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

Case number CC 22/18

In the matter between

THE STATE

V

ASHLEY WAGNER

JUDGMENT DELIVERED 29 MARCH 2019

THULARE AJ

[1] The accused, known as Sonop, is indicted for two counts of murder, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. The accused pleaded not guilty to all charges.

[2] Ashley (Ashley) Arendse and Claude Peters (Claude) were shot and killed inside a garage at [...] Court, Mannenberg, on 20 November 2016. This is Kasbar's home, who is the father of Claude. Claude had been in an intimate relationship with Stacey, Sonop's daughter. Colin Anthony (Colin), Lekewaan Adams (Lekewaan), Connor Dean (Connor), Anastacia Godfrey (Stacey) and Sonop were present inside the garage when the deceased were shot and killed. It is common cause that Ashley Adams (Ellatjie) entered into a plea and sentence agreement in relation to the same incident and was sentenced to 25 years imprisonment on each of the two murder charges in that he shot at and wounded the two deceased. The issue is whether Sonop was also in possession of a firearm and whether he also shot at any of the deceased.

[3] It is common cause that Kasbar is a member of the Jester gang and that accused is a member of the Ghetto gang, and that the two gangs have a good relationship. Sonop used to visit Kasbar at Kasbar's home and both were involved in illegal activities. On 19 November 2016, a Saturday evening, Claude assaulted Stacey at his home and Stacey sustained bodily harm. Stacey fled from Claude. Sonop got a report of the assault and went to investigate. The State case is that Stacey was with her father at the time of that investigation and the defence case is that she was not present then.

[4] Sonop in his investigation found Claude, Colin, Lekewaan, Connor and Rowan on the corner in Kasbar's street and enquired about Kasbar's whereabouts that evening. Rowan is one of Kasbar's sons. Sonop was told that Kasbar was not there. Sonop did not do anything to Claude or any other person he found at the corner. He left and told Lekewaan to tell Kasbar that he, Sonop, would return the next day. Sonop's version is that he wanted to meet with Kasbar to discuss with Kasbar Claude's assault on his daughter.

[5] The following day, Sonop arrived with Stacey, Ellatjie, Flam and Zuku. Flam and Zuku stood outside, Ellatjie waited by the door of the garage when Sonop and Stacey entered the garage where the others were present enjoying some drinks. Stacey stood next to Claude. Sonop enquired about the whereabouts of Kasbar. Ashley told Sonop that Kasbar was there whilst Lekewaan told him that Kasbar was not there.

[6] Sonop spoke to Claude and Ashley, expressing his displeasure at the assault on his daughter and his view that Claude kept doing it and got away with it. He then asked Ashley to look at Stacey's face and asked: "What would you do if I shot at this laaitie", referring to Claude. Ashley replied: "If you shoot him you must shoot me as well". It was at that moment that Ellatjie drew a firearm. Flam looked at Ellatjie and shook his head, an indication that he was not in agreement with Ellatjie's conduct. Ellatjie shot at Claude and at Ashley.

[7] There are some differences in the version of the State and that of the defence on what actually happened inside that garage. Colin said after Ellatjie shot at

Claude, the accused also drew a firearm and shot at Claude. Colin said when others that were with him fled, he did not run out but fell to the floor, covered his face with his hands and remained inside the garage. He saw how Stacey blocked Claude as he tried to run out. He saw when Sonop also shot at Ashley. His version is that after shooting Ashley, Sonop ran out but came back, felt at Ashley around his neck and then shot him again in his face before he ran out again. He said that Sonop also shot towards him and the bullet hit the floor next to where he lay.

[8] Lekewaan said Sonop was angry when he came on the 20th. It is for that reason that he told Sonop that Kasbar was not there. After Ellatjie shot at Claude, he froze. He saw Sonop draw out a firearm and he ran out. He did not see Sonop shoot. He heard two shots go off as he ran into the house.

[9] Connor alleged that after Ellatjie shot at Claude, he saw Sonop draw a firearm. Sonop then shot at Ashley, and then shot at Claude. He and others ran out. Stacey remained with Claude. He saw Sonop return to the yard. He saw Sonop feeling Ashley's neck and then shot at Ashley again in the face. He was at the corner of the street at that stage, where he had ran for safety.

[10] There is no evidence led in relation to cartridges, if any were found on the scene, and whether it could be discerned from the cartridges as to whether there was more than one firearm used in the shooting inside that garage. This is objective evidence which would have been of assistance to the court.

[11] Sonop acknowledged that he is a member of the Ghetto gang. He was on good terms with Kasbar although Kasbar was a member of another gang, the Jesters. The two gangs did not have a conflict and were on good terms. He was aware of the relationship between his daughter and Claude and did not have any problems with that relationship. He also knew Ashley very well. He and Ashley previously dated cousins and both have a child with each of those cousins. His relationship with Ashley was a good one.

[12] On 19 November Kasief and Spoel came to inform him about the assault on his daughter, Stacey. The report was that Stacey had been kicked into the air by Claude. He was informed of the site of the assault and went there immediately. When he arrived, he saw the young men at the corner. He approached them and asked Lekewaan where Stacey was. Lekewaan informed him that Stacey had run down the road. When he asked Lekewaan why he did not intervene when the assault happened, Lekewaan told him he could not involve himself in the business of the young lovers. When Sonop asked Claude why he assaulted Stacey, Claude replied: "She is playing me, making me like a doll in front of my friends". The implication was that Stacey cheated on Claude. Sonop left, telling Lekewaan to inform Kasbar that he would return the following day. He wanted to discuss Claude's conduct with Kasbar.

[13] The following morning, the 20th, Stacey arrived at his home. He spoke with her but did not see her injuries as he spoke with her with his eyes closed. They agreed to go and see Kasbar that afternoon. He saw Stacey's injuries only when

Stacey arrived that afternoon. He saw the swollen lip, the blue eye and the swollen head.

[14] On their way to Kasbar they met Ellatjie. Upon enquiry as to where they were going, Ellatjie decided to join them, as he alleged that a Jester member gang had robbed him the previous day, and he wanted to see Kasbar as Kasbar was the Jester gang leader. Sonop was not aware that Ellatjie was armed. They met his friends, Flam and Zuku who were on their way to visit Sonop. Sonop's mother would not have allowed them to go into his room at the backyard without him, so they also joined and they all went to Kasbar's home.

[15] As they approached, someone amongst them recognised Kasbar inside the garage, but Kasbar rose up and went into the house. Sonop and Stacey went into the garage, Ellatjie stood by the door and Flam and Zuku remained outside. When Ashley asked why they were there, Sonop asked Lekewaan whether he did tell the people of the house that he was coming. Sonop told Stacey to go and stand next to Claude and to remove the scarf with which she covered her injuries. When Stacey showed her injuries, he said to Ashley that was the reason he was there. Ashley then asked Claude: "What did you do".

[16] Sonop then asked Ashley: "What will you do if I shoot Claude." Ashley replied: "Then you have to shoot me too." Sonop had asked this question rhetorically. Claude used abusive and disrespectful language towards Sonop. Sonop heard a gunshot after Claude spoke to him in that manner. Sonop reached for Stacey to provide her with cover. He then saw that it was Ellatjie who shot at

Claude. Sonop then asked Ellatjie: "What are you doing? Why are you shooting?". Ellatjie responded: "They don't respect us." Sonop then told Ellatjie: "But that does not give you reason to shoot this laaitie". Ellatjie then screamed at him: "Duck". He bent down, still facing Ellatjie. At that time, Ashley was behind him and he did not know why Ellatjie screamed at him to duck. Ellatjie then shot at Ashley.

[17] Sonop then told Ellatjie: "We are now in trouble and it no longer looks like we were here to come and sort out the problem." He told Stacey that they should leave, because it will no longer be safe for them. Stacey refused to leave Claude and stood by Claude. She was holding on to him and crying, trying to help him. Sonop ran out and he and Ellatjie, Flam and Zuku ran away. He then heard gunshots and knew that it was members of the Jester gang who were in the street. Kasbar is a gang leader and deals in drugs. As a result there are Jester gang members who he recognized as those who guarded the territory of their boss. These gang members, who were in the street, were the ones shooting at him and his company as they fled.

[18] Stacey was 16 years old at the time. She was in a relationship with Claude. Claude was jealous arising out of her movements earlier on the 19th, accused her of infidelity and assaulted her that evening when they met. She escaped and ran away and spent that night with a friend and not at home. Besides the injuries that her father saw, her chin was blue and six of her teeth were loose as a result of the assault. She did not see her father, Sonop, that evening and only went to visit him the next morning. Sonop was already aware of her assault but she did not know

how he knew about it when she arrived and they agreed to go to Kasbar that afternoon.

[19] They were inside the garage as all the other witnesses testified. Her father asked her to remove her scarf and she showed those present what Claude had done. She saw Ellatjie shoot at Claude. Sonop was upset at Ellatjie for shooting and also that Ellatjie had shot Ashley. Sonop did not have a firearm and did not shoot at all. She could not remember everything that happened after the shooting. However, she can remember that there was nobody left in the garage after the shooting.

[20] Stacey was cross-examined. It was during cross-examination that she became upset at the version presented to her by the State Prosecutor, which was in line with the State case and contrary to what she said. She cried and ran out of the witness stand and out of the courtroom. The court had to adjourn. The State submits in its argument that it had to take a talk by Sonop's legal representative with Stacey, for her to return to the witness stand and finalise cross-examination and the rest of her testimony. The State submits that this conduct of Stacey was as a result of the State pointing out the discrepancies between her own evidence and that of her father. This included that Sonop said he told her to stand next to Claude whilst she said that she chose to go and stand next to him out of own volition. Sonop said Claude used abusive and disrespectful language towards her whilst she said he did not say anything.

[21] It was the State's version that she had blocked Claude when he attempted to flee after being shot that upset her the most. This suggested that she was complicit in the shooting and killing of her boyfriend, for whom she had risked her life and remained to help when the rest fled after he was shot, which broke her down. She could not deal with the impression in the State case that she was angry at Claude for assaulting her and had called her father and others to come and sort him out, by killing him, a boyfriend she clearly loved. She cried and ran out of the courtroom when the State was adamant that this was what happened. She could not live inside the courtroom where she was given as the reason that the confrontation happened which led to the death of two people, one of them a young man she loved.

[22] In *S v Shackell* 2001(2) SACR 185 (SCA) at para 30 the court said:

"[30] ... It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[23] It is natural that Sonop would have been angered by the nature of the assault on his daughter as reported to him. Every father would not take it kindly if it is reported that your daughter was kicked into the air. If the perpetrator has a history of assaulting your daughter, this may aggravate the situation. It makes

sense to me, that being on good terms with the father of the perpetrator, Sonop would have wanted that the elders attend to the continued assault of his daughter by Kasbar's son. It is logical that he would have wanted to talk to Kasbar.

[24] I am unable to find that Sonop's anger, although it was occasioned by Claude, was misdirected. If it was, he had both the opportunity and the means to hurt Claude when he found him at the corner in the street on the evening of the 19th. It is reasonably possibly true, in my view, that Sonop wanted to discuss Claude's conduct towards Stacey with Kasbar. This, in my view, explains why Sonop did not attack Claude when Claude was vulnerable, but opted instead to tell Lekewaan to inform Kasbar that he would return the next day, in the presence of all the witnesses present there.

[25] According to Lekewaan and Connor, all those who were present in the garage before Sonop and his company arrived, fled and ran out of the garage when Ashley fired the shots. This is consistent with the defence version testified to by Sonop and Stacey, that only the two of them and the two deceased remained in the garage. The rest of those who were in the garage at the time fled after Ellatjie fired at Claude. This is the first problem with Colin's evidence as he is the only one who said he remained. The other is that he said he went down and covered his face with his hands, yet he claimed to have seen what was happening. His evidence was full of inferences that he drew, and not what he observed. He did not hesitate to say that Sonop was a known killer, as a fact, when he had never observed Sonop kill anyone before. He was clearly prejudiced towards Sonop. Whereas in court he testified about Sonop shooting at him, this material fact was

not contained in his affidavit to the police and it is not strange that the State did not pursue a charge of attempted murder on him against the accused.

[26] Furthermore, even on Colin's own version, Sonop did not have any reason to shoot at Ashley. It is inconceivable, if Colin's version is correct, that Sonop who was an experienced killer, would have simply left an eye-witness alive on the floor without eliminating any possible link with him to the murders. Colin, Lekewaan and Connor are involved in the drug trade of Kasbar. They are self-confessed what is commonly referred to as runners. They receive drugs from Kasbar to sell in the streets and the soccer field. Kasbar is their employer and their leader in the Jesters gang environment. They have reason to lie. It is not for this court to speculate as to whether they are doing this out of own volition to appease Kasbar or under the influence of Kasbar. Kasbar, their employer and leader lost a son in their presence. They have reason to seek to redeem themselves in Kasbar's pain and grief.

[27] Besides the example already referred to in Colin's testimony, Connor's version also demonstrate the extent to which the three State eye witnesses were prepared to stoop to appease Kasbar. Connor ran out of the garage and stopped a few houses away from the scene. He was on the same side of the street as Kasbar's house, in line with the perimeter fences of the houses lining up to Kasbar's house. It is humanly impossible, for someone at the position where he said he was, to see what was happening inside the garage. It is common cause that the garage's walls are concrete slabs and that the rest of the houses' perimeter fences are from concrete. They blocked the range of view to the garage

from where Connor stood. Yet Connor said he saw Sonop get back to the garage and inside the garage he saw how Sonop shot at Ashley in the face. Connor goes so far as to deny that Stacey had facial injuries, which all others confirm.

[28] Lekewaan lied about the whereabouts of Kasbar. He knew that Kasbar was in the house when Sonop asked and Ashley said he was there, yet he said Kasbar was not there. He is very loyal to Kasbar and even Sonop seemed to know that as he chose to ask Lekewaan to tell Kasbar that he would return the next morning instead of Rowan who was present and is Kasbar's son. Lekewaan showed a propensity to tailor the facts to protect and advance the interests of Kasbar. He is very calculating and can adjust the facts to present a front that favours Kasbar. It is against this background that his evidence that he saw Sonop pull out a firearm before he, Lekewaan, fled out of the garage, deserve caution. When it comes to what he sees as being in Kasbar's interests, he cannot be relied upon to tell the truth. He is the only one amongst the state witnesses who said that the Sonop shot at Ashley first and then at Claude.

[29] Having observed Stacey in court, against the background of her conduct after Claude was shot at, I am unable to conclude that beyond reasonable doubt she reported Claude to his father, and ganged up with his father and others to go and kill Claude. In my view, it is reasonably possibly true that, against the background that Claude used to beat her up, and that she loved him, she accompanied her father for the father to speak to Claude's father, Kasbar. Her father's intervention had the potential to eliminate the challenge to her relationship with Claude, to

wit, the violence which characterized it which was perpetrated by Claude. Sonop's intervention was in her interest, that of Claude and their relationship.

[30] It is highly improbable, in my view, that Sonop, intent on going to kill Claude and anyone who stood in his way, would have taken his daughter with him. Sonop knew that Kasbar's home, as a gang leader and drug dealer, was always guarded by armed young men who were loyal to Kasbar. Any shooting in Kasbar's house would have been met by a counter shooting. In my view, it is reasonably possibly true that Sonop took Stacey with her, for Kasbar to see for himself the nature and extent of the injuries suffered by Stacey as a result of Claude's assault. This in my view explains why, when Sonop was told that Kasbar is not available, he asked Stacey to remove the scarf for Ashley to see the injuries, and to understand why Sonop was there with Stacey.

[31] Moreover, Sonop was aware that Stacey was standing next to Claude. He is a gangster and is not a novice on the use of firearms. The State case is that he is used to shooting. Anything can happen in the sense of the direction a projectile can take once it is released at the pulling of the trigger, especially within a closed environment like a garage with concrete slabs. It seems to me not to be a stretch too far to say Sonop would have been aware of the danger of shooting at Claude whilst Stacey was standing next to Claude, especially if the projectile were to hit the concrete and ricochet. In my view, it is reasonably possibly true that Sonop did not shoot at Claude whilst Claude stood next to Stacey.

[32] I am not inclined to agree with the State's criticisms of Sonop and his version. The time factor makes it impossible, in my view, for Sonop to have disarmed Alletjie before he fired the shots. The reason that Sonop advances for running away and not rendering assistance to the injured persons, contextualized and placed under the prevailing circumstances, seems to me to be valid. On the State's own version by the investigating officer, Warrant Officer September, Sonop was arrested whilst appearing in court on another matter, and therefore it cannot be said beyond reasonable doubt that the reason that Sonop was arrested a month after the incident was because he was fleeing from the police.

[33] In my view, the version of the accused is reasonably possibly true. The State failed to prove that the version of the accused is false beyond reasonable doubt. The State did not prove beyond reasonable doubt that the accused is guilty of the offences he is charged for.

[34] There is one issue which does not sit well with me and presents heavily on my shoulders, on the conduct of Stacey, in relation to her being upset such that she cried, ran out of the witness stand and out of the courtroom and refused to immediately return to the witness stand. In my judgment, it is clear that I do not agree with the State as to the reasons that informed her conduct. Her conduct is in my view as a result of a greater mischief as to how our criminal justice system treats its witnesses, especially vulnerable women who are victims of domestic violence when they appear in courts to give their testimony. I am unable to remain silent.

[35] Accused persons enjoy the protection and benefit of the law through having their rights and responsibilities explained to them throughout the legal process of a criminal trial from the police, the prosecutors up to judicial officers. In my view, South Africa is unfairly discriminating against a class of persons, to wit, witnesses. By law no one is required to generally orientate and induct witnesses on their roles and responsibilities. In my view, it is arising out of ignorance that Stacey did not know what her role was and what was expected of her by the court in the witness stand.

[36] With the benefit of hindsight, there was an explanation which ought to have been made to the young woman when she entered the stand, to appraise her of her rights and responsibilities. In my view, Stacey's storming out of the witness stand and out of the court, in tears, demonstrates that a witness at criminal proceedings should after the administration of an oath or after the making of an affirmation in lieu of an oath or after a warning, be orientated and inducted through an explanation of her rights and responsibilities.

[37] A witness should be informed that the State or the defence, as the case may be, alleges that he or she has true and correct knowledge of facts which may assist the court to prove or disprove the allegations placed in issue in the matter. That he or she is required to candidly, honestly and frankly disclose that information to the court with forthrightness and sufficient particularity. The witness should further be informed that the other party other than the one that called him or her may test their credibility and truthfulness of their version by asking questions and making statements to them. The witness should be

informed that to assist the court in search for the truth, he or she may kindly answer the questions to the best of their ability and where statements are made to them, that they are welcome to comment thereon if they have any comment to make on the statement. If they do not know anything about what they are asked, they are welcome to say so, and also to say that they have no comment to a statement made to them if that is the case. The witness should be informed that they are not allowed to ask any questions, except to indicate that they seek clarity on any question or statement made to them. A witness should be informed that at all times the court will protect them from any undue mental stress, insult or suffering, while the true issues between the parties before the court are being ventilated through evidential material.

[38] In my view, the orientation of witnesses will go a long way in making sure that witnesses understand their true role in our justice system. In my view, there is a great risk that because the issues with which Stacey as a witness was confronted with were highly emotional, her attitude to the court proceedings as a whole hardened because of the absence of her orientation and induction, which I highly regret. Unless such orientation happens, parties and courts will struggle to win the co-operation of material witnesses, especially in highly emotionally charged matters.

[39] Not being properly informed makes one and means one is inadequate. Judicial officers should not be the authors of the ill-informed position of witnesses who appear before them as regards what is expected of those witnesses. In my view, there is an obligation on a judicial officer to give an orientation and

induction to a witness after the oath process before the evidence is led. This in my view will enhance the equality of witnesses before the courts, which is currently lacking, for want of being adequately informed.

For these reasons, the accused is acquitted of all charges.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

Counsel:

State: Advocate Stone

Accused: Advocate Nel