brought under the relevant provisions of the Firearms Control Act 60 of 2000 in respect of the alleged unlawful possession of a firearm and ammunition.

[4] Counts 7 and 8, respectively, concerned charges put to accused 1, 4 and 5 in respect of their alleged commission of the murder by shooting of Ashley Davids on 27 April 2016 at or near MC Stores, Jordan Str, Manenberg, and the attempted murder of Carl May in the same incident. Counts 9 and 10 were the related charges under the Firearms Control Act in respect of the unlawful possession of the firearm and ammunition used in the shooting incident.

[5] All of the accused pleaded not guilty to the charges put to them in terms of the indictment.

[6] Mr Holt, who appeared for accused 1, gave an oral plea explanation from the bar. It was indicated that accused 1 would admit having been present, together with accused 2 and 3, at the shooting incident on 24 December 2015. He would say that he had noticed a gambling game going on under the floodlights and decided to join in. While he was there a shot went off and everyone scattered. He and accused 3 cycled away, and accused 2 had run away. Accused 1's plea explanation indicated that he had been at home on the night of the events

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[1] Section 9(1)(a) provides: '*(1) 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'*.

[2] Section 9(2)(a) 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 a criminal offence*.'

that were the subject of the offences allegedly committed on 27 April 2016 and he had heard about the occurrences only later.

[7] The other accused elected not to give a plea explanation, save that Mr Roberts, who appeared for accused 3, indicated that his client would also admit having been at the scene of the shooting incident on 24 December 2015.

[8] Accused 1, 4 and 5 made formal admissions in terms of s 220 of the Criminal Procedure Act in respect of the identification of the body of the deceased, Ashley Davids, and the content of the post-mortem examination report (exh. E). It was admitted that the deceased had been found dead on the scene by the attending para-medics and that the cause of death was the effect of multiple gunshot wounds as indicated in the post mortem report. Nine entrance wounds were identified on the body of the deceased.

[9] The first witness called by the state was Cst. Ndonga of the South African Police Service. He was patrolling with a colleague in the Manenberg area on the night of 24 December 2015 when he heard a report over the police radio of a shooting incident. In consequence of the information received, he proceeded to the Jooste Hospital in the nearby suburb of Heideveld. There he found one of the persons who had been shot receiving medical attention. He was able to identify the person concerned only by his forename, L. As a result of the information he obtained from L, who was in a state of distress and apparently not particularly coherent at the time, Ndonga and his colleague proceeded to a park on Gamka Street in Manenberg, which he understood to have been the place where the shooting incident had occurred. No-one from the community was present when he arrived there and he was unable to find any related real evidence such as cartridge casings or blood in the area.

[10] Ndonga said that he had been stationed in Manenberg for several years at the time of the incident and had acquired knowledge of the gang activities in the area and of gang warfare between rival gangs. I understood him to say in his evidence in chief that the Hard Livings gang controlled Gamka Street, but under cross-examination he denied having said that and said instead that it was mainly the Hard Livings gang that was involved in fights with other gangs. According to his evidence, gangs known as the Americans and the Stupa Boys were also active in Gamka Street.

[11] The next witness was the complainant in respect of count 2, L J. He was 16 years of age and a grade 9 pupil at the Phoenix Secondary School at the time of the trial. He had been 14 when he was injured in the shooting incident on 24 December 2015. He had lived all his

life in Gamka Str. He knew accused 1 by sight from having seen him walking from time to time in Gamka Str. He knew him by the nickname 'Boef'. J inferred that accused 1 was a member of the Clever Kids gang because he often saw him in the company of other members of that gang in Elsjieskraal Rd. – 2 streets away from Gamka Str. - which was where he understood accused 1 to reside. He also knew accused 2 by sight and knew him by the names 'Shalomodien', or 'Lapes'. He said accused 2 lived opposite his school. He believed him to be a member of the Dixy Boys gang because he saw him standing with members of that gang at the corner of Gamtoos Street. He knew accused 3 as 'Oupa', and that his actual name was 'Manzan'. He did not know where accused 3 lived, but understood that accused 3 was a member of the Clever Kids gang because he always walked around with that gang.

[12] J explained that Gamka Str. and the other roads in the area that I have mentioned run in parallel with each other in the following order: Gamtoos Str, Gamka Str, Jordan Str. and Elsjieskraal Rd. A Google Map of the area (exh. N) was put in later at the court's prompting. It confirmed the witness's evidence as to the order of the roads, but it also made it apparent that Gamka Street and Gamtoos Street were actually squares, rather than linear routes. The Google Map also showed that what was referred to in the oral evidence as a 'park' between Gamka and Gamtoos Streets was in point of fact just an open space, also square or rectangular in shape. As can be seen on exh. N2, the 'park' is an interlinking space between Gamka and Gamtoos Streets.

[13] L J testified that at some time after 10:00 pm on the night of 24 December 2015 he had been participating in a gambling game under a street light at the aforementioned 'park'. Seven or eight persons were involved in the game. He knew two of them by name, namely, Keegan Solomons and one Galiek. Both of the persons he knew were gang members. Solomons belonged to the Stupa Boys gang and Galiek to the Hard Livings gang. J testified under cross-examination by accused 3's legal representative that the place where the gambling game was being held was in the area in which the Stupa Boys gang dominated. The Stupa Boys were allied to the Hard Livings gang. The gambling game was some form of dice game. Keegan Solomons was in a position at the game next to that in which J was squatting on his haunches at the time.

[14] At a certain stage J noticed accused 1, 2 and 3 approaching the game. They were together and on foot. They approached from his right hand side from the direction of Gamtoos Str. The direction of approach described by J corresponded with that related by accused 1 and 3 when they gave evidence. He said the accused took up a position behind the

participants in the dice game. He denied the proposition put to him by counsel for accused 3 that accused 1 and 3 had participated in the game while accused 2 had stood by watching. He acknowledged, however, that accused 3 used to regularly participate in the gambling games played at that spot.

[15] J said that shortly after the arrival of the three accused he happened to glance behind him and saw accused 2 pointing a firearm at a downward angle in the direction of the place where he and Solomons were positioned. He noticed that it was a silver coloured revolver. A shot went off and everyone scattered. He said that accused 2 had fired the shot.

[16] J said he ran towards Gamtoos Str. He noticed the three accused running in the opposite direction towards Gamka Str. As he was running from the scene of the shooting he felt a pain in his lower leg and looked down to see blood oozing from the sneaker on his left foot. It was only at that stage that he realised that he must have been shot. He encountered his cousin who scooped him up in his arms and took him by car to the Jooste Hospital in Heideveld.

[17] J related that he had suffered a gunshot wound in the region of his left ankle. There was apparently some confusion in the medical records as to whether he had suffered one or two wounds. He cleared that up explaining that the other injury, a cut to his buttock, had been caused by a piece of broken glass onto which he had momentarily fallen back when he commenced his panicked escape from the scene of the shooting.

[18] J said that there had not been any particular gang-related problems in the area at the time. He said that Keegan Solomons had been killed in another shooting incident some time during 2016.

[19] He said that he had pointed out accused 1 and 3 in a photo album identification exercise during May 2016. He said that there had not been a photograph of accused 2 in the album.

[20] The witness was cross-examined about various minor discrepancies between his evidence and the content of a statement he had made to the police at the hospital on the evening of the incident. The discrepancies were not material and J gave satisfactory explanations for them. (It bears remark in this connection that one of the less fortunate effects of the essential abolition of the state's docket privilege in *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC) has been the use by some defence legal representatives of prosecution witnesses' statements to the police for

lengthy and, too frequently, pettifogging cross-examination. The courts have to bear in mind when evaluating the effect of such cross-examination that the statements are often affected by issues such as language difference and are more often than not just summaries of what the witness has told the policeman, not the ipsissima verba. It would be unusual for the recording police officer to go into the matter in the detail that counsel do with the witness in court, and it should therefore be no cause for surprise that each and every detail elicited during examination of the witness in the courtroom has not been captured in their police statement.)

[21] J denied the proposition put to him by the accused's counsel that accused 1 and 3 had come to the scene of the gambling game on bicycles. He reiterated that all three of them had approached together on foot and had fled the scene together after the shooting, also on foot. He conceded that accused 1 had been a member of the schoolboy gang at the time and that he had subsequently become a member of the Clever Kids.

[22] The complainant on count 8, Carl May, testified that at between eight and nine o'clock on the night of 27 April 2016 he had been playing dice with one Ashley Davids (also known as 'Elly'), who was a friend, and one Moneeb outside MC Stores, off Jordan Str in Manenberg, when he noticed accused 1, 4 and 5 approaching them across the parking lot from Ganges Close. (The witness indicated that Ganges Close was the road shown on exh. J as intersecting with Jordan Str, and from which vehicular entrance to the parking lot outside MC Stores could apparently be obtained. Ganges Close is also indicated on exhs. N1 and R.) He knew accused 1 by his nickname 'Boef' and accused 4 by his nickname 'Zaraks'. Accused 4 had previously played dice with him and they had smoked dagga together. He said that accused 1 and 4 both lived in Elbe Street. Accused 4 broke away from the other two accused and proceeded around the corner of the MC Stores, along the side of the building adjacent to Ganges Close. (The witness described the direction in which accused 4 proceeded as being to 'the yard of the enemy'. The direction in which accused 4 was described as having deviated would have taken him towards Gamka Str, elsewhere described as the stronghold of the Stupa Boys and their ally, the Hard Livings gang.) A person called Charlie had also been standing nearby at the time, behind the metal gate at MC Stores that is evident in some of the photographs in the photo album that was handed in, by agreement with the legal representatives of accused 1, 4 and 5, as exh. H. See in particular photograph 4. A police sketch showing the situation of MC Stores, the adjacent parking lot and Jordan Str. was also handed in as exh. J. Various measurements relevant to the site depicted in exh. J were taken by the investigating officer during the course of the trial. These measurements

were recorded in a document that was handed in as an 'addendum to exh J', to which I shall refer as exh. J1.

[23] May indicated that the area was illuminated by a floodlight at the entrance to the parking lot off Ganges Close next to the corner of MC Stores. He marked the position of the floodlight with the letter E on exh. J. The area was also illuminated by light that was shining from behind the iron gates in the MC Stores building that are apparent on photographs H 1, 2 and 4.

[24] According to May, the other two accused (accused 1 and 5) continued to proceed towards the place at which he and his two companions were gambling. Accused 4 quickly re-joined the other two. Moneeb then got up from the gambling game and walked towards and past the three accused who were still approaching.

[25] May then saw accused 1 draw a gun from his waist and heard two shots being fired. He got up and ran from the scene in the direction of Ganges Close. As he fled he looked back and saw Davids on his haunches apparently struggling to get up. Davids was at this stage outside the Green Pastures church, which is the pink coloured building depicted in the photo album exh. H1 and H2, some metres away from the place where the gambling game had been played. The witness said he noticed that accused 1 was walking towards Davids holding a firearm in front of him with both hands pointing with it in the direction of Davids. He indicated that Davids was at the spot that he indicated with the letter A on photograph 1 in exh. H – this corresponded with the position marked B in the key to photographs H2, 37 and 38. May placed accused 1 at the time at the spot he marked on the photograph with the letter 'M'. He estimated that the distance between points M and A, so indicated, was 6-7 metres. He also noticed that accused 4 and 5 had run off towards the corner of Jordan Str and Ganges Close when accused 1 fired his weapon. After May had rounded the corner of the MC Stores building into Ganges Close he heard several more shots being fired.

[26] May said he was not a gang member, but his friend Ashley Davids had been a member of the 'HL's'. (Initially, the witness professed not to know that HL was an abbreviation for Hard Livings, but later, in answer to a question from the court while he was under cross-examination, he acknowledged that they were one and the same thing.) He denied the proposition put to him by accused 1's legal representative that he was himself a member of the Hard Livings gang. He said that he understood that accused 1 and 4 were members of the Clever Kids and accused 5 a member of the Americans gang. His evidence

concerning the accused's gang membership was vague and tentative, however, and it was by no means clear that he was able to reliably identify any of them as gang members. It did, however, emerge later in the other evidence that accused 1 and 4 had been connected with the Clever Kids and that accused 5 was indeed a member of the Americans.

[27] It emerged in cross-examination that the witness had identified accused 1 and 4 at a photo ID parade. He said that he had not identified accused 5 at the photo ID parade because there had not been a photograph of him there.

[28] Various discrepancies between the statement the witness had given to the police (Exh. M) and his oral evidence were put to him under cross-examination, particularly by accused 1's legal representative. I did not consider any of them to be material. He explained that he had not mentioned accused 5's name in his police statement because he had not known his name at the time he made the statement. It was quite clear from the contextual evidence given by the witness about his knowledge of accused 5 and his relationship with the deceased, Ashley Davids, that the witness did indeed know who accused 5 was. For example he knew that he was the nephew of one 'Junaid', who was known by the nickname 'Natang'.

[29] It was put to May in cross-examination that he had a grudge against accused 1 and suggested that that was the reason the witness had implicated the accused. No particulars as to why such a grudge should have been harboured were put to the witness. He denied the proposition, and stated that in point of fact, although not friends, they had had a sociable relationship, often participating in gambling games together.

[30] It was put to the witness by counsel for accused 4 that accused 4 would say that he had not been present when the shooting took place at MC Stores, but that he had been in Elbe Street. The witness denied that proposition.

[31] He also denied the proposition put to him by accused 5's representative that accused 5 had not been on the scene of the shooting, but had been at the traffic lights in Duinefontein Road when he heard shots from the Jordan Str area and had decided to divert to Elsjieskraal Road. The relative positions of these roads are apparent in the Google Maps screenshot that was introduced into the evidence as Exh N1.

[32] The next witness, Moneeb Davids, confirmed that he had been in a gambling game with the deceased, Ashley Davids, Carl May and one Charlie Engelbrecht on the evening of 27 April 2016 outside MC Stores. He also indicated the relative positions that the game participants had occupied at the game. His evidence in this regard corresponded with that

given by Carl May with reference to photograph H1 during his evidence. Moneeb Davids is employed at the store as a delivery driver. He stated that he had happened to look up from the game at a certain stage and noticed three persons approaching from the direction of Jordan Str. On closer questioning it emerged that he saw the three entering the parking lot through the entrance off Ganges Close near its intersection with Jordan Str. He immediately felt uneasy and decided to leave. He was unable to articulate precisely what it had been about the situation that had caused him to feel discomforted, but I had no doubt while watching him give his evidence as to the truthfulness of his description of his experience.

[33] Moneeb Davids recognised two of the three approaching men as accused 4 and 5. The witness also knew accused 4 by the name 'Zaraks', and had seen him for approximately a year frequenting the area, especially in Elbe Street. He knew accused 5 because he delivered bread to a shop run by a Somalian from a container in the driveway of the address at which accused 5 resided in Elbe Street. He said that he knew accused 5 by the name 'Yurieq'. He explained that he learned about the names 'Zaraks' and 'Yurieq' after he had identified accused 4 and 5 at the photo ID parade. He had not previously known their names. However, he did not know the middle person in the approaching trio.

[34] As mentioned, Moneeb got up to leave the gambling game because of his feeling that something was amiss. He headed towards Ganges Close along the stoep (also referred to as 'the pavement') in front of the MC Stores building. On his way to Ganges Close, as he passed by the approaching three men, he heard accused 4 utter the words '*This is a naai HL*'. He did not understand those words to have been directed to him. In the context of his identification of the deceased as having been the only Hard Livings gang member present at the time, it may be inferred that they must have related to Ashley Davids.

[35] Moneeb Davids said that as he rounded the corner of the MC Stores building and turned into Ganges Close to head towards his home in Gamka Street he heard two gunshots. As he proceeded further towards his house he then heard several additional shots being fired. He returned to the scene about 10 minutes later and found Ashley Davids lying dead outside the Green Pastures church at the place depicted in photograph H 37.

[36] Moneeb Davids confirmed Carl May's evidence about the lighting at the scene. He was adamant that he had recognised accused 4 and 5, but he was unable to recall what they had been wearing. As the two accused had been known to him by sight for some time it is

unlikely that he would have misidentified them. Knowing who they were, he would have had no reason to take particular note of, or remember, what they were wearing.

[37] Charles Engelbrecht, another employee at MC Stores, confirmed that he had been present at the store on the night of the shooting. Engelbrecht testified that he was currently a member of the Ghetto Kids gang, which is allied to the Hard Livings gang. He said that he had been a member for the past two to three months (i.e. since June-July 2017). He said that the Hard Livings gang's rivals in the area were the Clever Kids, the Dixy Boys and the Americans. He said he had known accused 1 since childhood. He knew him by the name 'Boef'. He also knew accused 4 from seeing him at MC Stores. He knew him by the name 'Zaraks'. He was not in a position to say whether or not accused 4 belonged to a gang. Engelbrecht also said that he knew accused 5 by the name Yusrieq, although he had never spoken to him. He said accused 5 operated with the Clever Kids gang. He knew accused 5 by sight from having seen him in the neighbourhood. (It was common ground that accused 5 was in point of fact a member of the Ugly Americans gang, but Engelbrecht's impression that he was associated with the Clever Kids is consistent with the description by a number of witnesses of the alliance between the two gangs.)

[38] Engelbrecht confirmed the evidence given by Carl May and Moneeb Davids concerning their participation in a gambling game outside MC Stores on the evening of 27 April 2016. He also described having seen the approach of accused 1, 4 and 5 from the direction of Jordan Str; although he said that accused 1 had been somewhat ahead of accused 4 and 5 as they approached. He nevertheless described the three of them as having been together. He also described how accused 4 had broken away from the other two and as having briefly disappeared down Ganges Close alongside the wall of the MC Stores building on Ganges Close. He confirmed that Moneeb Davids had left the gambling game on the approach of the three accused and had passed by accused 4 at the corner of the MC Stores building.

[39] Engelbrecht stated that after accused 4 had broken away in the manner just described, accused 5 remained at the entrance to the parking lot off Ganges Close while accused 1 continued into the parking lot area, from where he fired two shots in the direction of where the gambling game had been taking place, hitting Ashley Davids. He said Ashley Davids had tried to escape. At that stage he (Engelbrecht) had taken cover inside the shop behind a wall near the metal gates. He said that accused 1 thereafter came closer to where Ashley Davids was and fired repeatedly at him until he had exhausted his ammunition. He could not say

exactly how many shots had been fired, but they had been several. By that time, indeed immediately after the first two shots had been fired, he had seen accused 4 and 5 running away from the scene in the direction of Jordan Str. He said that accused 1 also ran in that direction after he had finished firing at Ashley Davids. He also said that Carl May had walked off when the first two shots were fired. When asked by the court whether May had just walked, rather than ran, from the scene, he repeated his evidence that May had just walked away.

[40] Engelbrecht testified that the area in which MC Stores was situated, as well as the adjoining Gamka Str precinct in which he lived, were under the control of the Hard Livings and Ghetto Boys gangs. According to him these two gangs were also in alliance with the Stupa Boys gang. He said that the Clever Kids, Dixy Boys and American gangs were the rivals of the Hard Livings-Ghetto Boys alliance. The Clever Kids controlled the Elsjieskraal Rd/ Elbe Str precinct, which, as evident from the Google map (exh N), is on the opposite side of Jordan Street from the MC Stores / Gamka Str area. He said the Gamtoos Str area was controlled by the Dixy Boys.

[41] Engelbrecht was also tackled in cross-examination about various discrepancies between his evidence and the content of his written police statement, but in his case too, I am not persuaded that any of these points of criticism was material. The most important issue in this respect was that he had not mentioned accused 4 and 5 by name in his police statement. Having regard to his statement as a whole, and bearing in mind it was written out by a policeman, and not by the witness himself, it is clear that the focus was on the individual who had done the shooting (i.e. accused 1) and not on the two persons whom the statement records had been with him at the time. It was quite evident when the witness testified in court that he was very certain who the other two persons had been. He said that the police had not asked him who the other two had been. I do not find that evidence in any way implausible. The police had available at the time two other eyewitnesses who were far more articulate than Engelbrecht. They may well have already obtained the information as to the identity of all three of the accused from those sources. Engelbrecht was a strikingly unsophisticated witness, who impressed as being of limited intellect. He had difficulty in certain respects working in the abstract with things such as the sketch plan exh. J. He nevertheless came across as entirely frank and lacking in any guile in describing what he had observed on the evening in question. He was notably forthright in his rejection of the propositions put to him

in cross-examination on behalf of each the three accused concerned that they had been elsewhere at the time of the shooting.

[42] Ms W J testified that she was the mother of L Joseph who had given evidence earlier. She had been in a relationship with the deceased, Ashley Davids, for about four years before he was killed. At the time of Davids' death she was four months' pregnant and already had a child aged one year and four months by him.

[43] Ms J said that she had been visiting a friend at Ocean View near Kommetjie on the evening of 24 December 2015 when she received news that her son, L, had been shot. She returned home and after receiving a report about the incident went to the homes of accused 1 and 3 to find out why her son had been shot. Neither of the accused had been at home. She then went to the Jooste Hospital where she found her son who had just been discharged. She said that accused 1 had apologised to her some time later (she thought it had been during March 2016) for what happened to her son.

[44] As to the events of the evening of 27 April 2016, Ms J stated that she had been at her home in Gamka Str earlier that evening with Ashley Davids. She decided that their child should have some juice to drink and she understood that Ashley Davids had gone out to fetch some from the shop. While Davids was still away, she walked out to Great Fish Ave to accompany a friend of hers, one Fia, to the latter's home in Jordan Str. She carried her infant child with her. As they approached the intersection of Jordan Str with Great Fish Ave, where she and Fia engaged in conversation with another friend (Wannie), Ms J heard gunshots from the direction of MC Stores. She estimated the total number of shots as having been more than 10. It is apparent from exh. N that MC Stores is one block away from the intersection of Jordan Str and Great Fish Ave.

[45] Ms J said that she looked down Jordan Str in the direction of MC Stores and noticed two men crossing the road and approaching in the direction of Great Fish Ave along the pavement. At the same time she heard a hue and cry from MC Stores and inferred that somebody must have been shot there. She had a feeling that the two men she saw approaching from that direction might have been involved in the shooting. She decided to follow them up the passage between Jordan Str and Elsjieskraal Rd. She could see that one of the men was wearing a red hoodie and the other a reddish-orange cap. She observed the man in the hoodie handing a firearm to the other man. She also heard the words '*na my huis*' (*Eng.* 'to my house'), but was unable to tell which of the two men had uttered them. It was

also necessarily implicit in Ms Joseph's evidence in this regard that she had been unable to clearly see the faces of either of the men, for the evidence concerning the incident on 24 December 2015 confirms that had she seen accused 1's face she would have been able to recognise him. (I shall come back to the matter of Ms J having seen only two, not three, men coming down Jordan Str after the shooting later in this judgment.)

[46] After emerging from the passage at Elsjieskraal Rd, Ms J encountered another person from the area whom she knew by the name of Rosa. At that stage the two men whom she had been following had proceeded up Elbe Str. Rosa, who has since moved to Johannesburg and whose current address is apparently unknown, made a report to her. It is evident from Ms J'S conduct later in the evening that the report must have gone to the identity of at least one of the men she had been following. At this stage, when the witness went into Elbe Str, the two men she had been following had disappeared from view. A possible reason for their disappearance would be that they had entered a building on the street. In this regard it bears mention that all three of the accused arraigned in respect of the murder of Davids resided on Elbe Str. She then went back into the passage towards Jordan Str, where she met Fia who told her that Davids had been shot and taken to hospital.

[47] Ms J then walked up Jordan Str to its intersection with Ganges Close. She saw a large number of persons thronging outside MC Stores. She said this gave her the impression that somebody else must also have been shot. She formed this impression in the context of having been told by Fia that Davids had already been taken to hospital.

[48] Ms J said that she spotted the bakkie of Mr van Rooy, a local detective, on the scene. She approached van Rooy and gave him the address of the person who had been named to her by Rosa when they had met outside the mobile phone shop at the corner of Elsjieskraal Rd and Elbe Str. She had the impression that van Rooy did not seem to take particular note of what she had told him. Another detective, one Cwele, then arrived with a female colleague. They asked if they could speak with her and asked her to make arrangements for someone else to look after her infant child in the meantime. A grey Ford Focus vehicle with certain police details in it then arrived. She was asked if she was Ashley Davids' girlfriend, and when she answered affirmatively she was asked to get into the vehicle. She directed the police to 11 Elbe Street, where accused 1 resides. It was clear from the evidence that she had given concerning the incident on 24 December 2015 that Ms J was familiar with accused 1's home address.

[49] She said accused 1 was leaving the house as they arrived at the address. She pointed him out to the police who arrested him. They then all proceeded in the vehicle to the Manenberg police station, where the witness was asked to wait in the charge office, while the police dealt with accused 1 elsewhere. Ms J denied a proposition put her by accused 1's legal representative that the accused had been assaulted by the police in the vehicle.

[50] She was subsequently taken back to MC Stores, where she saw the deceased's body lying covered on the ground.

[51] Constable Manyota of the SAPS at Manenberg attended the scene of the shooting outside MC Stores shortly after the occurrence of the incident. He was involved in securing the crime scene. He found that there were 12 cartridge casings and one bullet head on the scene. These were later pointed out to a police photographer who attended the scene. It was uncontentious that these exhibits (which are described in the ballistics report exh. Q) were found in the positions indicated in the photographs in exh. H, and the accompanying key). The ballistics evidence established that all 12 cartridges had been fired from the same firearm.

[52] Cst Manyota was tackled by accused 1's legal representative over an indication in his (Manyota's) written witness statement (exh. P) of an entirely different account from Ms W J to that which she had given in court. The inconsistent version had not been put to Ms J when she testified, apparently because the accused's representative had not been in possession of Manyota's statement at that time. It became apparent in re-examination that the witness had in fact not interviewed Ms J. He explained that what he had written down in his statement had been based on what Cst Cwele had told him, and had not been obtained directly from Ms J. Accused 1's legal representative did not apply for Ms J'S recall for further cross-examination, despite having been alerted by the court that he should do so if he wished to pursue the point. (Cwele, who had left the police service before the trial, was not called as a witness.)

[53] Cst. Jordan of the Manenberg police station testified that he had arrested accused 4 at 9 Elbe Street on 28 April 2016, having been requested by radio while he was patrolling in the area to bring accused 4 in for questioning as a suspect in CAS 553/4/2016. The name that had been given to him was 'Zaraks'. He had only learned of the accused's given names later at the police station.

[54] The investigating officer in both matters was Detective Constable van Rooy. He testified that he had been stationed in the detective branch at Manenberg police station for eight years, attached to the gang unit. He gave evidence concerning the dates upon which the respective accused had been arrested. He also identified the various gangs that operated in the areas that are pertinent to the cases that are subject of this trial. He stated that the Young Dixy Boys, the Clever Kids and the Ugly Americans (also known simply as 'the Americans') were dominant in Gamtoos Str, Elbe Str and Elsjieskraal Rd, whilst the Hard Livings, Stupa Boys and their allies, the Ghetto Kids, dominated the Gamka Str and Jordan Str area in the vicinity of MC Stores. He said that the Hard Livings gang was in opposition to the Clever Kids, Young Dixy Boys and Americans. The Clever Kids, Young Dixy Boys and Americans gang alliance was referred to in the area as 'die driekamp'.

[55] Van Rooy testified that there had been a shooting elsewhere in Manenberg (in Humber Street) on the evening of 27 April 2016 shortly before that at MC Stores. Two persons had been injured in that incident. One of them was an Ugly American and the other a member of the Clever Kids gang. He had attended that scene and been informed by the victims that they had been shot by someone from the Hard Livings gang.

[56] Van Rooy expressed the opinion that the shooting at MC Stores had been a revenge attack. He described that there had been an elevated level of inter-gang violence in Manenberg since 2014, with only brief intervals of relative peace. He said that the deceased, Ashley Davids was a member of the Hard Livings gang. He knew accused 1 to be a member of the Clever Kids. Accused 1 did not have any tattoos, but the witness had seen him on many occasions actively associating with the Clever Kids at the scene of gang confrontations that reportedly commonly take place, where the participants throw bricks and stones at each other even in the face of a visible police presence. He also identified accused 4 as a Clever Kid, pointing out that the accused has an identifying CK tattoo on the inner side of his right ankle. He had not personally witnessed accused 4 participating in gang activities, but said that he was known to members of the gang unit. The witness said that accused 5 was a member of the Ugly Americans gang and had UA tattoo marks on his middle finger and left leg.

[57] Under cross-examination by accused 3's legal representative, Det. Cst. van Rooy said that accused 3 had a tattoo mark TSB, which identified him as a member of the Terrible School Boys gang. The TSB's associated themselves with the Clever Kids gang. He said that accused 3 lived at Silverstream Rd, which is within walking distance of Gamka Str. Van

Rooy conceded that the TSB gang had ceased to exist during 2016. He said it had amalgamated with the Clever Kids. The witness testified that he had seen accused 3 involved in gang fights between 'die driekamp' and members of the Hard Livings gang.

[58] In answer to a proposition by counsel for accused 4 that accused 4 had left the Clever Kids in 2011, the witness said that he had no knowledge of that.

[59] It was put to van Rooy on behalf of accused 5 that the witness had tried to persuade him to turn state witness and to implicate accused 1. He denied the proposition. It was also suggested to van Rooy that he had made a similar suggestion to accused 5's mother. Accused 5 did not testify in support of that proposition when he gave evidence, and his mother was not called as a witness.

[60] The state closed its case after van Rooy completed his evidence.

[61] An application for discharge at the end of the state case was brought on behalf of accused 3. The prosecutor conceded that the accused should be discharged on counts 1 and 3 (i.e. the charges under the Prevention of Organised Crime Act and for the attempted murder of Keegan Solomons, respectively). The accused was accordingly found not guilty and acquitted on those counts. In the face of the evidence concerning his gang membership and his association with accused 2, who had been identified as the shooter, the application was otherwise dismissed. The prosecutor also conceded that accused 1 should be acquitted on count 3, and accused 2 on counts 1 and 3. Those accused were also acquitted accordingly after the close of the state's case.

[62] Accused 1 gave evidence that on the evening of 24 December 2015, he and accused 2 and 3 had joined the gambling game that was in progress in the 'park' between Gamka and Gamtoos Strs. He said that he and accused 3 had been on bicycles and accused 2 had been walking with them. He had spent some time beforehand with accused 3 and others smoking dagga and had then gone to accused 3's house so that accused 3 could put on something warmer to wear, whereafter they had gone to accused 2's house near the Phoenix School. At accused 2's house it had been decided that the three of them would go to Elbe Str. On the way they had come across the gambling game. He and accused 3 had joined the game and accused 2 had stood behind them.

[63] The accused gave various contradictory indications in his evidence as to the relative positions of the three accused and L J at the game. He was consistent only on the fact that the participants had been arranged in a circle and that accused 2 had been standing somewhere

behind him. Initially, he said that accused 2 was directly behind him and a later stage positioned accused 2 obliquely behind him. When pressed, he ended up saying he could not say precisely where accused 2 had been in relation to him and accused 3 because he had been concentrating on the gambling game. Initially, he had accused 3 sitting opposite him in the circle of persons playing the gambling game. Later he had him next to him, with two persons between them. At one stage he had accused 3 to the right of him, but later in his evidence he put him as having been to his left. Initially, accused 1 said that a few minutes after he had joined the game he heard a shot going off and then saw accused 2 running from the scene with a firearm in his hand. At a later stage he said he had been at the game for about an hour when this happened, and then when, pressed in cross-examination on the point, said that, despite having reached standard 7 at school (which he left only because his father had found him employment and because the family was experiencing financial hardship), he was illiterate and unable to make an estimate of the time.

[64] Under cross-examination by counsel for accused 2, the accused also appeared to retract his incriminating evidence against accused 2 and gave the impression that he could not tell whether accused 2 had been carrying a firearm. Under subsequent cross-examination by the state, however, the accused reverted to his original evidence and was even able to say that he had seen that the firearm was greyish in colour. In answer to the prosecutor's questioning accused 1 said that accused 2 had carried the gun with his arm pointing downwards towards the ground. He said that he had not known that accused 2 had a firearm on him and was shocked to see him with one after the shot had gone off.

[65] Accused 1 said that it sounded as if the shot had gone off behind him. He said that after the shot had gone off there had been pandemonium, with everyone who had been present fleeing from the scene in all directions. He learned only later that L J had been injured in the shooting incident. He said that he had climbed onto his bicycle and headed in the direction of his home via Gamka Street. In his evidence in chief he stated that he had not left together with accused 2 and 3. Under cross-examination he said that he did not know the names of the streets, and was therefore unable to say whether his route had taken him via Gamka Str or Gamtoos Str. Earlier in his evidence he had no difficulty in saying that he had seen both accused 2 and accused 3 leaving the scene of the shooting in the direction of Gamka Str. Under questioning by the court, with reference to exh. N, he confirmed that he had taken the route via Gamka Str, Great Fish Ave and the passage between Jordan Str and Elsjieskraal Rd to get to Elbe Street, where he lived. He said that he and accused 3 had left

the scene of the shooting by bicycle, and accused 2 on foot. He was unable to explain why he had not overtaken accused 2 in the course of his escape from the scene if, as he described, they had both departed in the direction of Gamka Str.

[66] Accused 1 said that after he had arrived home L J'S 'people' arrived there in an agitated state and caused an uproar. He said that they had accused him of firing the weapon and that he had denied this, but told them that he had seen accused 2 with a firearm. He stated that W J had been one of these people. This evidence was in stark contradiction of the evidence of Ms J that the accused had been absent when she had gone to his house. It was not put to Ms J, when she gave evidence, that the accused had been present. On the contrary, the tenor of the cross-examination was consistent with Ms J'S evidence. It was to the effect that she had confronted the accused's mother about the shooting of her son. The accused confessed that he had not given the version he advanced in his oral evidence to his legal representative in pre-trial consultation.

[67] Accused 1 said that he had made no enquiries of either of his co-accused after the event as to what had happened. He also denied having gone to apologise for the shooting to L Joseph's mother. He said that in fact L J had come to him to apologise for having laid charges against him. (It had not been put to L that he had apologised to the accused.)

[68] As to the incident in which Ashley Davids was killed, accused 1 asserted, as had been foreshadowed in his plea explanation, that he had been at home at the time. He said that the witnesses who had identified him as the shooter had been badly mistaken. He admitted that Carl May and Charles Engelbrecht had been known to him. He said that he had been on his way out of his house to go to buy cigarettes when the police pulled up and arrested him. He said that he had not been outside his house at any stage earlier on that day. He testified that as he had left the house and just before the police arrived he had encountered accused 4 on the street outside his house. He was wearing a blue top at the time and noticed that there was some discussion between the police about the colour of his upper garment. He seemed to suggest that Ms J had given the police a different description of his clothing. Indeed, he said that Ms J had got out of the police vehicle and pointed him out saying that he had been wearing a red top. He denied that he had worn a red top on that day.

[69] Accused 1 initially stated that he had not had the opportunity to tell the police that he had a number of witnesses right there, by way of his family members and girlfriend, who could support his alibi. He later contradicted himself on this point. He also later said that his

mother had actually come out of the house before he was taken away and remonstrated with the police that he could not have been involved in the shooting at MC Stores because he had been at home. That claim was not put to Ms J, who had been present when he was arrested. It was also inconsistent with his mother's evidence (to be described in more detail presently) that she did not know at the time for what he had been arrested. He said that he had asked his family members to make statements to the police confirming his alibi, but had not bothered to find out whether they had or not.

[70] Accused 1 stated that he was taken to the Manenberg police station and tortured by having a bag put over his head and having water poured over it onto his face to get him to say where the firearm was. He said that a policeman intervened at a certain stage to stop him from being mistreated. I infer that the policemen involved must have accepted from the time of his arrest that the accused was no longer in possession of the firearm for one would otherwise have expected them to have searched his house for it, which they did not. Their conduct is consistent with their having received a report, it would seem from Ms J, that he had handed the weapon to someone else. He then had gunshot residue tests done on his hands and was photographed. It is apparent from the photographs of the accused in exh. H that his t-shirt and the upper part of his trousers were wet. This lends support to his evidence concerning his ill treatment by some of the policemen at Manenberg police station after his arrest. It is common cause that the residue tests were negative. I do not think that the negative result of the residue test could properly be regarded as conclusive in the context of the evidence as a whole. Assuming ex hypothesi that accused 1 had been dependably identified as the shooter by the eyewitnesses, it is evident that there would have been an interval quite sufficient after he could have reached his home from the scene of the shooting to allow him to wash his hands and even change his clothing before he was picked up by the police. Furthermore, his dousing with water in the context of being tortured by the police could also have washed off any residue that might otherwise have been detected.

[71] Accused 1's evidence concerning his gang membership was that he had belonged to the Clever Kids for about six months during 2011, but had left the gang when he realised that membership would lead inevitably to his death, injury or incarceration. He sought to vindicate his claim not to be a member of the gang by pointing out that he did not have any identifying tattoo marks. He did not however give a convincing explanation of his claim that every gang member had an identifying tattoo mark. He could not explain why he had not obtained such a mark when he had admittedly been a gang member for some time.

[72] Accused 1 said that he had known accused 2 for six or seven years, but claimed to be unable to say whether or not he was a gang member. He said that accused 2 had not been a Clever Kid when he (accused 1) had been a member of the gang. He said that he had grown up with accused 3, whom he knew to be a member of Terrible Schoolboys gang. He confirmed that accused 4 was also a friend of his. Accused 4 lived next door to him in Elbe Str. He said he did not know whether accused 4 was a gang member. He had not seen him with gang members in the area. Accused 5 had been a friend of his, but had moved to Bonteheuwel. He said that he could say that accused 5 was not a gang member because he no longer lived in the area.

[73] Accused 1 called his mother, Lameez Jordaan to support his alibi. Ms Jordaan testified that her son had been at home for the whole day on 27 April 2016. She said that they lived in a small open plan maisonette with two bedrooms and a bathroom on the upper level and that she had been in a position to see that accused 1 had not left the house that day until he had been asked by his father to go to buy cigarettes. She had been busy cooking in the kitchen at that time, and was alerted to her son's arrest when people from the street came in to say that the police were taking accused 1 away. She said that she had gone outside and asked the police why they were arresting her son. The police told her that they were arresting him on a charge of murder. She was shocked and felt sick and numb in her legs. She had no idea at the time where or when the alleged murder had occurred, or who the victim had been. She had not asked the police for these particulars. She said that she and her late husband had gone to the police station the following day, but that when they arrived there the accused had already been loaded into a police van to be taken to court. The policeman to whom she and her husband tried to speak was not interested in their enquiries. He was more concerned that the accused might be late for court.

[74] Ms Jordaan was taxed in cross-examination as to why she had not been more assertive in establishing her son's innocence by speaking to his alibi. She was asked why she had not made a statement to the police or pointed out at the accused's bail application in the Wynberg magistrates' court that he had been at home all day. Her answer on the first point was that the police had not been interested in listening to her. On the second point she said that she did not think that she was permitted just to speak out during the bail proceedings. In answer to a question from the court, Ms Jordaan indicated that the accused had been legally represented at the bail application. She said that he had been represented by an attorney that had been privately engaged by the family.

[75] Ms Jordaan stated that she was absolutely intolerant of gangs and was initially adamant that her son had never been a gang member. When it was put to her that on the accused's own evidence he had been a member of the Clever Kids for six months, she said that she had no knowledge of that, but was in no position to argue with the prosecutor on the point. She did, however, after an initial slight equivocation, confirm that the Elbe Str / Elsjieskraal Rd area was the stronghold of the Clever Kids, Ugly Americans and Dixy Boys and that the territory of their rival, the Hard Livings gang, was the MC Stores / Gamka Str area. She said that she also had no knowledge whether accused 4, who lived next door, and had grown up before her, was a gang member.

[76] Ms Jordaan purported to be able to remember in detail exactly what the accused had been wearing on 27 April 2016. She also gave out that she could remember what she had been wearing, as well as what her daughter and her son's girlfriend had had on that day. The only reasons she offered for such an extraordinary ability to recall such insignificant detail were that the accused did not have a big wardrobe, and that it was important for a mother to pay attention to her children's clothing. Ms Jordaan was, however, unable to remember on which day of the week the 27th April had fallen, or what it was that she had made for breakfast, lunch or supper on that day. She was also unable to say what the accused had been wearing on the 23rd of April. She had been in court for much of the trial and when she was absent other family members and the accused's girlfriend had been present; as had the family of accused 4 who live right next door to her in Elbe Str. Ms Jordaan's description of accused 1's apparel on the day was consistent with the description that had been given by the accused in his evidence. She claimed that she had not discussed the evidence with anyone else in the family before she testified, but I find that improbable.

[77] As it was, in answer to questions posed by the court, inspired by the photographs that had been taken of the accused after his arrest that were included in exh. H, the witness said that the accused had been wearing a white t-shirt, whereas the photographs show him wearing a yellow one. When her attention was drawn to the discrepancy she sort to recover the situation by saying that her late husband may have taken a change of clothing to her son at the police station on the evening of 27 April. No evidence suggesting that such a visit had taken place had been adduced in the context of the accused's evidence concerning what had transpired at the police station after his arrest. On the contrary, Ms Jordaan's evidence had been that she and her husband had gone to the police station the following day to try to find out the particulars of the charge against their son. The witness also initially said that the

trousers accused 1 is shown in the photograph to have been wearing were not the blue jeans that she had said he had on, but shortly thereafter she contradicted that evidence saying that those were the trousers he had been wearing, but the top was not what he had had on.

[78] The only significance, in the context of the evidence adduced in the trial, of what the accused had been wearing on that day was related to the fact that it was plain from the actions of Ms J in taking the police to his address - after evidently having reported that he was the shooter - that she had identified him as the person wearing the red hoodie whom she had followed up the passage between Jordan Str and Elsjieskraal Rd. The accused himself emphasised that there had been some discussion between the arresting police details and Ms J at the time of his arrest about the fact that he was found wearing a *blue* top. Nothing in the evidence indicates that Ms Jordaan would have been aware of this issue at the time, and she said nothing to suggest that she had been alerted to the question shortly after the 27th of April 2016. On the contrary, as mentioned, she said that at the time her son had been taken away by the police she had not known who had been murdered or when the alleged murder had happened.

[79] Accused 1 closed his case after his mother had given evidence.

[80] Counsel for accused 2 closed his case without calling any evidence. The court confirmed with accused 2 that his decision not to testify had been taken after properly discussing the matter with his legal representative.

[81] Accused 3 testified that on 24 December 2015 he had gone to smoke dagga at a spot on Elbe Str that he regularly frequented for the purpose. He went there on his bicycle. Accused 1 was one of the persons whom he encountered there. The encounter was by chance. He said that he had not made arrangements to meet accused 1 there.

[82] It became cooler later in the evening and he decided to go home to put on warmer clothing. Accused 1 decided to accompany him. The two of them cycled back to accused 3's house in Silverstream Rd. After accused 3 had changed he went outside and suggested to accused 1 that they look in on accused 2 who lived on the same road, three or four houses away from that of accused 3. Accused 3 said that he had intended to ask accused 2 to arrange to procure some higher grade dagga for him to smoke later that evening to celebrate Christmas. He did not get to the stage of making the request, however, because accused 2 had indicated that he was bored and said he would accompany accused 1 and 3 back to Elbe Str and go to visit family that he had in Elsjieskraal Rd.

[83] Because accused 2 was on foot, they decided to take a more direct route back to Elbe Str. That route took them to the park where the gambling game was in progress. He and accused 1 decided (quite independently of each other, it would appear) to stop and join in the game. Accused 2 did not participate and stood by watching at a position obliquely behind accused 3. Accused 3 said that accused 1 had sat opposite him in the circle of gamblers participating in the game. In the result the evidence of accused 1 and 3 was mutually contradictory concerning where accused 2 had been in relation to each of them.

[84] Accused 3 said he had been engaged in the game for anything between 5 and 15 minutes when he heard a shot go off. He had no idea from where in relation to his position the sound had come. He could only say it was very loud. He had not seen anyone bearing a firearm, and even after the shot had been fired he had no idea who or where the shooter was. He grabbed his money, mounted his bicycle and rode off as fast he could in the direction of Elbe Str. He took the route via Gamka Str, Ganges Close, Jordan Str and the passage from the top of the Great Fish Ave to Elbe Str. He said that he did not see accused 1 or 2 in his flight. He pointed out that there were five routes of escape from the park and that the people at the game had scattered in disarray after the shot had gone off. When he reached the top of the passage, at the corner of Elbe Str and Elsjieskraal Rd, he looked back over his shoulder down towards Great Fish Ave to see if either of his co-accused was following him. He did not see them. He then went to his grandmother's house in Elsjieskraal Rd. He encountered his uncle in the front yard there and asked him to bring him a glass of water. After consuming the water he cycled back to his house in Silverstream Rd. When he reached home (which he agreed could have been no more than 15 minutes after the shot had been fired), his mother was at the gate and called to him to come to her. She reported that W J had been there about the shooting incident. Ms J had already left by the time that he arrived there. He told his mother about the shooting incident. She annoyed him by scolding him for having participated in the gambling game and he left to visit other friends around the corner from his address. On the way he encountered accused 2's sister, who told him that accused 2 had not yet returned home.

[85] Under cross-examination and questioning by the court accused 3 struggled to explain various inconsistencies and improbabilities in his evidence. His attempts to explain why various details volunteered under cross-examination had not been mentioned in his evidence in chief were unconvincing, as was his reportedly singular lack of interest in what had become of his two friends after the shooting incident. His dogged insistence that he could

not tell from which direction the shot had come and that he would not have been able to see anyone in front or to the side of him wielding a firearm, even in his peripheral field of vision, came across as disingenuous and evasive.

[86] He was moreover unable to explain how his version of events after the shooting incident could be reconciled with the evidence of Ms J that she had heard of the shooting incident when she had been at her friend's house in Ocean View near Kommetjie and had proceeded from there to the addresses of accused 1 and 3 respectively. The court is able to take judicial notice that Ocean View is more than half an hour's drive from Manenberg in traffic free conditions. Accused 3 suggested that Ms J must have already been on her way home when she heard of the shooting, or that she must have been untruthful in her testimony that she had been in Ocean View when she got news of the shooting. No plausible reason for Ms J to have concocted such an incidental piece of information suggests itself, and accused 3's legal representative did not challenge this aspect of her evidence in the course of detailed cross-examination. A far more likely reason for the conflict in the evidence of the two witnesses is that accused 3 was not being frank with the court as to his movements after the shooting. I formed the strong impression that accused 3 was not an honest witness, but dishonesty does not afford a safe basis, by itself, to found a conviction.

[87] Accused 3 called his mother, Ms Rochelle Maart, in support of his defence. She added nothing of substance to the evidence that her son had already given. She confirmed that the accused had been away from his home for most of the evening of 24 December 2015 and that W J and her sister, S, had come to her house that night claiming that accused 3 had been present at the gambling game when L J had been shot. She said that accused 3 had arrived home 15-20 minutes after W J had left. Ms Maart was obviously in no position to say where her son had actually been, or with whom, for most of the evening. It was clearly apparent from her evidence that accused 3 had not been honest in telling her where he would be. She confirmed that her son had been a member of the Terrible Schoolboys gang. She said that he had told her at some stage that he was no longer a member.

[88] Accused 3 then closed his case.

[89] The evidence as a whole did no more than establish that accused 3 had been present at the scene of the shooting and that he had arrived there with accused 1 and 2 and fled together with them after the shooting. Even if he had known that accused 2 intended to shoot someone at the gambling game, that knowledge and his mere attendance with accused 2 at the

scene would not make him a co-perpetrator or accomplice in the commission of the offence of attempted murder. I think it was improbable that accused 3 did not know that accused 2 was armed and that a shooting was going to take place. Even though I regard the probity of his evidence with scepticism, I nevertheless cannot discount the reasonable possibility that he was present at the shooting only in a passive capacity. The accused is entitled in law to benefit of that doubt.

[90] Essentially the same considerations apply in respect of the position of accused 1 in respect of the shooting incident on 24 December 2015. As Botha JA pointed out in *S v Mgedezi and Others* 1989 (1) SA 687 (A), at 703I-J, the court '*is obliged to consider, in relation to each individual accused whose evidence could properly be rejected as false, the facts found proved by the State evidence against that accused, in order to assess whether there was a sufficient basis for holding that accused liable on the ground of active participation in the achievement of a common purpose*'.

[91] There is no evidence of a prior agreement between the accused in respect of the respective charges of attempted murder and murder. Accepting that they were members of the same gang or of mutually allied gangs is not sufficient to make out a prior agreement between them to commit the acts in question. In the absence of proof of a prior agreement to commit the offence in issue, five requirements must be satisfied for common purpose to be established. In the first place, the accused must have been present at the scene where the offence was being committed. Secondly, he must have been aware of commission of the offence. Thirdly, he must have intended to make common cause with the person who was actually perpetrating the offence - in the current matters the person who fired the weapon. Fourthly, he must have manifested his sharing of a common purpose with the perpetrator by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased and the shooting of L J, the accused must have intended them to be killed, or must have foreseen the possibility of their being killed and performed their own acts of association with recklessness as to whether or not death was to ensue. I refer in this regard to *S v Mgedezi* supra at 705I-706C, most recently endorsed by the Constitutional Court in *Makhubela v S, Matjeke v S* [2017] ZACC 36 (29 September 2017), at para. 36. The collective import of these requirements for common purpose liability was summed up by Moseneke J in *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100, at para. 19 as

follows: '*The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.*'

[92] Insofar as the count of the attempted murder of L J is concerned, the evidence establishes conclusively that accused 2 was the shooter. L J was but a youth and also a sole witness for the state as to what happened in the shooting incident of 24 December 2015. I have been astute to assess his evidence with special care in the light of these considerations. His evidence was given coherently. He made a good impression in the witness box and he was not upset in any material respect in cross-examination. His evidence was, moreover, corroborated by that of accused 1, and accused 2 chose not to rebut it.[3]

[93] It was common ground that accused 1 and 3 were present when the shot was fired, but I am unable to discount the reasonable possibility that their evidence that they were unaware that accused 2 had a firearm might be true. There is no evidence of their active association in the perpetration of the crime. Evidence that they stood with accused 2 watching the gambling does not, without more, establish association. That they ran away when the shot was fired was also common cause. While it might be argued that fleeing the scene with accused 2 could point to their association with him in the undertaking, it is equally consistent with the absence of any association and a fear for their own safety. I am sceptical about the truth of the evidence of accused 1 and 3, but that is not enough to found a decision on the evidence to convict them of count 2 and they will therefore be acquitted and discharged on that charge.

[94] Accused 2 therefore falls to be convicted on the charge of the attempted murder of L J (count 2). In the circumstances, it seems more likely that the intended victim of the shooting was Keegan Solomons, who was positioned close to J at the time, and a member of a rival gang. Nevertheless, in firing the shot in the circumstances accused 2 must have appreciated that he might miss Solomons and hit someone close to him. The potential for fatal consequences would have been obvious to him, but he proceeded to fire reckless of the potential result. He therefore had the legal intention to commit the offence of murder.

[95] The proven facts show that accused 2 was in possession of a handgun of make and calibre unknown and at least one round of ammunition for it. He has not offered any evidence to suggest that he was legally authorised to be in such possession.[4] His counsel, Mr

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[3] As to the effect of the accused's election not to give evidence in the circumstances, see *S v Boesak* 2001 (1) SACR 1 (CC); 2001 (1) SA 912; 2001 (1) BCLR 36; [2000] ZACC 25, at paras. 24-29.

[4] See s 250(1) of the Criminal Procedure Act, which provides:

Beukes, argued, however, that the state had failed to prove the charges in terms of counts 4 and 5 against him because no expert evidence had been adduced to establish that the device used by the accused had been a firearm as defined in s 1 of the Firearms Control Act. Mr Beukes relied on the judgment of the Eastern Cape Division in *S v Filani* 2012 (1) SACR 508 (ECG) in support of his submission. He also provided the court with a copy of a published article that he has written on the subject, Beukes, H '*The loaded danger of deduction when dealing with illegal possession of ammunition*' (2016 June) *De Rebus* 38.

[96] The word 'firearm' is defined in the Act as follows:

> *'**firearm**' means any-*
>
> *(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);*
>
> *(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;*
>
> *(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);*
>
> *(d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or*
>
> *(e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d),*
>
> *but does not include a muzzle loading firearm or any device contemplated in section 5.*

Paragraphs (c), (d) and (e) of the definition are indicative of the legislature's intention to frame the ambit of the meaning of the word 'firearm' widely, rather than narrowly, because they draw into the net devices not available for immediate use as firearms, but amenable to adaption for the purpose, powerful airguns, and even just component parts of an incomplete firearm. By contrast, the 8 joules muzzle energy threshold on the other hand is manifestly intended to exclude devices with a low muzzle energy from regulation as 'firearms'.

Presumption of lack of authority

(1) If a person would commit an offence if he-

> *(a) carried on any occupation or business;*
>
> *(b) performed any act;*
>
> *(c) owned or had in his possession or custody or used any article; or*
>
> *(d) was present at or entered any place,*

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the 'necessary authority'), an accused shall, at criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.

[97] An 'airgun' (as defined) is a demonstrable example. 'Airgun' is defined as meaning –

> …any device manufactured to discharge a bullet or any other projectile-
>
> (a) of a calibre of less than 5.6 mm (.22 calibre); or
>
> (b) at a muzzle energy of less than 8 joules (6ft-lbs),
>
> by means of compressed gas and not by means of burning propellant;

[98] The expression 'muzzle energy' is not defined in the Act, nor have I been able to find a definition in a standard English dictionary. The expression 'muzzle velocity' is defined in the *Oxford Dictionary of English* as 'the velocity with which a bullet or shell leaves the muzzle of a gun'. A 'joule' is defined in the same dictionary as 'the SI unit of energy, equal to the work done by a force of one newton when its point of application moves one metre in the direction of action of the force, equivalent to one 3600th of a watt-hour'. A foot-pound is defined in the dictionary as 'a unit of energy equal to the amount required to raise 1lb a distance of 1 foot'. It follows that 'muzzle energy' relates to the energetic force involved in the propulsion of the bullet from the weapon's muzzle. There is no mystique in appreciating that the destructive potential of a projectile fired from a muzzle is related to the combined effect of its mass and muzzle velocity, in other words in direct relation to the kinetic energy involved. That is a matter of simple physics. Joules or foot-pounds are measures of the production of kinetic energy. A firearm with a low muzzle energy will not be capable of inflicting injury on the scale that one with a higher muzzle energy is able to do. The firearm devices excluded from the technical definition of the word for the purposes of the Act on the basis of their low muzzle energy are therefore ones that pose little or no threat to people's right to life and security of person.

[99] A more general consideration of the provisions of the Act bears out the effect of the proposition I have sought to demonstrate. Section 5 of the Act expressly provides that an 'airgun' is not regarded as a firearm for the purposes of the Act. Other devices similarly excluded in terms of that provision include 'a tranquiliser gun',[5] 'a paintball gun',[6] 'a flare gun' and 'a deactivated firearm'. The Act does not prescribe that a person may not possess an airgun unless one is licensed to do so. One also does not require a competency certificate

[5] 'tranquiliser gun' is not defined in the Act. It is clear enough that it denotes a device that is used to shoot a cartridge containing a sedative at an animal. An animal shot using such a device would be tranquilized or sedated. The object of shooting an animal with a tranquiliser gun would not be to kill or significantly injure it.

[6] 'Paintball' is not defined in the Act. *The Oxford Dictionary of English* gives the meaning as 'a game in which participants simulate military combat using airguns to shoot capsules of paint at each other' and gives 'paintball gun' as a modifier of the word. It is obviously not a device intended to cause injury.

to possess an airgun (as defined), as one does to qualify to obtain a licence for a firearm; nor must the device itself be licensed. Furthermore, the storage of airguns is not subject to regulation under the Act, whereas that of firearms is. The clearly discernible pattern throughout the Act is that firearms in the ordinary sense of the word that are not regarded as having sufficient firepower to represent material potential harm to members of the community are excluded from the defined meaning of the word. A firearm that is powerful enough to send a bullet through a person's leg would not fall into the category of relatively innocuous devices excluded from the regulatory requirements of the Act. Similar provisions are found in the firearms legislation of other countries. In Germany, for example, a licence is not required to use a firearm outside a shooting range if its projectiles have a kinetic energy of less than 7,5 joules.[7] The evident ratio for the exception is that projectiles with a kinetic energy of less than 7,5 joules were accepted by the German legislature not to present a material danger to life or limb.

[100] In *Filani*'s case, the High Court set aside the appellant's convictions in respect of the unauthorised possession of a firearm and ammunition in contravention of the Firearms Control Act, holding that it had been incumbent on the state to adduce evidence establishing that the device used fulfilled the technical criteria in the definition of 'firearm'. The court recorded that the evidence in that case had established that when the device had been fired the result had been to leave what a lay witness had described as 'a little, small hole' in the wall. Counsel for the state submitted that any weapon capable of having that effect would fall to be recognised as one having sufficient 'force or velocity' to qualify in terms of the technical criteria in the definition. Pickering J (Revelas J concurring) rejected the argument, holding (at p.515*f-g*):

> '… on an acceptance of Ms *Hendricks'* submission, any weapon which was capable of discharging or propelling a missile as set out above would fall within the ambit of the definition. In my view, however, given the increased technical nature of the various definitions of 'firearm' contained in the later and current Act, such a finding cannot be made in the absence of expert evidence to that effect. Certainly, it is not a matter of which this court may take judicial notice. The state failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it.'

The learned judge highlighted the difference between the current statutory instrument and its predecessor, the Arms and Ammunition Act 75 of 1969, which had not contained a definition of 'firearm', with the result, as held, amongst others, in *S v Shezi* 1980 (4) SA 494 (N), that

[7] Section 12(4)(1) of the Waffengesetz (WaffG), 2002, which came into effect on 1 April 2003.

the word had fallen for the purpose of the latter Act to be construed in accordance with its ordinary meaning such as that to be found in the *Oxford English Dictionary*, viz. '*a weapon from which missiles are propelled by an explosive, e.g. gunpowder*'.

[101] The logic of the court's reasoning in *Filani* is difficult to fault on the facts of that case. Depending on the evidence adduced in a particular case it could, however, give rise to uncomfortably anomalous results if applied as a general doctrine. In the current matter, for example, it is plain beyond question that a significant wound was inflicted on the complainant by a shot fired by accused 2 from a firearm in the ordinary sense of the word. It would make something of an ass of the state of the law if the court were to find the accused guilty of the common law offence of attempted murder committed with the use of a firearm, but be unable to hold that he had possessed the firearm without a licence on the basis that the weapon's muzzle energy had not been empirically proved. Such a result would be especially anomalous in the context of the expressly stated objects of the Firearms Control Act. The preamble to the Act states that the enactment is directed at the protection of every person's 'right to life and the right to security of the person, which includes, among other things, the right to be free from all forms of violence from either public or private sources' and acknowledges the duty placed on the state by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights in the context of the contribution of the increased availability and abuse of firearms and ammunition to the high levels of violent crime in our society. It seems to me that it would be inimical to the stated objects of the Act to apply its provisions in such a way as would place a higher burden on the state to successfully procure convictions in respect of the unlawful possession of firearms and ammunition. Certainly, if the language of its substantive provisions were construed to have such an absolute effect, the result would be undermining of the statute's stated objects.

[102] Mr Appels, who appeared for the state, argued that the court should take 'a common sense' approach. He submitted that regard should be had to the complainant's description of the firearm that he had seen the accused wielding as a revolver, identifiable as such by its revolving chamber.[8] He also argued that the evidence concerning the explosive report of the gunshot described by the complainant and accused 1 and 3, and the fact that the bullet had passed right through the fleshy part of the complainant's ankle, with an entrance wound on one side of the leg and an exit wound on the other, taken together, ineluctably supported

[8] The complainant described the firearm as a silver coloured handgun with a spin barrel.

deducing that the weapon had the requisite muzzle energy. It also demonstrated that the weapon that the accused had used was a device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant.

[103] The evident scope and object of the Act does give some basis for a purposive approach to its construction and application. That the statute is avowedly directed at giving substance to some of the fundamental rights in the Bill of Rights weighs in favour of construing it purposively in support of the achievement of its objects and brings the injunction in s 39(2) of the Constitution very much to the fore. These considerations, however, afford no warrant to depart from or do violence to the plain import of the wording that the legislature has chosen to employ, which undoubtedly has introduced technical criteria that were absent in the earlier legislation; nor does 'common sense' for that matter. The question essentially distils to whether it is only by expert evidence that the qualifying technical criteria may be established. Mr Appels' argument essentially propounds that the question should be answered in the negative.

[104] Some support for Mr Appels' argument is to be found in the approach of the Supreme Court of Appeal in *S v Sehoole* 2015 (2) SACR 196 (SCA), in which the state appealed from a judgment of a two-judge bench of the Gauteng Division of the High Court that had held that absent expert ballistic evidence it could not be proved that fifteen rounds of ammunition found in the magazine of a 9mm pistol in the possession of the accused was 'ammunition' within the defined meaning of the term. The SCA rejected the reasoning of the court a quo, holding (at para 19) 'Whilst it is undoubtedly so that a ballistics report would provide proof that a specific object is indeed ammunition, there is no authority compelling the state to produce such evidence in every case. Where there is acceptable evidence disclosing that ammunition was found inside a properly working firearm, it can, in the absence of any countervailing evidence, be deduced to be ammunition related to the firearm. Needless to say, each case must be judged on its own particular facts and circumstances'. (In that matter there had been a ballistic report put in evidence confirming the character of the firearm.)

[105] In the current matter, having regard to the evidence by the complainant and accused 1 identifying the object that accused 2 was carrying as a firearm and the nature of the injury inflicted on the complainant, I am satisfied beyond reasonable doubt, in the absence of any countervailing evidence, that the firearm was one with a muzzle energy materially 'exceeding 8 joules (6 ft-lbs)'. The consequences of the shooting incident demonstrate that the firearm used could not have been a device of the nature that the legislature excluded from statutory

regulation in terms of the Act. It is clear from the other evidence adduced at the trial that accused 1 is familiar with and knows how to use firearms and the complainant, as someone who had grown up in the violence-riven neighbourhood, would, as he indeed asserted under cross-examination, know a firearm when he saw it. The description by the witnesses of the explosive report made when the weapon was fired supports the finding that the bullet or projectile was propelled by means of burning propellant, but it would make no difference it were propelled by air pressure.

[106] In the circumstances accused 2 also falls to be convicted on counts 4 and 5 in respect of the charges brought under the Firearms Control Act.

[107] There is no basis upon which accused 1 and 3 might properly be convicted on counts 4 and 5, and they will therefore also be found not guilty and acquitted and discharged on those charges.

[108] Accused 4 testified that on the evening of 27 April 2016 he had been at home at his house at 9 Elbe Str. He had decided to go 'the corner' to smoke dagga. It was after dark. While there he heard several shots being fired. His mother came out of the house and called to him to come indoors. He initially said that he had remained inside the house for the rest of the evening. He reiterated that that had been the case when under cross-examination he was asked if he was certain that that had been so.

[109] He later amended his evidence to say that he had watched television for a while after being called inside by his mother. He then made himself a cup of tea. He had just finished pouring his tea into his cup when he heard a rumpus outside in the street. He went out to see what was going on and noted that accused 1, his friend and next-door neighbour, was in the process of being arrested by the police. His evidence in this respect was in conflict with that of accused 1, who had testified that he encountered accused 4 on the street just before he had been arrested.

[110] Accused 4 initially testified that he had not spoken to accused 1 when the latter was being arrested. Shortly thereafter, however, he contradicted himself and said that he had asked accused 1 why he was being arrested and that accused 1 had replied that it was for a murder of which he had no knowledge. Accused 4 also claimed to have spoken to the mother of accused 1 at the scene of the latter's arrest immediately after accused 1 had been driven away. This evidence was in conflict with that of his mother, whom he called as an alibi witness. Accused 4's mother testified that she and accused 4 had just watched accused 1

being arrested, that accused 4 had not known for what he was being arrested and that they had then withdrawn indoors because what was going on outside was none of their business. All of this evidence, whether by accused 4 or his mother, was, of course, inconsistent with accused 1's evidence. Accused 1's mother also did not testify that she had spoken to accused 4 on the street outside her house after accused 1's arrest.

[111] Accused 4 professed to have noted what the accused 1 had been wearing at the time. He described accused 1's attire in great detail; right down to the fact that he had been wearing black shoes with an orange logo and with the colour blue. His description of the shoes matched that of accused 1's footwear as depicted in the photographs in exh. H. It is evident from those photographs that accused 1 had been wearing shoes with blue soles. Accused 4 was unable to offer any explanation of why or how he should have noted such detail when there was much else going on to distract his attention, and, apart from street lighting, it would have been dark. It is difficult to reconcile his claim with his inability to describe what his mother had been wearing that evening. It is highly improbable that in the prevailing circumstances described by him and accused 1 that accused 4 could have taken in the detail he professed to recall. It is even more unlikely that, even if he had noted some of the detail that he described, he would have still remembered it 18 months later. He would not have had any cause to think it important to impress in his memory. I am firmly of the view that the accused's evidence in this respect was untruthful.

[112] His dishonesty showed in other respects too. His description of the Clever Kids as a sort of social group where the members entertained themselves having fun with the girls and going to parties, coupled with his professed ignorance that the gang's activities were in any way associated with criminal activity, imposed excessively on the court's credulity. His description of his allegedly short-term membership of the gang stood in stark contrast with the far more realistic description of gang membership given by accused 1. Both of them claimed to have been members of the gang only for a few months during 2011. Accused 4 was equally unimpressive in his evidence claiming not to know which the dominant gang in his area of Manenberg was, and who its principal rivals were. His denial that accused 5 was a gang member was contradicted by accused 5 himself. Accused 4 said that accused 5 was not a gang member. He said that he was of that opinion because accused 5 stayed home most of the time and he had not seen him in the company of gang members. Yet, accused 5 said that he associated with the Ugly American gang and stood with members of that gang at the corner. If accused 4, who was unemployed, were observant enough to be able to say that

accused 5 stayed at home most of the time, he could not but have noticed that the accused in fact associated with gang members and stood at the corner with them. The Elbe Str community is a small one. Elbe Str and Elsjieskraal Rd. comprise just a tiny corner of the Manenberg suburb. Furthermore, it was not as if accused 5 hid his gang association. He had two UA tattoos, and, as mentioned, admitted publically associating with gang members.

[113] Accused 4 called his mother, Ms Rochelle Hutchinson, to give evidence in support of his alibi. She was an unimpressive witness. I gained the impression that she would say anything to protect her son. Her story was a simple one that coincided in all material respects with the evidence given by her son. It was her evidence in respect of immaterial detail that showed her up. She professed, for example, to have remembered in detail what she had been wearing on the evening of 27 April 2016, when, unsurprisingly, she was unable to say what she had been wearing on 30 September 2016. The witness offered no reason why she should be able to remember such inconsequential detail and her claim in that regard was just not credible. She was also evasive on questions of time and refused to make concessions on various issues, such as that her son would have had ample time during the period he was out of the house on that evening to go to MC Stores, notwithstanding that, objectively, there could be no feasible basis for resisting the proposition. It was also in respect of matters of detail such as where in her mother's house the accused could have watched television that her evidence and that of accused 4 was mutually contradictory. Ms Hutchinson testified that there was only one television in the house and that it was upstairs. The accused testified that he had watched television when he came back inside after being called inside, and that he had done so downstairs. It is, of course, on matters of detail of the sort where there could be no scope for innocent error that witnesses who have fabricated a common version are likely to have the fallacy of their evidence exposed.

[114] Accused 5 also gave evidence. He said that he been 16 years' old in April 2016. He lived at the time with his grandfather at 32b Elbe Str. He had been living there since December 2015, after he had absconded from the boarding school that he had been attending at Schaapkraal. He said that he had run away from school because he had grown tired of not being able to come home during exeat weekends because his mother would not let him due to the dangers of on-going gang violence. The accused admitted that he had joined the Ugly Americans gang after coming to live with his grandfather and owned up to still having been a member of the gang at the time of the fatal shooting at MC Stores.

[115] Accused 5 stated that on the evening of 27 April 2016, towards nightfall, he had proceeded from his grandfather's house to go to visit his friend Shahieda, who lived on that part of Elsjieskraal Rd where the houses fronted towards Duinefontein Road. She was not at home, so he proceeded further down Elsjieskraal Rd in the direction of Jordan St. He heard several shots being fired from the direction of Jordan Str in the vicinity of MC Stores. He broke into a run and headed towards the corner of Elsjieskraal Rd and Elbe Str where he encountered a group of curious persons from the neighbourhood who had been drawn outside by the sound of gunfire to find out what had happened. His grandfather and one of his uncles were amongst these people. He stood around with them for a few minutes and then proceeded to visit his girlfriend in Gouritz Rd.

[116] Accused 5 denied any complicity in the shooting. He knew the various eyewitnesses to the shooting who had given evidence and conceded that they would also know who he was. He could not suggest any reason why they should have falsely incriminated him as having been on the scene. He had no personal differences or enmity with any of them. He said that he had first been arrested on 28 April 2016, but he had released after questioning. He had not known that the police had been looking for him between then and his subsequent arrest for a second time some months later. His mother had taken him to live in Bonteheuwel after his initial arrest. He had, however, continued his ties with the Manenberg area with visits to his grandfather and girlfriend.

[117] Accused 5, despite being much younger than his co-accused, and of limited formal education, came across as the most intelligent amongst them. He also gave a superficial impression of candour and reasonableness. If his evidence were to be assessed in isolation – which, of course, is *not* the proper approach – it would be accepted as probably truthful. It was not without material blemish or contradiction, however. Most notably, it was put by his counsel to Carl May that accused 5 had been at the traffic lights in Duinefontein Road on his way to Jordan St when he had heard gunshots and ran away to Elsjieskraal Rd. The necessary implication in the version put by his counsel was that he had accessed Elsjieskraal Rd from Duinefontein Rd. His evidence was different. It was to the effect that he had been walking in Elsjieskraal Rd and had run to Elbe St.

[118] Assessed, in the proper manner, that is together with all of the other evidence in the case, I think that accused 5 was astute to the areas in which there would be no point in his contesting the state's evidence. Hence, despite what might otherwise have appeared as reasonable concessions supportive of his overall credibility as a witness, I am nevertheless

satisfied as to the truthfulness of the eyewitnesses' evidence against him. Not only were the eyewitnesses not upset in cross-examination, their evidence about their knowledge of gang activity in the area was frank and obviously informed. This stood in sharp contrast to the coyness and professed ignorance of the accused on the subject. As borne out by many uncontested remarks made from all quarters during the course of the trial, and from the police evidence, it is notorious that Manenberg is a heavily gang infested area and the accompanying violence is salient in the local, if not the national, news. People living there cannot be other than alert to it, who is involved, and the dangers it presents to their lives and limbs. As mentioned, accused 5 could suggest no basis why the eyewitnesses, who he conceded were familiar with him, at least by sight, could have wrongly or falsely identified him as being on the scene with accused 1 and 4. Objectively, there is nothing to suggest that the eyewitnesses had any reason to falsely implicate him. They did not suggest that he actively participated in the assault on the deceased. On the contrary, they described how he ran from the scene as soon as accused 1 started firing. Being unsophisticated, they are not the sort of persons who are likely to have thought that the accused could be guilty merely because he had been present with someone else who had decided to shoot the deceased. I am satisfied that they identified the accused as having been there because they had indeed seen him there. The evidence establishes that the scene was well illuminated and the three persons who approached the gambling game outside MC Stores came within a short distance (less than 24 metres) of the eyewitnesses. That all three of them could have mistakenly identified the accused in the circumstances is so highly improbable that it may safely be discounted.

[119] In respect of the charge of murder arising out of the fatal shooting of Ashley Davids (count 7) the evidence established beyond reasonable doubt that the actual perpetrator was accused 1. The proven facts, in particular the repeated firing at him after he had tried to escape, bear out that the shooting of Davids was carried out with the deliberate and actual intention to kill. Accused 1 will therefore be found guilty of murder on that charge.

[120] Despite their denials, the evidence also established that accused 4 and 5 had been with accused 1 when he approached the gambling game in which the deceased had been participating outside MC Stores. I am satisfied that accused 4 and 5 probably knew that accused 1 intended to shoot someone. The circumstances suggest that the gangs with which they were associated (the so-called 'driekamp') would have been intent at the time on exacting revenge for the recent attack on two of their members in Humber Street, a few blocks away. The suggestion is borne out by the fact that the attack was made on the only

person present who was a member of a rival gang; and that there is nothing in the evidence to indicate that Davids was targeted for any other reason but his membership of a rival gang and by the observation made by accused 4 in offensive terms as the trio approached the persons in the gambling game, identifying Davids as a member of the Hard Livings gang.

[121] I am moreover satisfied that the state has proved that accused 4 made common purpose with accused 1 in the murder. His actions in uttering words that pointed out or identified Davids as a member of the Hard Livings gang and in checking that the coast was clear for an attack by looking to see what the position was along the side of MC Stores that led to Gamka Str were manifestations of an awareness of the intended assault on the deceased and his intention to make common cause with accused 1 to that end. His conduct in those respects unambiguously associated him in the intended assault. He identified the victim and checked to make sure that he could be attacked with impunity from counter-attack. This showed his active association and participation in a common criminal design with the requisite blameworthy state of mind. Accused 4 will therefore also be found guilty on count 7 and convicted on the charge of murder. It is convenient to interpose at this point that in my view it is probable that accused 1 and 4 were the two men that W J saw proceeding down Jordan Str from MC Stores after the shooting. Any puzzlement that the witness saw only two men, not three as might have been expected were her observations to tally with the descriptions given by the eyewitnesses, is resolved if one factors in the version initially put on behalf of accused 5, but abandoned when he gave evidence, that he had had made his way to Elsjieskraal Rd after the shooting via Duinefontein Rd. The proposition was not put to accused 5, but in the context of his fallacious defence he could hardly have acceded to it even if it had been.

[122] I have no doubt that accused 5 was also well aware of what accused 1 and 4 were about, and supportive of their object. In his case, however, the evidence did not establish any conduct by him that might qualify as active association in the commission of the offence. His mere presence, even knowing what the criminal design was, is insufficient to found a conviction based on the doctrine of common purpose. Accused 5 will accordingly be acquitted and discharged on the charge of murder in terms of count 7.

[123] The indictment relied on s 51(1) of the Criminal Law Amendment Act 105 of 1997 in respect of count 7. This implied, as the prosecutor confirmed, an allegation that the murder of Ashley Davids had been planned or premeditated; see para. (a) of the description of the various manifestations of the offence of ‘murder’ in Part 1 of Schedule 2 to the Act. The

import of the term ‘planned or premeditated’ is inherently imprecise; see GP Stevens, *The concept of premeditation in South African criminal law: Quo vadis?* 2015 SACJ 347. It is unlikely that the legislature could have intended that the term should be construed as synonymous with ‘direct intention’, and it is clear in any event that the crime can be committed with direct intention without the involvement of any prior process of planning.

[124] In *S v Raath* 2009 (2) SACR 46 (C), a full court of this Division (Bozalek J, Louw and Goliath JJ concurring) gave the following exposition of the import of the term, at para. 16:

> The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. The *Concise Oxford English Dictionary* 10 ed, revised, gives the meaning of premeditate as 'to think out or plan beforehand' whilst 'to plan' is given as meaning 'to decide on, arrange in advance, make preparations for an anticipated event or time'. Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is 'planned or premeditated'. In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was 'planned or premeditated'.

The court’s conclusion that the term does not lend itself to ready-made answers and that a determination of whether a murder has been planned or premeditated depends of a weighing of an indeterminate range of factors in the peculiar circumstances of a given case underscores my finding that it is inherently imprecise. The court’s identification that the time lapse between the time that the intention to commit the crime and the execution of that intention is of cardinal importance suggests that time for reflection about carrying out the intention in its nascent form is an important consideration. But how much time? And, indeed, is time for reflection in fact always an important consideration at all?

[125] The judgment of the Supreme Court of Appeal in *Kekana v S* [2014] ZASCA 158 (1 October 2014) suggests that time for reflection is not necessarily important, provided that the facts prove an element of planning in the commission of the offence. In that matter the

appellant, having decided whilst in a state of emotional arousal to kill his wife in the context of just having been informed by her that their marriage was over, fetched a canister of petrol that he had purchased to fill his car that was parked outside the house, poured the fuel onto the bed upon which the deceased had been lying and set it alight before leaving the room locking the door behind him as he went. He also spread the petrol in other parts of the house and set it alight too. The relevant action was accepted by the appeal court as having taken place within the compass of 'a few minutes, at the least'. In confirming the finding that the murder had been premeditated Mathopo AJA (Lewis JA and Gorven AJA concurring) held as follows at para 13-14:

> In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.
>
> The appellant pertinently admitted that after he saw his clothes, he formed an intention and in his own words he decided to end it all and kill the deceased. He then gave effect to this decision. He went outside to fetch petrol. He re-entered the house and poured it on the bed of the deceased while at the same time telling her of his intention. He set it alight with the petrol. He locked the deceased in the room. He spilled the petrol in the passage, kitchen and dining room. The locking of the door and further pouring of petrol show that he was carefully implementing a plan to prevent her escape and to ensure that she died in the blaze. To my mind, this is proof of premeditation on his part. It follows that the appellant was correctly convicted of premeditated murder.

(It is not necessary or appropriate to consider whether the finding that the appellant in *Kekana* had planned the murder was the only reasonable inference that the court could have drawn on the described facts. The argument that the court was dealing with appears to have been that absent proof by the state establishing the period of time between an accused person forming the intent to murder and his carrying out of that intention, premeditation could not be demonstrated. The court rejected that argument.)

[126] In *S v PM* 2014 (2) SACR 481 (GP), Thulare AJ held that the expression 'planned or premeditated' had a dichotomous connotation. In this respect the learned acting judge placed emphasis on the disjunctive implication of the word 'or'. He sought to explain his understanding of how premeditation and planning fell to be distinguished in the relevant context at para. 36 of the judgment as follows:

> In my view the two words 'planned' and 'premeditated' are two different concepts representing two different ideas. 'Premeditated' refers to something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension. On the other hand, 'planned' refers to a scheme, design or method of acting, doing,

> proceeding or making, which is developed in advance as a process, calculated to optimally achieve a goal. Such process has general features which include:
> (1) The identification of the goal to be achieved;
> (2) the allocation of time to be spent;
> (3) the establishment of relationships necessary to execute;
> (4) the formulation of strategies to achieve the goal;
> (5) arrangement or creation of the means or resources required to achieve the goal; and
> (6) directing, implementing and monitoring the process.
> In my view the word 'or' between 'planned' and 'premeditated' in part I of sch 2 introduces the second of the two alternative concepts. In my view the use of the word 'or' indicates that the legislature did not favour a composite description of the circumstances to meet the test.

[127] With respect, I find the basis for distinction essayed in *S v PM* unconvincing. The elements of 'rational consideration' that it attributes to 'premeditation' are equally inherent in any exercise of planning. Importantly, if regard is had to the object of the provision – i.e the creation of a criterion for the attraction of the mandatory sentence of life imprisonment if substantial and compelling circumstances to deviate from the prescribed sentence are not present - no evident statutory purpose would be served in making the distinction. It is a sterile exercise to seek the meaning of a word without regard to the context in which it has been employed. When the word lies in a statute, the evident scope and object of the instrument are critical contextual considerations.

[128] In my view the evident object of the provision actually militates in favour of construing the conjunction in its frequently acknowledged possible sense of 'and/or'; cf. e.g. *Reeskens v Registrar of Deeds* 1964 (4) SA 369 (N) at 371-2 and *S v Bennie* 1964 4 SA 192 (E) at 195; in other words, an interpretation that would render any possible basis for distinction that might be found between the concepts immaterial for practical purposes. Indeed, the definition of 'premeditation' in the *Oxford Dictionary of English* suggests that the concept of planning is wrapped up in that of 'premeditation'; viz. 'the action of planning something (especially a crime) beforehand; intent: *the defendant said there was no planning or premeditation*'.

[129] In an appeal from the judgment in *S v PM*, the Supreme Court of Appeal found it unnecessary to expressly decide whether or not the phrase 'planned or premeditated' denotes a single concept. See *Montsho v S* [2015] ZASCA 187 (27 November 2015). The court took the approach that the circumstances in which a crime was committed and the peculiar facts of each case will determine whether or not the commission of the crime was planned or premeditated. I would respectfully venture that such an approach is inconsistent with the

notion of any practical dichotomy between planning and premeditation. In point of fact the court in *Montsho* relied on the judgment in *Kekana* supra, which, as described, accepted planning as indicative of premeditation.

[130] One thing that is beyond doubt is that where the state relies on premeditation or planning it bears the onus of establishing those factors. In the current matter the only evidence in support of the allegation is the occurrence shortly before the shooting at MC Stores of the shooting at Humber Street and the conduct of accused 4, which taken together with that of accused 1, could be indicative of the execution of a preconceived scheme. There is no evidence, however, that the accused were aware of the shooting in Humber Str. There is also no evidence of the circumstances in which the three accused came together that evening, or of the circumstances in which accused 1 obtained the weapon or happened to be in possession of it at the particular time. In short there was no direct proof of planning or premeditation. The evidence about the prevalence of inter-gang rivalry and violence in the area was such that it is reasonably possible that the shooting could have been a random act of violence perpetrated when members of one gang group chanced on a member of another gang group in vulnerable circumstances. It is reasonably possible that the accused could have decided on the assault virtually on the spur of the moment in such circumstances. In my judgment, while acknowledging this to be a borderline case, the state has failed to discharge the onus of proving that the shooting was premeditated or planned.

[131] It follows from the finding that accused 1 was the actual perpetrator of the murder that he has also been proven to have been in possession of a firearm and of at least 12 rounds of ammunition. No evidence has been offered that he was licenced to possess the firearm and ammunition,[9] and accordingly he will, in addition, be found guilty on counts 9 and 10 in the indictment. In this instance there was ballistic evidence proving that the firearm used in the assault fired 9mm calibre bullets, which exceeds the maximum calibre of ammunition that the Firearms Control Act would allow as dischargeable from an 'airgun' as defined. Indeed, the manner in which the firearm was discharged according to the description given by Charles Engelbrecht suggests that the weapon used must have been self-loading, but the charge did not allege that a semi-automatic weapon had been used.

[9] See note 4 above.

[132] As discussed, accused 4 and 5 were probably aware that accused 1 was armed and that he intended to use the firearm against any member of the Hard Livings gang that they might encounter. That would not be sufficient to convict them of unlawful possession of the firearms and ammunition. As explained by Marais J in *S v Nkosi* 1998 (1) SACR 284 (W), joint possession of firearms and ammunition is proved only if the state establishes beyond reasonable doubt (a) that the company of which the actual *detentor* was part intended as a whole to exercise possession of firearms through the actual *detentor* and (b) that the actual *detentor* intended to hold firearms on behalf of the others. The correctness of that analysis has been endorsed in a number of appeal court judgments; see *S v Mbuli* 2003 (1) SACR 97 (SCA) at para. 71, *S v Kwanda* 2013 (1) SACR 137 (SCA) at para. 5 and *S v Ramoba* 2017 (2) SACR 353 (SCA) at para. 11. In my judgment, in the absence of proof of a prior agreement or any evidence concerning the circumstances in which accused 1 came to be in possession of the firearm, the state has failed to satisfy those requirements. Accused 4 and 5 will therefore be acquitted and discharged on counts 9 and 10.

[133] The evidence did not establish that there was an attempt to murder Carl May (count 8). On the contrary, it was established that the shooting on 27 April 2016 was directed narrowly, and effectively, at Ashley Davids, not at anyone else in the group outside MC Stores that evening. The prosecutor reasonably conceded as much in argument. Accused 1, 4 and 5 will therefore be acquitted and discharged on count 8.

[134] Turning, lastly, to consider the charges on count 1 brought under the Prevention of Organised Crime Act. The expression 'to aid and abet' means to assist in or facilitate the doing of something or to give counsel or encouragement in respect of its doing; see 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)*'. The expression cannot apply to the conduct of the principal actor, only to a person who assists him. Accused 2 therefore cannot be guilty of contravening s 9(1)(a) of the Act in respect of the shooting on 24 December 2015, nor can accused 1 and 4 in respect of that on 27 April 2016. There was nothing in the evidence to support a finding that accused 1 had aided and abetted the commission of the offence of attempted murder by accused 2. He is therefore entitled to be acquitted and discharged on the main charge in terms of count 1. Similarly, there is no evidence to establish that accused 5 aided and abetted accused 1 and 4 in the commission of the murder of Ashley Davids. His

mere presence at the scene did not constitute, assistance, facilitation or co-operation in the relevant sense. Accused 5 will therefore also be acquitted and discharged on the main charge in terms of count 1.

[135] In order to obtain a conviction on the alternative charge in terms of s 9(2)(a) it was incumbent on the state to prove acts by the accused 'aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity'. In other words the state had to establish a relevant connection between the acts of the accused and a pattern of criminal gang activity. The term 'pattern of criminal gang activity' is defined in s 1 of the Act as follows:

> "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.

[136] I have had occasion previously, in *S v Peters and Another* (unreported judgment delivered on 4 November 2013 in case no. SS 17/2013), to remark on the difficulties inherent in the definition of 'pattern of criminal gang activity', which is used only in s 9(2)(a) of the Act and in the definition in s 1 of 'criminal gang'. It was found unnecessary in that case to resolve the difficulties; more particularly, whether the import of the term was comprehensively determined by the statutory definition, or whether it also bore the meaning denoted by the words making it up used in their ordinary sense. The same situation applies in this case. In my judgment the state failed to adduce evidence to prove a relevant 'pattern of criminal gang activity', whether in the defined sense of the term or the ordinary meaning of those words, to which the actions of the accused could be related for the purposes of s 9(2)(a). Accused 1, 4 and 5 can therefore also not be convicted on the alternative charge on count 1.

[137] To sum up:

1. Accused 3 and 5 have already been, or are hereby found not guilty and acquitted and discharged on all counts against them.

2. Accused 1 has already been, or is hereby found not guilty and acquitted and discharged on counts 1, 2, 3, 4, 5 and 8.

3. Accused 4 is found not guilty and acquitted and discharged on counts 1, 8, 9 and 10.

4. Accused 1 is found guilty of –

    a) murder on count 7 (the murder of Ashley Davids on 27 April 2016);

    b) contravening s 3(1) read with s 120(1)(a) of the Firearms Control Act 60 of 2000 on count 9 (the unlawful possession of a firearm of make and calibre unknown on 27 April 2016); and

    c) contravening s 90 read with s 120(1)(a) of the Firearms Control Act 60 of 2000 on count 10 (the unlawful possession of at least 12 rounds of ammunition on 27 April 2016).

5. Accused 2 is found guilty of –

    a) attempted murder on count 2 (the attempted murder of L J on 24 December 2015);

    b) contravening s 3(1) read with s 120(1)(a) of the Firearms Control Act 60 of 2000 on count 4 (the unlawful possession of a firearm of make and calibre unknown on 24 December 2015); and

    c) contravening s 90 read with s 120(1)(a) of the Firearms Control Act 60 of 2000 on count 5 (the unlawful possession of at least one round of ammunition on 24 December 2015)

6. Accused 4 is found guilty of murder on count 7 (the murder of Ashley Davids on 27 April 2016).

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

For the State:	**Mr Q.B. Appels**
For accused 1	**Mr E. Holt (attorney)**
For accused 2	**Mr H.A. Beukes**
For accused 3	**Mr K. Roberts (attorney)**
For accused 4	**Mr I. Salie**
For accused 5	**Ms N. Abdurahman**