NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: Case No: CC 3/2018

THE STATE

And

SHAAN HORNE **Accused No. 1**

SHANE ARENDS **Accused No. 2**

Coram: **Chetty J**

Heard: **1 August 2018 – 10 August 2018**

Delivered: **13 August 2018**

JUDGMENT

Chetty J:

[1] At approximately 09:25 a.m. the morning of 23 July 2016, Captain *Christian Muller* (*Muller*), whilst on routine patrol duty in Goliath Street, Gelvandale, Port Elizabeth, hastened to van Duuren Street in response to an inter police radio bulletin of a shooting incident. On his arrival at the scene within minutes of the report, he encountered the prone body of a male person lying on the bottommost segment of a concrete pedestrian stairway linking van Duuren Street to its summit in Avalon Crescent. The rapid bloodstream from the cadaver's head attested to the propinquity of the shooting and voices within the crowd assembled in close proximity reported that the deceased's assailants had fled the scene in a Gold coloured VW Polo. *Muller* immediately conveyed the information to radio control and requested medical assistance.

[2] Constable *Carelse* (*Carelse*) and his fellow officers in the Tactical response squad of the South African Police Services were fortuitously parked in Thoroghgood Street with the vehicle pointing in the direction of Rabie Street when news of the shooting and the description of the suspects' getaway vehicle was announced on their police radio. Almost immediately, he observed the Polo careering down Thoroghgood Street and violently entering Rabie Street. It screeched to a halt whereupon four occupants alighted and fled into the adjoining erven. Their flight signalled their intended route towards Durban Road and as he drove thence, *Carelse* saw a police vehicle entering Rabie Street. He thus turned his vehicle and drove towards and into Durban Road where he observed a person with a similar pants to that which one of the fleeing suspects from the Polo had been wearing. He instructed

his colleague, one Constable *Ngwenya* to apprehend and detain him. It is not in dispute that the person detained was accused no. 1. *Carelse* in turn entered the yard of the premises accused no. 1 had fled out of and observed another person clothed in a hoodie top. He grabbed hold of him and almost immediately observed another person in black, who attempted to retrace his steps but was thwarted by a policeman to his rear who apprehended him. It is likewise not in issue that the person whom *Carelse* arrested was *Dayne Oosthuizen* aka *Pokkels*, now deceased. After he locked the latter in the police van, *Carelse* returned to the yard the suspects had fled through and found a hoodie top lying next to the house. It is common cause that the fleece top is that depicted on exhibit "E", photographs 17 and 18.

[3] Constable *Marvin Slater* (*Slater*), attached to the Gelvandale Police Station was simultaneously engaged in routine patrol operations along Standford Road near the graveyard when a report of the shooting and flight of the suspects echoed through the vehicle radio. The information conveyed apropos its direction of travel intuited his own path and whilst driving he observed the Gold Polo turning into Rabie Street, in Korsten and pursued it. When he entered the street he found the Polo stationary and persons scurrying away. One them he recognised as *Dayne* aka *Pokkels*. He stopped his own vehicle and pursued them. He scaled the back wall of the premises in hot pursuit and found a person clothed in black standing at the side of the house holding a firearm. He, i.e. *Slater* fired two shots and ordered the person, whom it is common cause was accused no. 2, to throw the firearm onto the ground. The latter duly complied whereafter *Slater* handcuffed him and secured the firearm.

[4] The two accused and *Dayne Oosthuizen* (*Pokkels*) were duly arrested and charged with the murder of the deceased; *Pokkels* has since died and the two accused now stand arraigned for trial on charges of theft, murder, the unlawful possession of a firearm and the unlawful possession of ammunition. Accused no. 1 pleaded not guilty to all the counts whilst accused no. 2 pleaded not guilty to counts 1 and 2 but tendered a guilty plea to counts 3 and 4. In his written plea explanation he adverted to the circumstances surrounding the commission of the offences and recounted them as follows –

> "(a) On 23 July 2016 I was visiting my friend Daniel at […] B. Street in Gelvandale. I was planning on attending a funeral service of another friend named Shaffer. Soon after 09h00 Accused 1, the now deceased co-accused Dayne Oosthuizen ("Dayne") and one unknown man came to fetch me in a goldish colour VW Polo. Dayne said we must go for a drive. Dayne was driving the vehicle whilst Accused 1 was seated in the front passenger seat. I was seated in the right rear passenger seat behind the driver.
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> (b) Dayne did not say where we were going but he proceeded to drive around and drive in Avalon Street in Gelvandale. In Avalon Street Dayne suddenly stopped the vehicle and Accused 1 suddenly jumped out of the vehicle. I then noticed for the first time that Accused 1 had a firearm in his possession which he removed from his hoodie top. It was a black in colour revolver.
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> (c) Accused 1 then chased an unknown male person down an alley between the house leading to Van Duuren Street. Accused 1 then fired one (1) shot into the direction of this unknown male person

who was running away from him. Accused 1 then fired a second shot in his direction. This unknown person fell to the ground. Accused 1 then further approached this unknown person and fired two (2) or three (3) shot at close range in the direction of the unknown male person. Dayne, the unknown male occupant of the vehicle and I were seated in the vehicle. I had no idea that this was going to happen.

(d) After Accused 1 fired the shots he returned to the vehicle. Dayne then chased away and drove in the direction of Korsten. Dayne then drove into another vehicle and caused an accident with a Red Toyota Tazz. He kept on driving. A South African Police vehicle was then chasing the VW Polo we were travelling in and at a certain point in Rabie Street, Schauderville, Port Elizabeth, The VW Polo came to a standstill.

(e) Accused 1 then threw the firearm back on my lap at the backseat and at that stage I heard shots being fired and I grabbed the firearm and ran away. It was police members firing shots in the direction of Accused 1. I was then apprehended by the police in the nearby property whilst in possession of the firearm."

Although accused no. 1 declined to proffer any plea explanation, his own evidence placed him on the scene and in the Polo at all relevant times. The crux of his defence, as it emerged during his testimony, was that shortly after being escorted into the Polo at one *Daniel's* home on the morning of 23 July 2016, he fell asleep and was only aroused therefrom when the Polo collided with the red Toyota Tazz in Highfield Road later the morning.

[5] A gravamen of the charges preferred against the two accused is that they acted in concert and in the execution of a common purpose and it is apposite to emphasize that it is not in issue that the scene of the shooting is an area under the control of the Dustlife gang, a bitter adversary of their nemesis, the Upstand Dogs. The only witness who testified on behalf of the state concerning the events which unfolded on that fateful morning was Mr *Jonathan Swartbooi* (*Swartbooi*), an admitted member of the Dustlifes. He recounted how the Polo entered Avalon Crescent from the direction of Daphne Street, passed him, came to stop some 15 to 20 metres away in front of an electrical substation whereupon accused no. 1 alighted, ran towards the stairway and along it in pursuit of the deceased and shot him before returning to the vehicle which drove off. *Swartbooi* was a thoroughly unimpressive witness and his account of the events which unfolded is clearly a reconstruction. Whilst I accept that he was positioned in one *Capone's* erf when the Gold Polo entered Avalon Crescent, I can place no reliance on his narrative of the *sequelae* save the correctness of his identification that accused no.'s 1 and 2 were two of the occupants of the vehicle.

[6] The only other direct evidence concerning the shooting of the deceased was that tendered by accused no. 2, in essence a detailed reiteration of his plea explanation. The evidence of one accused is admissible against any co-accused as any other witness. In the assessment of such testimony, in effect, accomplice evidence, the cautionary rule applies. The correct approach to such evidence is that

as formulated by Holmes JA in ***S v Hlapezula and Others***[1] where the learned judge state: -

> "It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the aforegoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him. Or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular *R. v Ncanana*, 1948 (4) S.A. 399 (A.D.) at pp. 405-6; *R. v Gumede*, 1949 (3) S.A. 749 (A.D.) at p. 758; *R. v Nqamtweni and Another*, 1959 (1) S.A. 894 (A.D.) at pp. 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned."

[1] 1965 (4) SA 439 (A) at 440D-H

[7] There are a plethora of factors which vouchsafe the veracity of accused no. 2's fingering of accused no. 1 as the arch villain. It is not in issue that accused no. 1 was an occupant of the Gold Polo at the time of the shooting. His evidence that he was in a comatose state, oblivious to his whereabouts, is not only nonsensical but a complete fabrication advanced to provide some explanation for the presence of gunpowder residue on his hands. It is common cause that shortly after his arrest accused no. 1 and the other arrestees were transported to the Mount Road police station where Warrant Office *Kevin Cecil Swartbooi* (Warrant Office *Swartbooi*) conducted prime residue tests of their hands. In her testimony Lieutenant Colonel *Noneke Gogela* (*Gogela*) confirmed that upon analysis of the samples collected by Warrant Officer *Swartbooi* from accused no. 1, it tested positive for gunpowder residue.

[8] The presence of gunpowder residue foretold of dire consequences for the accused and an explanation had accordingly to be sought but there was a hurdle to overcome. After his arrest accused no. 1 instructed his erstwhile attorney, one *Bence*, to have him admitted to bail. The application was brought on affidavits deposed to by accused no. 1 and two (2) supporting witnesses, its collective import, an alibi, that the accused was nowhere near the scene of the shooting. The presiding magistrate, for reasons which invite only bewilderment, acquiesced in the application and admitted accused no. 1 to bail. The recantation of the alibi during his testimony before me was, notwithstanding Mr *Bodlo's* reticence to concede the obvious, triggered by the gunpowder residue test result. It is wholly unnecessary to undertake any intensive analysis of accused no. 1's testimony for, as it unfolded, its concocted nature was laid bare. I am satisfied that there are sufficient safeguards to conclude

that accused no. 2's account of the shooting of the deceased is truthful, reliable and establishes that in firing repeatedly at the deceased, accused no. 1 had the direct intent to kill. His possession of the firearm and ammunition has likewise clearly been established.

[9] In his submissions before me, Mr *Sandan* urged me to convict accused no. 2 as an accessory after the fact. Sec. 257 of the ***Criminal Procedure Act***[2] provides as follows –

> "If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence of which he may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence or, as the case may be, such other offence, and shall, in the absence of any punishment expressly provided by the law, be liable to punishment at the discretion of the court: Provided that such punishment shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory."

[10] It is trite law that in order to sustain a conviction of being an accessory after the fact, the state is required to prove that the accused performed some acts(s) intended to assist the main perpetrator to escape his/her own conviction. The sole ground advanced warranting such conviction relates to accused no. 2's acts apropos

[2] Act No, 51 of 1977

the firearm. It is admittedly so that accused no. 2 advanced two conflicting versions concerning its possession. When the evidence is viewed holistically however, the inference cannot be sustained that in fleeing from the vehicle with the firearm, accused no. 2 intended to assist accused no. 1. On the probabilities, his conduct is rather the product of instinctive behaviour. I am unpersauded that there is any legal basis to found the conviction contended for.

[11] Counsel for the state has fairly conceded that there is no evidence implicating the accused in the commission of count 1 and in the result, the accused are convicted as follows:

1. On count 1, theft, both accused are acquitted.
2. On count 2, Murder, accused no. 1 is convicted as charged whilst accused no. 2 is found not guilty and is acquitted.
3. Accused no.'s 1 and 2 are found guilty as charged on counts 3 and 4.

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D. CHETTY

JUDGE OF THE HIGH COURT

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