



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

In the matter between

Case No: SS41/16

**THE STATE**

and

**SEFIRO PETERSEN  
ENRICO HARRISON**

**FIRST ACCUSED  
SECOND ACCUSED**

**Coram:** ROGERS J

**Heard:** 27 & 28 FEBRUARY, 1, 2, 6, 7, 13-16 & 20 MARCH 2017

**Delivered:** 22 MARCH 2017

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**JUDGMENT**

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**ROGERS J:**

[1] The accused are charged with the following crimes relating to a shooting which took place at the home of Joseph and Chantal Boltman at [...] B. Avenue, P., on the evening of Tuesday 26 January 2016: (i) trespass by entering the said home; (ii) the attempted murder of Tasriek Lewin; (iii) the attempted murder of Joseph Boltman; (iv) the murder of J. S., the Boltmans' ten-year-old son; (v) unlawful possession of the firearm used in the shooting; (vi) unlawful possession of the ammunition used in the shooting. The indictment alleges that in committing the murder and the attempted murders the accused were acting in the furtherance of a common purpose.

[2] Mr Badenhorst prosecuted, Mr Nel appeared for No 1 and Mr Adams appeared for No 2. The accused pleaded not guilty. Each of them said that their defence was an alibi.

[3] The layout of the area appears from the aerial map exhibit 'A3'. If the map is held vertically, B. Avenue runs from the bottom to the top of the page. Although the orientation is south-west (bottom) to north-east (top), I shall for convenience treat B. Avenue as running from south (bottom) to north (top). Parker's Walk is parallel with, and to the east of, B. Avenue. P. Avenue is parallel with, and to the west of, B. Avenue.

[4] There are two dwellings at 38D B. Avenue. Joseph Boltman's father, Patrick, lives with Joseph's sister, Frans, in an upstairs residence. The entrance to Patrick's dwelling is off B. Avenue.<sup>1</sup> Joseph's house is downstairs. Its entrance is off a netball court which runs between B. Avenue and Parker's Walk.<sup>2</sup> Joseph's house faces

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<sup>1</sup> The upstairs residence and part of the stairway can be seen on the left of photo C1. See also the sketch plan forming part of exhibit "V". The dwelling marked '38D' is the upstairs dwelling. Joseph's house is marked 'Primary scene as per sketch'

<sup>2</sup> The entrance is between the two green vibracrete panels seen in photo C1. The netball court is in the foreground.

south onto the netball court. (On the aerial map, the name 'Parkers' appears immediately to the right (east) of the open rectangle constituting the netball court. The two Boltman residences occupy the north-west corner of the netball court.)

[5] As at January 2016 Joseph was a Rastafarian who smoked and sold dagga. To the locals he was known as the 'Aai' or 'Aaiman Joey'.

[6] At the entrance to Joseph's house is a security gate, immediately behind which is a corrugated tin door.<sup>3</sup> On the inside of the gate/door is a roofed yard or passage area. The part of the passage/yard to the left of the entrance is a storage area where Joseph and his Rastafarian friends would smoke dagga. It was referred to in the evidence as the 'rookhokkie'. I shall call it the shed. If one turns to the right of the entrance one finds the door to the lounge. Through the lounge one can access the kitchen and bedroom.<sup>4</sup>

[7] For some years there have been two gangs active in P., the Americans and the Junky Funky Kids ('JFKs'). The JFKs' turf is the area east of B. Avenue as well as Moosa Walk, being the block lying to the north of Abdulla Moosa Road (which runs between B. Avenue and P. Avenue). The Americans' turf is the area to the west of P. Avenue and north of Eric Viljoen Road and also Abdulla Walk, being the block lying to the south of Abdulla Moosa Road.

[8] As at January 2016 there was warfare between the two gangs with frequent gun fights.

[9] No 1, aka 'Viro', was a member of the Americans before he went to prison in 2013. In prison he became a member of the 27s. He says that when he came out of prison in October 2015 he was no longer a member of the Americans though he continued to associate with them. He has an Americans tattoo and a 27s tattoo. His date of birth is 19 November 1991. As at January 2016 he was 25 years old.

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<sup>3</sup> See photo B2.

<sup>4</sup> See the sketch plan forming part of exhibit "B". Points A4 to A6 are in the shed. Point A3 is at the entrance to the shed. Photo B3 is taken from the lounge looking out towards the yard/passage with the shed in the distance.

[10] No 2, aka 'Bal', was an American in 2013/2014 and has an Americans tattoo. He says he withdrew from the gang at around the time of the birth of his daughter in October 2014. His date of birth is 11 February 1997. As at January 2017 he was 18 years old. No 1 and No 2 are cousins.

[11] Tasriek Lewin ('Lewin', aka 'Tas') and his friend Randall Jones ('Jones', aka 'Pie'), who both testified for the State, said that they associated with the JFKs but were not members. Lewin is the victim in one of the attempted murder charges.

[12] The State's principal witnesses regarding the events of the night in question, and who identified one or both of the accused as the perpetrators, were Joseph and Chantal Boltman, Lewin and Jones. Evidence of a peripheral nature was given by Patrick and Frans Boltman and Igshaan Diedericks ('Diedericks'). In general terms, the State's evidence was to the following effect.

[13] In the early evening, after 20h00, Chantal and J. briefly left the house – Chantal to buy cigarettes from her father-in-law, J. to buy a loaf of bread. As they walked out, J. turned left (east) while Chantal turned right (west). J. told his mother they should have a race to see who could get home first. (Tragically for him, J. won this race.) Joseph was in the lounge watching TV with their one-year-old daughter on his lap. An older daughter was sleeping in the back.

[14] Lewin and Jones were walking in the vicinity of the netball court when they encountered the accused. At least one of the accused, No 1, was armed. The accused chased them. Lewin and Jones ran into Joseph's yard and tried to close the gate and tin door. Jones testified that he heard a weapon being cocked and heard someone outside saying, 'Dalla!', an expression meaning 'Go for it' or "Do it". He ran through the lounge into the bedroom, out of a window and onto the roof. Joseph and Lewin testified that a shot was fired through the tin door.<sup>5</sup> By this stage Joseph had put his daughter on the chair and got up to investigate.

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<sup>5</sup> The shot was probably fired through the rectangular hole visible in photos C4 and C5. The small round hole beneath the rectangular hole was not, according to the ballistic expert, a bullet hole. The bullet hole found in the partition wall dividing the back of the yard/passage and the kitchen can be aligned with the rectangular hole (cf photos C24-C34).

[15] In their efforts to flee, Lewin and Joseph both found themselves in the shed. No 1 stood at the entrance of the shed. According to Joseph, No 1 was joined by No 2 who said, 'Dalla, my broer!'. (Lewin testified that he did not hear this.) No 1 fired several shots at Lewin, then turned to Joseph and fired a single shot at him. Both of them were hit but not fatally. Lewin tried to flee. No 1 fired several further shots at him, one of which struck him in the buttock. Joseph and Lewin both lay on the ground.

[16] Joseph said that he recognised the shooter as Viro (No 1) and the person who came and stood next to him as Bal (No 2). He knew them from the area as persons who associated with the Americans. Lewin identified the shooter as Viro. He claimed not to be able to identify the second suspect. He also testified that he did not see the second suspect inside the yard.

[17] When the accused were gone, Joseph got up and walked to the lounge where he found J. lying on the floor. When he lifted the boy, he felt wet blood. Lewin testified that when he tried to get away and was shot in the buttock, he had seen J. running out of the lounge.

[18] Chantal was upstairs with her father-in-law when the shooting began. She ran down the stairs, turned left into B. Avenue and left again onto the netball court. She was now at the north-west corner of the netball court. She saw two men running away from Joseph's house in a south-westerly direction across the netball court towards B. Avenue. She hurled abuse at them. They turned around. She recognised them as Viro and Bal. Like her husband, she knew them from the area as persons who walked with the Americans. They ran off in a southerly direction down B. Avenue. She went to the entrance of her house where she encountered Lewin. She slapped him.

[19] When the shooting subsided, Jones, who was hiding on the roof, walked across the roof to an electricity pole located a couple of metres to the right (east) of the entrance to Joseph's yard.<sup>6</sup> He testified that when he first saw the two assailants

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<sup>6</sup> The pole can be seen in photo B1.

on the netball court he recognised them as Viro and Bal. Afterwards, while he was standing on the roof at the electricity pole, he saw them running off. At one point No 1 stopped to reload his firearm. After the accused disappeared, Jones slid down the pole and went off with Lewin.

[20] Diedericks took J. and the distraught parents to Victoria Hospital, a drive of about ten minutes. Although J. was still alive on arrival, he died in his mother's arms before receiving medical treatment. According to the hospital death form, which was admitted,<sup>7</sup> the doctor saw J. at 21h10. The doctor recorded J.'s time of death as about 21h00. If the drive to the hospital took around ten minutes, Diedericks and the family must have left P. at 20h50 at the latest. There was some delay between the shooting and their departure for the hospital. The shooting is unlikely to have occurred later than 20h40.

[21] The post-mortem report<sup>8</sup> established that J. suffered a single gunshot wound. The entry was in the left back shoulder region. The bullet tract went more or less vertically downwards towards the right of the body, perforating the fourth rib, the intercostal muscles, the lower lobe of the left lung and the left dome of the diaphragm, lacerating the posterior wall of the stomach, perforating the small bowel and the body of the pubis and ending in the soft tissue just behind the right femur head. The bullet was removed for forensic examination. The cause of death was internal bleeding from the perforation of the chest and abdomen.

[22] It is not possible to say when J. returned to the house and where he was when the bullet struck him. Joseph did not see him return. Lewin claimed to have seen J. running from the lounge when No 1 was firing further shots at him. According to the forensic pathologist, Dr Van der Heyde, the terminal position of the bullet in J.'s right femur head indicates that his upper leg was flexed, as if running or crouching. He could have moved a few metres after being shot but the blood in his airways would have made this difficult. It is not possible to say whether the bullet that struck him was a direct shot or a ricochet. The bullet did not have the tell-tale signs of ricochet damage but, according to the ballistics expert, a ricochet could not

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<sup>7</sup> Exhibit "N1".

<sup>88</sup> Exhibit "N2".

be ruled out. If it was a direct shot, the bullet tract indicates that the shooter must have been quite close to J. (within a metre or two) with the firearm pointed downwards.

[23] Joseph received treatment at Victoria Hospital for a gunshot wound to the left shoulder.<sup>9</sup> The doctor cleaned the wound and gave him antibiotics and painkillers. The bullet was not removed. The doctor told Joseph it would come out on its own. This happened some months later. Joseph gave the bullet to the police.

[24] Lewin went to Retreat Hospital for treatment. According to the J88 from that hospital,<sup>10</sup> he had two gunshot wounds on the upper left arm and a third wound on the right buttock. Lewin testified that the Retreat Hospital referred him to Groote Schuur Hospital where he was hospitalised for two weeks. (No report of his treatment at Groote Schuur was adduced.) He said that he was told by the doctor at Groote Schuur that there was a bullet lodged in his upper right leg but that the medical team did not want to remove it for fear of paralysing him.

[25] Unsurprisingly the evidence given by Joseph, Lewin and Jones regarding the fast-moving events which occurred after Lewin and Jones took refuge in Joseph's yard is not entirely consistent. Lewin and Jones said that one 'Saatje' was in the yard when they fled there. Saatje was one of Joseph's customers. Joseph could not recall whether Saatje was there that night. Joseph's evidence was that three people, not two, took refuge in his yard, that two of the three men fled with him into the shed and that No 1 fired shots at the third man as well. Possibly the third man was in fact Saatje though Lewin's evidence was that Saatje opened the gate and left before the shooting began. In the circumstances then prevailing, this does not seem very plausible. Another possibility is that when Lewin, having already been shot at, got up to run away, Joseph mistakenly thought that the person getting up was a third man.

[26] No 1 was arrested on the evening of 26 January 2016. Although the police were looking for him in connection with the shooting, he was at that stage arrested

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<sup>9</sup> Exhibit "N6".

<sup>10</sup> Exhibit "N7".

for possession of a knife. At his appearance in court the next morning he was arrested for the shooting. No 2 was arrested on the morning of 27 January 2016.

[27] Seven cartridge cases were recovered at the crime scene. They were all 9 mm Parabellum cartridges. Ballistic examination established that they were fired from the same weapon. Four bullets were recovered: one in the kitchen, one in the yard, one from J.'s body and one from Joseph's body. (A fifth would have been in Lewin's body. Two were not found.) They were all 9 mm calibre bullets. (It is not possible by ballistic examination to link a bullet to a specific firearm.) One can thus say that at least seven shots were fired.

[28] A gun shot residue sample was taken from No 1's hands following his arrest. It is common cause that by this stage he had washed his hands. The test was negative.

[29] Joseph and Chantal Boltman, Jones and Lewin attended photographic ID parades. Lewin identified No 1.<sup>11</sup> The other three identified both accused.<sup>12</sup> By the time they participated in the ID parades, the witnesses had already stated that the perpetrators were Viro and (except for Lewin) Bal. It is uncontentious that the witnesses knew No 1 and No 2 by sight from seeing them in the area so it is not surprising that they could pick out their photographs.

[30] No 1's evidence was that he and his girlfriend, Nicol Ja., who lived together with his mother at 4 Abdulla Moosa Walk, went off on the morning of 26 January 2016 to fetch Nicol's children at the house of her Aunt Latiefa Levy who lived in Eric Viljoen Road. The children were not there. He left Nicol at Aunt Latiefa's house and went to smoke a pipe at his friend Ernie's house, also in Eric Viljoen Road. (He did not know Ernie's surname.) He was there until about lunchtime. He then went to the house of his friend 'Mulla' where they smoked mandrax. (He did not know Mulla's proper name.) He returned to Ernie's as it was getting dark. There he smoked with Robbie, who lived at Aunt Latiefa's house with his girlfriend Leighana Louw.

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<sup>11</sup> Exhibit "K".

<sup>12</sup> Exhibit "F" (Chantal Boltman); exhibit "J" (Jones). The exhibit dealing with Joseph Boltman's identification was not adduced.



[31] No 1 testified that Robbie left before him to return to Aunt Latiefa's house. No 1 left Ernie's place and returned to Aunt Latiefa's house at around 21h00. One Denzil Barendse ('Barendse'), aka 'Ougat', a member of the Americans, arrived at Aunt Latiefa's place about five minutes later. They ate, drank and chatted. Later in the evening the police arrived and arrested him, Barendse and one or two others.

[32] Barendse got out of prison about one week before the shooting. He passed away on 4 March 2016. Part of No 2's defence is that those witnesses who honestly identified him as one of the perpetrators mistook Barendse for him, there being some similarity in appearance. Barendse was 38 years old as at January 2016.<sup>13</sup>

[33] No 1 did not call any witnesses in his defence. In particular, he did not, despite being afforded time to consider this option, call Ernie, Mulla or Robbie. The State called Nicol Ja..

[34] No 2's version was that he spent the whole of 26 January 2016 (day and night) at home. He lived with his mother, Mrs Harrison, at [...] C. Court, P. Avenue. Other residents of this flat were No 2's girlfriend and No 2's sister Gail. In support of his evidence that he was at home, he called his mother and sister as witnesses.

[35] The case turns on identification. In evaluating the evidence I have reminded myself of the caution to be exercised in relying on eyewitness identification. In *S v Mthetwa* 1972 (3) SA 766 (A) Holmes JA said the following (at 768A-C):

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities, see such cases as *R v*

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<sup>13</sup> See exhibit "D" which records his date of birth as 1 May 1978.

*Masemang* 1950 (2) SA 488 (AD); *R v Dladla & Others* 1962 (1) SA 307 (AD) at p 310C; *S v Mehlaphe* 1963 (2) SA 29 (AD).’

[36] Joseph and Chantal Boltman made a favourable impression. I am satisfied that they were honest. Initially Chantal Boltman appeared to be a reluctant witness but from her subsequent behaviour in the witness box it became apparent that this was because of the pent-up emotions of reliving the traumatic night on which her child died. They had no motive falsely to implicate the accused. They had no gang affiliations. They would have derived no satisfaction from seeing the wrong people convicted for killing their child.

[37] Jones and Lewin were members of a rival gang. One cannot assume that they are persons of high moral scruples.

[38] Jones was very softly spoken – so much so that at one point I suggested the use of an interpreter simply to amplify his answers. He struck me as being of below-average intelligence. He passed standard five at school. I wondered whether his intellectual faculties had been impaired by drug use. When cross-examined with reference to his statement to the police, he said that while there were some things he could remember there were others he could not – his mind was mixed up because of the recent death of his mother in prison.

[39] There were material conflicts between Jones’ oral testimony and the statement he made to the investigating officer, W/O Williams (‘Williams’), on 30 January 2016.<sup>14</sup> The statement is in English whereas the interview was in Afrikaans. (Williams testified that they are required to take statements in English because some prosecutors cannot read Afrikaans.) Jones testified that the statement was not read back to him. He signed it without knowing what was in it. The statement recorded that both No 1 and No 2 were carrying firearms. Jones’ oral testimony was that he only saw No 1 with a firearm. He did not know how the statement came to record that No 2 also had a firearm. There were three paragraphs dealing with a third perpetrator, Archie, who supposedly fired a shot at Jones while he was on the roof. Jones said he did not know where Williams had got this from.

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<sup>14</sup> Exhibit “T”.

[40] Williams' testimony was that everything in the statement came from Jones and that he read the statement back to Jones, translating it into Afrikaans. While there may have been a misunderstanding about whether both or only one of the accused were armed, the part of the statement dealing with Archie must either have come from Jones or have been fabricated by Williams. The latter is implausible. Williams testified that he investigated Jones' allegation regarding Archie (real name Faud Brenner) by taking a statement from the latter. In the light of this statement and the fact that no other witnesses implicated Brenner, he did not remain a person of interest in connection with the shooting.

[41] It emerged during the evidence of Mrs Harrison (No 2's mother) that Jones may have made a further statement to the police. As a result, Mr Badenhorst applied to reopen the State's case by recalling Williams. To Mr Badenhorst's evident surprise, it transpired that Jones had made a further statement to Williams' colleague, Sgt Slingers, on 20 October 2016 <sup>15</sup> in which he said that he had falsely implicated No 2 in his earlier statement and that the perpetrators had been No 1 and Barendse. The statement never found its way into the docket. Williams' unsatisfactory explanation was that by then the docket had already been sent to the State advocate. (This had not prevented other more recent statements from being sent to Mr Badenhorst.)

[42] Jones was recalled to deal with this further statement. He testified that he had been pressured by Mrs Harrison and his own mother, who was a drug user, to change his version so as to exculpate No 2. He claimed that Mrs Harrison had offered his mother money. He was scared of his own mother.

[43] I did not gain the impression from Jones, in the witness box, that he was being untruthful. However the circumstances I have summarised above show that great caution is required in relying on his evidence.

[44] Lewin was an unsatisfactory witness. Initially his evidence went well. However towards the end of his evidence in chief he was invited to explain a

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<sup>15</sup> Exhibit "Z".

material discrepancy between his first statement to the police, made in the early hours of 27 January 2016 while he was at the Retreat Hospital,<sup>16</sup> and a further statement made on 23 February 2017,<sup>17</sup> shortly before the trial started. In the first statement he said that the shooter was No 2 and that he could not recognise the other suspect because his face was hidden by a scarf. In the second statement he said that the shooter was No 1 and that he could not recognise the other suspect because his face was hidden by a scarf. He said both suspects had firearms.

[45] Initially Lewin refused to answer questions regarding the discrepancies. With reference to s 189 of the Criminal Procedure Act, I warned him of the consequences of his refusal to respond to questions. A short while later I asked him whether he was frightened. He eventually said yes but refused to say why. With the agreement of counsel, his evidence continued in camera but without significant improvement. (In fairness I should mention that he was in custody. If he was under any sort of threat, he may have felt particularly vulnerable in prison.)

[46] As best I could understand him, Lewin claimed, in making his first statement, to have been influenced by Jones to say that the shooter was No 2. This would suggest that, in the immediate aftermath of the incident, Jones identified No 2 as being one of the perpetrators. Since Jones admittedly did not see the shooting, Lewin either misunderstood him as having said that No 2 was the shooter or Jones had fabricated this piece of information.

[47] Lewin said that when he was discharged from Groote Schuur, Jones told him that No 1, not No 2, had been the shooter. No 1 was the person whom Lewin picked out at the photographic identification parade held on 25 May 2016.

[48] It is thus obvious that great caution needs to be exercised in placing reliance on Lewin's testimony. Nevertheless, when it was put to him in cross-examination that he had not seen No 1 on the scene that night, he insisted that Viro had indeed been there. It was put to him that he was mistaken. He replied, no, it was Viro. My

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<sup>16</sup> Exhibit "L".

<sup>17</sup> Exhibit "M".

contemporaneous note of his responses at this stage was that they had the ring of truth.

[49] The State witnesses knew the accused by sight from seeing them in the area. They knew their nicknames. The Boltmans testified that the accused 'walked with' the Americans. Jones and Lewin were members of a rival gang. It is common cause that both accused were once members of the Americans gang. No 1 said that he was a member of the gang until he went to prison in 2013. Upon his release in October 2015, he continued to associate with the Americans even though on his version he was no longer a member of the gang. No 2 was a member of the Americans during 2013/2014 though claimed to have disassociated from them at around the time of the birth of his daughter in October 2014. Both of the accused said that they knew who Joseph Boltman was. It is not surprising that the State witnesses knew the accused by sight and their evidence to this effect was not challenged.

[50] Joseph Boltman's identification was based on the brief period during which the shooter and his associate stood at the entrance of the shed. Joseph testified that there was a light on the inside wall facing the entrance and that it provided good illumination in both directions, including in the shed. He had no doubt that the two perpetrators were the accused. He acknowledged that the episode in the shed lasted only a few seconds and was frightening but said it was not possible that he was mistaken – he had enough time to recognise them, he looked them in their faces.

[51] Joseph was shown a photograph of Barendse.<sup>18</sup> Barendse was not known to him. He acknowledged that No 2 and Barendse had a similar appearance though he does not seem to have been in any doubt that the second person was No 2, not Barendse.

[52] He denied that either of the suspects was wearing a scarf over his face.

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<sup>18</sup> Exhibit "D".

[53] I have already referred to the fact that Joseph testified that there was a third person in the shed. This person may have been Saatje. Alternatively Joseph may have been mistaken about the presence of a third person. Counsel for the accused submitted that Joseph's evidence in this respect showed that his observations were not accurate and reliable though they did not question his honesty. There is, however, a qualitative difference between Joseph's possible error about the presence of a third person and his identification of the accused. Joseph did not know Lewin. His attention would have been on the assailants. He looked the shooter in the face and recognised him.

[54] Chantal Boltman's identification occurred as the perpetrators were fleeing across the netball court. It is common cause that the netball court was illuminated by a light mounted on a pole situated on the south side of the court opposite the entrance to Joseph's house. Although other witnesses described this as a floodlight, W/O Abrahams, a police photographer and plan compiler, revisited the scene on 5 March 2017 and took photographs. He said the light was an ordinary street lamp. He took some night photographs without using a flash.<sup>19</sup> According to the witnesses, the light provided good illumination across the whole court. It also appears from W/O Abrahams' photographs that there was a street lamp in B. Avenue on the western side of the court.<sup>20</sup> Diedericks said that the netball court lamp was often broken but could not recall whether it was burning on the night of 26 January 2016. The other witnesses, including Chantal, were certain that the light was working that night.

[55] I am satisfied that there was sufficient illumination for Chantal Boltman to make an identification. Although she only had a few seconds to look at them, she knew them by sight. They were about 8 m from her, and about 12 m from the court lamp, when they looked around.<sup>21</sup> They lived nearby. She named them to the police at the earliest opportunity (while she was at Victoria Hospital).

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<sup>19</sup> Exhibit "V".

<sup>20</sup> See photo V29 which is taken from east to west. The street lamp on B. Avenue can be seen midway between the points C (where Chantal Boltman was standing) and D (where, according to her, the perpetrators were when she saw them).

<sup>21</sup> See the sketch plan which is the first page of exhibit "V".

[56] Under cross-examination she was absolutely certain that one of the two suspects was No 1. (I should mention that No 1 has a reasonably distinctive face.) In regard to No 2, she conceded that he and Barendse looked quite similar and was prepared to accept that she might have mistaken Barendse for No 2.

[57] Chantal's first written statement to the police was made at 09h00 on 27 January 2016.<sup>22</sup> In that statement, taken by Williams, she purported to say that she had seen two members of the JFKs running into her yard, one of them known to her as Tas; that they were being chased by two members of the Americans, known to her as Viro and Bal; that both Viro and Bal were armed; and that, after hearing shooting, she saw both of them running out with firearms still in their hands. She said that the statement was incorrect in recording that she had seen the persons going into her house and in recording that both of the accused were armed. These errors were corrected in her statement of 22 February 2017, prepared shortly before the trial began. She confirmed that the earlier statement had been read back to her and that she signed it. She could not say how the errors occurred but denied having given Williams the incorrect information.

[58] The discrepancy between her first statement and subsequent testimony is undoubtedly a point of criticism. The explanation may be (though she disavowed it) that she was combining what she herself observed with what she had heard from others. Since on her version she saw both accused as well as Lewin and Jones in the immediate aftermath of the shooting, it would have made sense to her that the accused had chased Lewin and Jones into her house. Possibly this was an inference. If she told Williams things which she herself had not observed, she should not have done so. One should not, however, judge her too harshly. She made her statement barely 12 hours after her son had been killed. She is unlikely to have had any sleep and would still have been traumatised. She may have reconstructed the scenario from what she herself had observed. She may not have appreciated the importance of limiting herself to things she herself saw. Williams may have put things too strongly in the statement. She may not have been following carefully as

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<sup>22</sup> Exhibit "G".

he read the statement back to her; or she may have felt that it was true in its essential details and that this was good enough to sign it.

[59] Whatever the explanation, I am satisfied that she was an honest witness. If she was dishonest, she could have adhered to what was recorded in her first statement, thus making the case against the accused stronger.

[60] Mr Nel submitted that if Chantal included information in the first statement which she only learnt from others, the same might apply to her identification of the accused. He said it would have been natural for Joseph and Chantal to discuss the matter. They may each have influenced each other. I accept that the Boltmans may have discussed the case. However I am satisfied as to their honesty. Chantal Boltman identified No 1 and No 2 as the perpetrators at Victoria Hospital, at a time when her husband was inconsolable and unable to speak sensibly to the police. She was willing to concede the possibility of a mistake in relation to No 2. This is a further guarantee of her truthfulness.

[61] She denied that either of the suspects was wearing a scarf over his face.

[62] I have already referred to the evidence of Jones and Lewin. Jones was consistent in identifying No 1 as one of the perpetrators. He had occasion to see him before they fled into Joseph's yard and again from the roof. In regard to No 2, he was steadfast in oral testimony that he was with No 1. Jones knew who Barendse was. He testified that his father and Barendse used to smoke together and that Barendse robbed his father. He thought that Barendse's skin colour was lighter than No 2's. He said Barendse was not on the scene that night.

[63] The consistency of Jones' identification of No 2 as one of the perpetrators is, however, undermined by his statement of 20 October 2016. I shall return to this aspect when evaluating the evidence adduced on behalf of No 2.

[64] Lewin's oral evidence was consistent that No 1 was the shooter and that he could not identify the second suspect. His identification of No 1 is called into question by the fact that in his first statement the only perpetrator he identified was



No 2. That statement was taken at 02h45 on the morning of 27 January 2016 while he was at Retreat Hospital. He was injured and probably still in shock. At the identification parade on 25 May 2016 he picked out No 1 as the person who shot at him. There is no evidence that he was unduly influenced. If he had been brought under pressure by the police, he would presumably have picked out both of the accused. I have already mentioned that in cross-examination his evidence that No 1 was the shooter had the ring of truth about it.

[65] Since Lewin knew who No 2 was, why did he not also identify him? One possibility is that he was influenced by others. Jones testified that Mrs Harrison not only placed pressure on him (through his mother) to protect No 2 but said that she would also be approaching Lewin. Perhaps this occurred. Another possibility is that Lewin was truthfully unsure who the other person was.

[66] For reasons I have explained, I must be cautious about placing undue weight on the testimony of Jones and Lewin. Nevertheless I can take into account that their evidence, insofar as No 1 is concerned, accords with that of the Boltmans and that Jones provides some additional support for the Boltmans' identification of No 2 as one of the perpetrators.

[67] I now turn to a consideration of the alibis offered by the accused, starting with No 1. He did not impress me as a witness. He came across as sullen, not really caring about his answers. However I do not place too much weight on his demeanour since this might be a mantle developed over several years of gang membership in and out of prison.

[68] In his warning statement, made on 28 January 2016, No 1 said that he had no knowledge of the incident and that he had been with his girlfriend N. Ja. ('Ja.'), at Aunt Latiefa's house.<sup>23</sup> As will be apparent, he only got to Latiefa's house at around 21h00, after the shooting. If he had an alibi, it was that he was at Ernie's house at the time of the shooting. In his warning statement he did not say that he had been at Ernie's house during the first part of the evening. He did not call Ernie or Robbie or

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<sup>23</sup> Exhibit "P".

anyone else from Ernie's house to support his version. One thus has only his evidence that he was at Ernie's house, and not in the vicinity of the netball court, at the time of the shooting.

[69] Because of the alibi offered in the warning statement, Williams approached Ja. and Latiefa Levy for statements. The former provided a statement and was called by the State. The latter told Williams that she did not know No 1 and did not want to become involved.

[70] Ja. was a good and confident witness though she may have enjoyed the drama of the occasion. She testified that as at January 2016 she and No 1 were in a relationship. Her evidence about their movements on 26 January 2016 differed from the version No 1 subsequently gave in evidence. She said that Barendse spent the night of 25 January 2016 with them at No 1's mother's house. When she woke up the next morning, No 1 and Barendse were gone. She inferred that they had left together. She went looking for No 1 in his usual haunts. She did not see him at Ernie's place. When she could not find him, she went to Latiefa's house, knowing that No 1 often went there to smoke with Robbie and Latiefa's son Shafiek (aka 'Fikkie').

[71] She testified that No 1 arrived there sometime after 21h00. She initially said that he arrived together with Barendse. In cross-examination she said No 1 got there first and that Barendse followed within about one minute. No 1 washed his hands in a mop bucket that was standing at the front door. Shortly after No 1 and Barendse's arrival, a man called 'Boera' came to the house and said that 'they have shot the Aai's son'. Barendse vomited in the bathroom (whether this was a reaction to the report is unclear). Nicol, No 1, Barendse, Robbie and others then moved to a bungalow at the back of the house. According to Nicol, No 1 and Barendse smoked a pipe. They appeared at one point to be arguing. It was there that they were arrested. (Barendse was released quite promptly.)

[72] Ja.' evidence is materially at odds with No 1's. It is clear that, contrary to No 1's warning statement, Ja. does not provide him with an alibi for the time of the shooting. When he was cross-examined about this, he said that Nicol had been with

him at Ernie's. Apart from the fact that this is not the alibi he gave in his warning statement, it was not put to Nicol that she had been with No 1 at Ernie's. No 1 was asked whether he had informed his lawyer that Nicol was with him at Ernie's. He said no, he had forgotten. It is clear, in my view, that he was adapting his alibi in the witness box. Furthermore, upon completion of No 1's evidence, Mr Nel required an adjournment for the rest of the day in order to investigate whether Ernie, Robbie and/or Mulla should be called. The fact that they might be able to supply No 1 with an alibi evidently came as a surprise to Mr Nel.

[73] No 1 did not dispute that Barendse vomited. He thought Barendse arrived about five minutes after himself. He denied having been with Barendse prior to their arrival. In fact he said he had met Barendse for the first time that night. He admitted washing his hands in the mop bucket. He said that this was to get rid of the smell of mandrax. This does not seem very plausible. If he was the shooter, he probably knew enough about guns and criminal investigations to realise that he should wash his hands.

[74] No 1 does not bear any onus of showing where he was at the time of the shooting. The question is whether I can be satisfied beyond reasonable doubt that he was one of the perpetrators. It is essentially his word against that of the identification of four witnesses, two of whom at least were honest witnesses who were familiar with his appearance and who had no motive falsely to implicate him. In *S v Mathebula* 2010 (1) SACR 55 (SCA) para 11 Heher JA observed that the 'vulnerability of unsupported alibi defences is notorious, depending, as it does, so much upon the court's assessment of the truth of the accused's testimony'. For this reason corroboration by other witnesses is important (cf *S v Carolus* 2008 (2) SACR 207 (SCA) para 28; *S v Mhlungu* [2014] ZAKZPHC 27 para 47).

[75] No 1 had motive to do Jones and Lewin harm. They were members of the rival gang. No 1 openly associated with the Americans upon his release from jail in October 2015. He testified that in November 2015 he was shot in the leg by one of the JFKs. About a month later he was again shot at by the JFKs but was not hit. Jones' evidence was that for several years No 1 would come to his house with his cousin Kosie to smoke. No 1 said that he did not know Jones or Lewin but

acknowledged having seen them with other JFKs in the vicinity of the Somali shop where the JFKs used to congregate. Although No 1 denied this, Jones testified that No 1 had chased him on several occasions.

[76] It was argued that No 1 had no motive to shoot Joseph Boltman. Generally speaking, that would probably have been true for any member of the Americans gang, since Joseph had no gang affiliations, yet undoubtedly somebody shot at him after pursuing two persons with JFK affiliations into his house. No 1 may have shot at Joseph because the latter could identify him. Or No 1 may, in the heat of the moment, had mistakenly thought that the second person in the shed was Jones, not Boltman.

[77] All things considered, I am satisfied beyond reasonable doubt that No 1 was the shooter and that his evidence to the contrary is false.

[78] No 2 made a better impression in the witness box than No 1. He was supported in his version by his mother and sister. There is nothing about their demeanour which I can criticise. Mrs Harrison in particular came across as unsophisticated but genuine.

[79] It is not in dispute that No 2 is the father of a daughter born in October 2014. He testified that, when it was discovered that his girlfriend was pregnant, his mother urged him to put aside his gang affiliation to concentrate on fatherhood. Mrs Harrison and Gail confirmed this. No 2 says that he dissociated from the Americans at this time. He told the then leader of the gang in P., one 'Skollie', that he was leaving. He returned his revolver to Skollie.

[80] No 1 and No 2 both testified that although they were cousins they did not move around together. Importantly, No 1's girlfriend, Ja., confirmed this, as did Mrs Harrison and Gail. This is not implausible, given that No 1 was nearly seven years older than No 2.

[81] As to his movements on 26 January 2016, No 2 testified that he was at home the whole day. His mother returned from work at around 17h00. His mother and Gail

were there the whole evening. No 2 and his girlfriend watched movies (there were television sets in the lounge, in Mrs Harrison's room and in Gail's room). No 2 was preparing noodles when Gail received a telephone call from another sister, Yolanda, reporting that there had been a shooting in B. Avenue and that people were saying that Viro and Bal were involved. There was a second phone call from Yolanda to say that the victims of the shooting were Aaiman Joey, his boy and another person and that the child was dead.

[82] Gail and Mrs Harrison confirmed No 2's version in its essential details. There were minor discrepancies, such as the room in which No 2 was watching television, but not such as to justify a conclusion that the evidence was definitely false.

[83] It is perhaps surprising, in view of the information received from Yolanda, that No 2 and his family did not immediately contact the police to report what they had heard and to say that No 2 had been at home with his family the whole evening. They knew that Williams was a detective at Grassy Park who dealt with murder cases. On the other hand, No 2 made no attempt to hide. He was at home with Gail when the police arrived the next morning to arrest him.

[84] Gail accompanied No 2 to the Grassy Park police station. She waited for some time. Eventually they told her that No 2 had been charged with murder. She told the police that she had been with her brother the previous night. She went to Williams' office and repeated this. She said he did not take a statement from her.

[85] Williams' evidence was that he tried on several occasions to interview Gail for purposes of taking a statement (he wanted to check No 2's alibi) but that she was uncooperative. She denied this.

[86] Mrs Harrison testified that she learnt of the arrest when she got home from work on 27 January 2016. She got Williams' number from one of her daughters and phoned him. She knew him sufficiently well to call him by his first name. She told Williams that her son could not have been involved because he had been at home. Williams replied that there were witnesses who said No 2 was one of the perpetrators. According to Mrs Harrison, Williams said that she should go and see

what clothes Ougat (ie Barendse) had been wearing. She replied that she did not know Ougat. She testified that Williams did not approach her for a statement but that she did eventually make a statement in November 2016.

[87] It was put to Mrs Harrison that Williams would deny that she had phoned him on the Wednesday and would deny saying anything about Ougat. To both propositions she replied that Williams was lying. These answers were given with what appeared to be genuine passion. (I should mention that by the time Mrs Harrison allegedly spoke with Williams, the latter had received information from Yolanda that Barendse might have been involved in the shooting. The source of Yolanda's information was Ricardo Harrison (aka 'Vissie'), the son of Mrs Harrison's sister Sophie. Williams testified that he approached Ricardo but the latter was not willing to talk with him.)

[88] Mrs Harrison testified that some months after the shooting she received information from her daughter, Nikita, that Pie (Jones) wanted to see her. She did not know Jones. Nikita took her to Jones' house where one 'Poen' introduced her to Jones. According to Mrs Harrison, Jones told her that he knew who had done the shooting. Mrs Harrison told him that he had to tell the truth because her son had not been involved and that he had a young child to raise. Jones told her that the dead boy's father (ie Joseph Boltman) knew about the whole thing. Jones told Mrs Harrison that he had run into the house and climbed onto the roof. He said that from the roof he had seen Chantal Boltman slapping a youngster (a 'klong', presumably Lewin) and that he (Jones) had come down from the roof and pulled the youngster away from Chantal. He said No 2 was not involved and that he would testify to this in court. He asked when No 2 would next be appearing in court.

[89] No 2 was in fact appearing in the Wynberg court the next day. Mrs Harrison, Jones, Poen and other members of the Harrison family went to court. Mrs Harrison testified that they spoke with the prosecutor and No 2's legal aid lawyer. Jones told the lawyers that No 2 was not part of the shooting. The prosecutor took down Jones' name and address.

[90] Mrs Harrison's evidence was that Williams was at the hearing. He was also with them in the lift as they were leaving. Jones told Williams that he wanted to make a statement because No 2 had not been involved. Williams told Jones that it was not necessary for him to make a statement but Jones insisted that he wanted to do so. Williams told him to be at Grassy Park police station at 14h00. The Harrison/Jones entourage took a taxi to Grassy Park where they waited for Williams. When he did not arrive, Mrs Harrison's daughter, Elenore, found another policeman (Sgt Slingers) to take Jones' statement. When he emerged from Slingers' office, Jones told Mrs Harrison that the policeman had told him that Williams would lock him up for giving false information. (The statement taken by Slingers is the one which did not find its way into the docket and which only emerged when Williams was re-called.)

[91] It was put to Mrs Harrison that Williams would deny having been at Wynberg court when the Harrison/Jones entourage was there and that he had only heard about it from a colleague. It was put to her that Williams would deny the supposed conversation in the lift. Mrs Harrison seemed genuinely shocked at these propositions and said that Williams was lying.

[92] Jones was recalled after the Slingers statement came to light. His version was very different from that of Mrs Harrison. His evidence was that Mrs Harrison had put pressure on him, through his mother (a drug user), to exculpate No 2, inter alia by offering his mother money. He said Mrs Harrison did not speak directly with him. She spoke with his mother outside the house while he was inside. He overheard their conversation. He confirmed that on the following day the Harrison/Jones entourage went to the Wynberg court. He denied, however, that he had spoken with any lawyers or that he had seen Williams that day. He confirmed that they went to Grassy Park police station where he made the statement to Slingers. He said that his statement to Slingers was false and that the true position is that the perpetrators were No 1 and No 2.

[93] Although the witnesses could not remember the dates, Jones' statement to Slingers<sup>24</sup> was made on 20 October 2016, which coincides with a date on which the matter served before the court in Wynberg.<sup>25</sup> Mr Badenhorst informed me that Williams' pocketbook for the period 18-27 October 2016 was missing, so we do not have the pocketbook to tell us about Williams' movements on 20 October 2016

[94] There are undoubtedly some strange features about Mrs Harrison's version. If Jones wanted to talk to her, there was no reason why he and his mother could not have gone to Mrs Harrison's house. They lived nearby. The fact that Mrs Harrison went to Jones' place may suggest that the initiative came from her, not Jones. What may support this view is that No 2 was appearing in court the following day. Jones would not have known this. It seems somewhat coincidental that Jones made his approach on the day before the hearing. Mrs Harrison seems to have displayed an unusual lack of curiosity. Although Jones allegedly told her that he knew who was responsible for the shooting, on her version Jones never told her who the perpetrators were and she never asked. There is no reason why Jones should have decided to change his story in October 2016 or revert to his original version a few months later. It was rather convenient that Jones changed his story at a time when Barendse was no longer alive to deny it.

[95] In short, and despite Mrs Harrison's good performance in the witness box, I am somewhat sceptical of her evidence about how Jones came to make his statement to Slingers. Jones, I may say, struck me as a person who might well be susceptible to bullying. Furthermore, when he was being cross-examined it was never put to him by Mr Adams that he was the one who had approached Mrs Harrison; his version, not challenged in cross-examination, was that she had approached him to stand with Bal.

[96] On the other hand, and although there was nothing to criticise about Williams' demeanour in the witness box, there are question marks about the integrity of the investigation in so far as No 2 is concerned. It is not implausible that Mrs Harrison phoned Williams upon learning of her son's arrest. Any mother would be concerned

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<sup>24</sup> Exhibit "Z".

<sup>25</sup> Exhibit "Y" p 9.



for her child. If she did contact Williams, he took no effort to get a statement from her. There is a factual dispute as to whether Gail was cooperative. Again, it is not implausible that Gail was willing to make a statement in defence of her brother (whether or not her alibi for him was the truth). After all, she was a willing witness in his defence at the trial. There is some doubt as to the vigour with which Williams tried to set up an interview with her. Most importantly, there is this disturbing fact that Jones' statement to Slingers was not part of the docket. Had it not been for Mrs Harrison's testimony, and my indication to counsel that I might wish to have Williams recalled, the statement may never have seen the light of day. Williams did not deny knowledge of the statement. He had no satisfactory explanation for not having disclosed it at an earlier time. I mentioned earlier that Mrs Harrison testified that she made a statement to the police in November 2016. If she did, that statement has never been produced.

[97] There is independent evidence which lends some support to No 2's protestations of innocence. Nicol's testimony is that No 1 and No 2 did not move around the neighbourhood together. Although there was a family connection, they do not seem to have been close associates or friends. There was a significant age difference. The birth of No 2's child in October 2014 provides a plausible basis for his having withdrawn from gang activity. Importantly, one knows that shortly after the shooting occurred No 1 arrived at Aunt Latiefa's house in the company of Barendse. Although Barendse's vomiting may have been unrelated to the news of the death of Joseph Boltman's child, it could have been caused by the shock of realising what he and No 1 had done. Joseph Boltman acknowledged that there was some similarity in appearance between Barendse and No 2. Joseph's attention may have been focused on the shooter rather than his associate. Chantal Boltman went further, accepting the possibility that it was a case of mistaken identity. Lewin did not identify anyone as the second perpetrator. When asked whether he tried to interview Barendse, Williams said that he saw him on several occasions while patrolling but that Barendse had run away.

[98] Speaking for myself, I do not think that the similarity between Barendse and No 2 is particularly close, and there is the further circumstance that Barendse was 38 whereas No 2 was 20. One does not know how old Barendse was in the image of

him appearing in the record but I do not think mistaken identity is very likely with such a significant age difference.

[99] No 2 can also be criticised for not calling, as a witness, his girlfriend Jolita van Graan. On the other hand it cannot be said that she would necessarily have been more independent than Mrs Harrison and Gail. Even if their attachment has come to an end as a result of No 2's incarceration for more than a year, he is the father of their child.

[100] All things considered, I think there is sufficient doubt that I cannot be satisfied beyond reasonable doubt that No 2 has been correctly identified as one of the perpetrators.

[101] On the other hand, there is no reasonable doubt in my mind that No 1 was the shooter. On this basis he is guilty on the two counts of attempted murder (in relation to the shots fired at Lewin and Joseph Boltman)

[102] In regard to the murder count, it is unlikely that No 1 had the direct intention of killing J.. He may not even have seen J.. The question is whether, by firing at least seven shots within the confines of a house of modest dimensions, he foresaw that other people who might be there could be struck and was reckless as to whether or not they were killed. No 1 knew that the house belonged to Aaiman Joey. He had bought dagga from him in the past. He knew Joseph had a wife and children. He had seen J. playing on the netball court. The shooting happened at night, at a time when the family could be expected to be at home. No 1 is not a stranger to gang warfare. It is a notorious fact that innocent people, including children, are sometimes injured or killed in the crossfire. In the absence of countervailing evidence from the accused, I am satisfied beyond reasonable doubt that No 1 in fact foresaw the possibility that innocent people in the home might be hit by bullets and was reckless as to the consequences. There was thus *dolus eventualis*, coupled with *dolus indirectus*, in relation to J.'s death (see *S v Nhlapo & Another* 1981 (2) 744 (A) at 750H-751D; *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA) para 31).

[103] No 1 was accompanied by a second person. I accept Joseph Boltman's evidence that the second person entered the yard and associated himself with the shooting, including the reckless disregard for others in the house who might be struck. The murder and the two attempted murders were thus carried out in the furtherance of a common purpose.

[104] No 1 must also be convicted on count 5 and 6 since he was in possession of a firearm and at least seven rounds of ammunition. By virtue of s 250 of the Criminal Procedure Act, the onus rested on him to prove (on a balance of probability) that he was licensed to possess the firearm and ammunition. He did not attempt to discharge that burden.

[105] In regard to count 1, it is clear that No 1 entered Joseph Boltman's property without the permission of the lawful occupier. He is thus guilty of trespass. (An alternative way in which he might have been charged was housebreaking with intent to commit murder.)

[106] In the circumstances, No 1 is found guilty on all the charges while No 2 is found not guilty on all the charges.

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ROGERS J

## APPEARANCES

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