IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No. JPV 2007/0403

Date:20/06/2008

In the matter of:

THE STATE

versus

KEITH PIETERSON Accused 1

PEDRO DELANO Accused 2

JUDGMENT

[1] The two accused, Keith Pieterson, presently aged 26 years, and Pedro Delano, presently aged 21 years, have been arraigned for trial on an indictment containing charges of the murder of the late Mr Sallie Gassant ("the deceased"), armed robbery of a Toyota Tazz motor vehicle with registration letters and number MND 295 GP ("the deceased's vehicle"), the unlawful possession of a 7,65 mm calibre Pietro

Beretta Model 81 semi-automatic pistol with serial number obliterated ("the firearm"), and the unlawful possession of 7,65 mm calibre rounds ("the ammunition") against each accused.

[2] Mr Nel appears for the State, and both accused are represented by counsel, accused 1 by Mr Mpanza and accused 2 by Mr Roothman. Both accused pleaded not guilty and made no plea explanation.

[3] At the commencement of the proceedings both accused made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (exhibits "A" – "E"), relating *inter alia* to the identity of the deceased, his death on 1 September 2009 as a result of *'a gunshot wound to the chest'* and the consequences thereof which he sustained on 1 September 2006 at Sipres Street, Bosmont, and that the photo-album and key thereto (exhibit "C") correctly reflect the scene at or near Sipres Street, Bosmont where the body of the deceased was found as well as the scene at or near Mayor Street, Westbury where the deceased's vehicle was found. Both accused also admitted that the cartridge case found at the crime scene and the 7.65 mm calibre fired bullet retrieved from the body of the deceased were fired from the firearm that was found in the possession of Mr Grant Elliot at the time of his arrest on 1 September 2006. The correctness of the ballistics report (exhibit "D") has also been admitted. It should be mentioned here that the firearm has, during the course of the trial, been admitted into evidence as exhibit "1".

[4] Accused 1 alone admitted that he freely, voluntarily and without any undue influence made a statement to a Magistrate on 22 November 2006 (exhibit "E") and

that this statement is admissible. In this statement he places himself at the scene of the crime and he admits that he left the scene in the deceased's vehicle. He, however, distances himself from the commission of the offences by laying the blame squarely at the door of accused 2, averring that he merely stood by and played no part in the shooting of the deceased. Accused 2 admitted that his right thumb print was found on the outside of the driver's door of the deceased's vehicle.

[5] The state called as witnesses Mr Enver Ally, Ms Shireen Kieser, Inspector Barents Christiaan Viljoen, Captain Wayne Peter Kidd, Mr Mohammed Faiez Sallie, Mr Grant Elliot, Constable Nezzie McKenzie, and Inspector Ntsient Lamson Rathumbu. Inspector Viljoen, Captain Kidd, Mr Sallie, and Constable Mckenzie gave hearsay evidence on certain aspects, which I, at the instance of the state advocate, Mr Nel, and with the agreement of counsel for accused 1, Mr Mpanza, and of counsel for accused 2, Mr Roothman, allowed only provisionally. In order for the accused to appreciate the full evidentiary ambit they faced, I invited submissions from counsel before the state closed its case on whether or not such hearsay evidence should be admitted. The state advocate indicated that the prosecution did not persist in having such evidence admitted, and I accordingly ruled all the pieces of hearsay evidence which had been provisionally allowed, to be inadmissible. The state thereafter closed its case. Thereafter Mr Roothman applied on behalf of accused 2 for his discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 ("the Act"). The application was opposed by Mr Nel on behalf of the state. After hearing argument and after considering the application, I refused the discharge sought by accused 2, and I indicated that my reasons will be given later. I will deal with such reasons later in

this judgment. Accused 1 testified and closed his case. Accused 2 testified and closed his case.

[6] Mr Enver Ally testified that on the evening of Friday, the 1st of September 2006, he attended a Mosque. He resided at No. 13 Sipres Street, Bosmont, Johannesburg, which was about a 10 minute walk away from the Mosque, and the deceased had given him a lift home. It was about 8:00 to 8:30 pm and the deceased parked his vehicle virtually under a lamppost in front of Ally's residence. The point where the deceased parked is marked "X" on photograph 1 on exhibit "C" (point "X"). It was dark, but the street light was on. The deceased and Ally remained seated in the deceased's vehicle and they were talking. Suddenly an unknown coloured male aged approximately in his twenties appeared at the driver's window where the deceased was seated, he knocked on the window with a firearm, and he told the deceased, in the Afrikaans language, to get out. The deceased alighted from the vehicle and moved to the front thereof in an attempt to get away. This is when Ally noticed a second unknown coloured male also aged approximately in his twenties on the driver's side of the deceased's vehicle. The deceased moved up the street away from his vehicle in the same direction in which the deceased's vehicle was facing. Both males followed the deceased. Ally was not certain whether the deceased turned around facing the two males or whether they grabbed him and turned him around when they were about three metres away from the vehicle. Ally got out of the deceased's vehicle. A shot went off. Ally could not see where the shot was coming from. The deceased was facing the two males and they were facing the deceased with their backs to Ally at the time when the shot went off. The deceased fell down at a point which is marked C on photograph 01 on exhibit "C"(point "C"). Ally went to

the deceased. The two males turned around when Ally was behind them. One said to Ally *'ek skiet jou vrek'*, whereupon Ally lay down on the street. The two males got into the deceased's vehicle and drove off in the same direction as it was facing. Ally flagged down another vehicle which came up the street. It was driven by his neighbour, Ms Shireen Kieser, who was known to him. He told her what had happened. He then went into his house and caused the police and ambulance services to be phoned. Ally was unable to identify either of the two accused. When cross-examined by counsel for accused 1, he conceded that he might be mistaken as to a second person following the deceased.

[7] Ms Shireen Kieser resides across the road from Ally. The gate to her premises is situated across the road from point C. She testified that she noticed three unknown coloured males talking in the street when she drove out of her premises at about 20h30 on the evening in question. One of the males then walked towards the shops and the other two stayed under the lamppost talking. The street lights were on. She described these two as being about her own height, which is four feet three inches, and stated that one was smallish and the other was bigger built. She saw their faces in her vehicle's headlights and she recognised accused 1 on the first day when she attended court. She returned approximately 20 to 30 minutes later. When she was approximately 20 metres away, she noticed something was happening in the street opposite her house. She saw the same two males *"tackling"* an old man, who was falling down. It is common cause that the old man is the deceased. The smaller built man, whom she identified as accused 1, was handling the deceased in a manner which she described as *'roughing him up'* or *"ruffling"* him. Under cross-examination by counsel for accused 1 she stated that accused 1 could have helped the deceased to lie

down. Under cross-examination she also stated that while accused 1 *"was roughing the old man"*, she had *"no vision"* of the other male, he was there, but she couldn't say what he was doing. Accused 1 and the other male got into a Tazz and drove off. When they had left, Ally, her neighbour, flagged her down. The deceased looked as if he had a fit. She is a nurse at the Coronation Hospital and she then attended to the deceased. She noticed a small hole on his chest. Shortly thereafter the paramedics arrived.

[8] Inspector Barents Christiaan Viljoen testified that he attended the crime scene and took over the command. He found the deceased already dead and lying at point C. He found a cartridge case and a torch as depicted on photos 12 and 13 (exhibit "C"). He noted that the street light closest to the deceased was working. He also attended the scene where the deceased's vehicle was found as depicted on photographs 14 to 17 (exhibit "C"). He also arranged for photographs to be taken of the interior of the deceased's vehicle, as depicted on photographs 18 to 21 (exhibit "C"). He arranged for the safekeeping of the vehicle. Inspector Viljoen was not cross-examined.

[9] Captain Wayne Peter Kidd testified that he attended the crime scene during the evening on the 1st September 2006. Information received resulted in the recovery of the deceased's vehicle in Steytler Street, Westbury, and in Capt Kidd and other police officers attending at No. 1 Nicholas Court, Claremont, Johannesburg ("the flat"), which Capt Kidd knew to be a place where drugs were sold. They found three coloured males and children at this flat. Shortly after their arrival, another coloured male entered the flat. He was found in possession of the firearm (exhibit 1). It is

common cause that this person was the state witness, Mr Grant Elliot. He then noticed accused 1 sitting on a couch in the flat. He was, according to Capt Kidd, looking nervous and trying to move something from behind him. Capt Kidd asked him what it was and accused 1 replied that it was nothing. When accused 1 stood up, Capt Kidd noticed a small white plastic bag behind him. Capt Kidd asked accused 1 what was inside the plastic bag and he replied that he did not know. Capt Kidd asked him a second time whereupon accused 1 replied *'an ID book and stuff'*. Capt Kidd asked him where it came from and accused 1 said he did not know and that it was not his. Capt Kidd found the deceased's identity book (exhibit 2), an empty chips packet and other papers in the plastic bag. Accused 1 and Elliot were arrested and taken to the Sophiatown SAPS where they were detained. Captain Kidd was only cross-examined by counsel for accused 1. It was put to Capt Kidd that accused 1 would testify that he moved the plastic bag away from him, because he was sitting on it and it was uncomfortable, but he would deny that he said to Capt Kidd that there was *'an ID book and stuff'* in the plastic bag.

[10] Mr Mohammed Faiez Sallie, the son of the deceased, testified that he attended at the crime scene. He saw his father lying on the pavement and a lady, who said she was a nurse, performing CPR on him. He provided a spare set of keys for the deceased's vehicle to the police and he subsequently identified the deceased's vehicle and its contents as depicted on photographs 14 to 21 (exhibit "C"). In particular he identified the Arabic inscriptions hanging from the rear view mirror, depicted on photographs 16 and 18, the religious booklets on the front passenger seat and the blue "BA Venter" jacket, depicted on photographs 19 and 20. When he identified the deceased's vehicle to Inspector Viljoen he noticed that the spare wheel and the

deceased's spanners were missing from the vehicle, as well as the deceased's identity book which the deceased always kept in the vehicle. Mr Sallie identified exhibit 2 as being the deceased's identity book. Mr Sallie was not cross-examined.

[11] Mr Grant Elliot testified that he attended a party at the flat on 1 September 2006 from about 6:00 pm. He consumed a substantial quantity of alcohol and drugs and was under the influence of alcohol and drugs, but he was fully aware of what was happening around him since he had been a drug user for many years. At some stage when he stood outside the flat smoking a cigarette, both accused, who were known to him, drove past him in a vehicle that he could not describe, accused 2 called out Elliot's name and waved to him, and they then parked the vehicle behind Nicholas Court. About 3 – 4 minutes later, accused 1 approached Elliot. He carried a spare wheel and tool box and he enquired from Elliot whether he was interested in purchasing the items. Accused 2 also arrived with a cellular phone and sunglasses, and he too enquired from Elliot whether he was interested in purchasing the phone and sunglasses. Elliot was not interested but referred them to his friend, Ziggy. Both accused then entered the flat. Elliot left the flat (under cross-examination he said he walked about 8 – 10 metres) to go and buy cigarettes and 'airtime', but was called back by accused 2, who gave him the firearm saying he (accused 2) was coming back soon. Elliot took the fire-arm, put it into the pocket of his coat, and proceeded to *'Aunty Anna's house shop'*. When he returned to the flat, he *'walked into the police'*. They *inter alia* searched him and found the firearm, and also drugs, in his possession. He told the police that he found the firearm on a couch outside the flat. He lied, because he was too afraid to tell the police the truth. At some later stage, however, he

did inform the police that he got the firearm from accused 2. He was arrested and handcuffed. He noticed that a police officer came out of the kitchen with accused 1.

[12] It is undisputed that Elliot was subsequently convicted on a charge that he, on 1 September 2006, unlawfully possessed the firearm and drugs, and he was sentenced to three years imprisonment wholly suspended for five years on certain conditions for his possession of the firearm and to five years imprisonment, three years of which were suspended for a period of five years on certain conditions for his possession of the drugs. His convictions and sentencing followed upon an agreement concluded between him and the state in terms of section 105A of the Act, and his plea of guilty. He is currently incarcerated at the Krugersdorp Prison.

[13] Constable Nezzie McKenzie, a reservist constable, attended the scene of the crime at about 9:00 pm on the 1st September 2006, and he and a constable Elliot patrolled the Westbury area and they found the deceased's vehicle at approximately 10:00 pm where it was parked in front of certain flats in Steytler Street, Westbury, which is roughly a kilometre or less from Nicholas Court, Claremont.

[14] Inspector Ntsient Lamson Rathumbu, who described himself as a criminalistic expert, who had examined the deceased's vehicle for fingerprints and who compared the fingerprints obtained, confirmed that accused 2's right thumb print was found on the driver's door of the deceased's vehicle, as was admitted by accused 2 in paragraph 13 of exhibit "A". Capt Rathumbu added that the print was located in a position above the handle of the driver's door, indicating to him that accused 2 had opened the door. He had also found a smudged left palm print on the outside of the rear

passenger door, from which he could not ascertain the required seven points of comparison. He testified, in his expert opinion, that such smudged print was nevertheless the palm print of accused 2. It is not necessary to make any finding in this regard. Eight other finger prints had all been lifted from the outside of the deceased's vehicle, and were not the fingerprints of either of the accused.

[15] As I have indicated at the beginning of this judgment, I refused an application by accused 2 for his discharge in terms of section 174 of the Criminal Procedure Act at the close of the state case. I now give the reasons for my refusal of the application. The basis of the application was that there is no evidence implicating accused 2 in the commission of the offences with which he is charged. The question is accordingly whether there is evidence upon which accused 2 might reasonably be convicted [see: *S v Luxaba 2001 (2) SACR 703 (SCA)*, at p 706, para 11], or put differently, upon which a reasonable man, acting carefully, may convict accused 2 [*S v Tsotetsi and Others (2) 2003 (2) SACR 638 (WLD)* at p 639 I – j]. It is common cause that the deceased was shot and robbed of his vehicle in Sipres Street, Bosmont on the evening of 1 September 2006 at some time between 8 and 9. The evidence of both Ally and Kieser was that there were two young coloured males present at the scene when the deceased was shot. Ally did not identify either of the accused. It is common cause that accused 1 was present. Accused 2 admitted that his right thumb print was found on the outside of the driver's door of the deceased's vehicle. Elliot's evidence places both accused in a vehicle later that same evening. The firearm with which the deceased was killed was found in the possession of Elliot, also later that same evening. Elliot testified that the firearm was handed to him by accused 2. Mr Roothman submitted that the credibility of Ally, Kieser and Elliot was of such a poor

quality that no reasonable person could possibly convict on their evidence. I disagreed, and considered it appropriate to further consider the credibility of these witnesses at the end of all the evidence. I further considered it a reasonable possibility that accused 1 would testify and implicate accused 2 in the commission of the offences with which they are charged, or an offence or offences of which he can be convicted on the charges against him. There is evidence on record (exhibit "E"), which of course is not admissible against accused 2 or at least not at this stage of the proceedings, in terms whereof accused 1 implicates accused 2 and there is also the version of accused 1, which was put to Ally. In the circumstances of this case, to have discharged accused 2 at the stage when the application was made would have compromised the proper administration of justice and amounted to a failure of justice [see: *S v Luxaba 2001 (2) SACR 703 (SCA)*, at p 708, paras 20 – 21; *S v Tsotetsi and Others (2) 2003 (2) SACR 638 (WLD)*; *S v Tusani and Others 2002 (2) SACR 468 (TD)* at pp 475e – 478g;].

[16] Accused 1 testified that after 17h00 on the afternoon of the 1st September 2006, he visited his two children, aged eight and nine, in Claremont where they stayed. Thereafter he went to the flat where he met accused 2 and two other friends, Muzi and Leonard. He joined them in sitting outside the flat listening to the radio, drinking alcohol and using drugs. Earlier in the week, accused 1 had arranged to visit another friend, one Karl, in Bosmont. He told accused 2 that he was going to visit this friend, and, between 8:00 and 9:00 pm, he, accompanied by accused 2, walked from Claremont to Bosmont. On their way, and about three streets away from where accused 1's friend stayed, they came across a Toyota Tazz standing in Sipres Street, Bosmont. They were walking on their left side of Sipres Street. Accused 2 then

approached the car which stood on their right side of the street. Accused 1 followed close behind accused 2. When he was about 3 – 4 metres away from the car, accused 2 pulled out a firearm. Accused 2 knocked with the firearm against the driver's window of the car and shouted at the occupants of the car to get out. Accused 1 stood at the back of the car. The deceased got out of the car and started wrestling with accused 2. The deceased and accused 2 were moving away in the direction of the front of the car and the wrestling continued. They were about 6 to 7 metres away from accused 1 when he heard a shot go off. The deceased fell to the ground. Accused 1 realized the deceased was shot. There was also a passenger seated in the car. Accused 2 ran back to the driver's side of the car. When accused 2 got back to the car, the passenger jumped out of the car and ran to the deceased. Accused 2 got into the driver's side and accused 1 into the passenger side. They drove off in the deceased's vehicle to Nicholas Court in Claremont where accused 2 parked the deceased's vehicle in the parking area. Accused 2 told accused 1 to take out the spare wheel and tool box and to take it into the flat, which accused 1 did. There was a small party in the flat. Accused 1 bought drugs and sat in the sitting room using the drugs. Accused 2 left alone with the car. Police officers arrived. They were looking for accused 2. They found the firearm on Elliot. They were beating him and brought him into the sitting room where accused 1 was sitting. Accused 1 was approached by Capt Kidd. He was sitting uncomfortably and he therefore removed a packet from underneath him. He pushed it to one side. He did not know what was in the packet and how it got on to the couch. Upon being asked by Capt Kidd what was inside the packet, he replied that he did not know what was inside it and how it got there. Capt Kidd found the deceased's identity book in the plastic bag. Elliot and accused 1 were arrested and thereafter detained at Sophia Town Police Station.

[17] Accused 2 testified that on the evening of 1 September 2006, he was at his mother's residence, which was No. 14 Nicholas Court. At some stage during the evening he left his mother's flat to go and buy cigarettes. He then saw Elliot and accused 1. Elliot said to accused 1 *"hier is die man"*, whereupon accused 1 asked Elliot *"moet ek vir hom wys."* Elliot answered *"wys hom"*. Accused 2 asked them *"wys wat"*. They then asked accused 2 to accompany them. They walked with accused 2 into the washing line area and showed him a Toyota Tazz car, which accused 2 confirmed was the same vehicle as is depicted on photograph 14 (exhibit "C"). Eliott asked accused 2 to find a buyer for the car. Accused 2 did not ask them where they got the car and he knew that it was a stolen vehicle. Accused 2 inspected the car and asked them how much they wanted for it. Accused 1 replied that they wanted R3 000.00, to which accused 2 agreed. He said to them *'kom ons gaan na die buyer.'* Elliot replied that accused 2 must go alone, and that he would find them at the flat. They gave accused 2 the keys for the car and Elliot showed accused 2 how to start it. Accused 2 drove to Westbury and parked the car. He could not remember the name of the street where he parked the car. He then walked from the car *'up the street'* to the house of his *'buyer'*. He knew this buyer from before. Under cross examination he said that he knew this *'buyer'* for 5 to 6 years. He offered the car to his buyer for R5, 000.00. He then drove with his buyer back to where he had parked the car. Accused 2 noticed police officers at the car when they got closer to it. They did not proceed further to the car. Accused 2 walked back to Nicholas Court in Claremont. When he arrived he saw accused 1 outside at the stairs and Eliott came out of the flat. Accused 2 told them *'ouens 'n tracker het die kar gevat.'* They accused him of lying and an argument ensued. Accused 2 offered them the keys, but

no one took them. He then threw the keys into the parking area. Elliot said to accused 2 *"jy is te clever, jy sal sien."* Accused 2 said the same to him and went upstairs back to his mother's flat. Accused 2 was arrested on the 20th September 2006 at his father's house in Westbury where he resided.

[18] In S v Van der Meyden 1999 (1) SACR 447 (WLD), this was said at p 448 f–i: *"The* onus *of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent* (see, for example, R v Difford *1937 AD 370 at 373 and 383*). *These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.*
In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

[19] The approach to be followed in this case was formulated as follows in S v Chabalala 2003 (1) SACR 134 (SACR), at pp 139 – 140, para 15:
"The correct approach is to weigh up all the elements which point towards the guilt of the accused accused against all those which are indicative of his innocence, taking

proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto *determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."*

[20] The disputes are whether accused 1 was a party to a common purpose to rob the deceased of his motor vehicle with contents, and whether accused 2 was present at the scene of the crime, was in possession of the firearm (exhibit 1), shot the deceased therewith, made his getaway in the deceased's vehicle together with accused 1, and handed the firearm to Elliot later the same evening.

[21] Ally was an impressive and honest witness who made his observations at the scene of the incident under most traumatic circumstances. He did not try to implicate any one of the accused and merely conveyed what he had observed. His observations are, viewed in the totality of the evidence, reliable and many aspects of his evidence were undisputed or corroborated by Kieser and accused 1. Ally was adamant in his evidence in chief, when cross-examined by both counsel, and in re-examination that the deceased was followed by two males when he moved away from his vehicle until just before he was shot, and that the two males then returned to the deceased's vehicle

and drove off in it. It was put to Ally when cross examined by counsel for accused 1 that he did not mention that the deceased was followed in his witness statement, but viewing Ally's evidence in isolation and within the context of all the evidence, we do not consider that it detracts from the credibility of his evidence or from the reliability of his observations in respect of the participation of two males throughout the incident [compare: S v Mafaladiso 2003 (1) SACR 583 (SCA)].

[22] Kieser generally did not inspire confidence. Kieser's identification of accused 1 as the assailant is not reliable and no weight can be afforded to her evidence relating to his involvement [see: S v Mthetwa 1972 (3) SA 766 (A), at p 768 A – C] irrespective of whether or not it could be considered a so-called dock identification as was contended for by Mr Mpanza on behalf of accused 1 [see: S v Ebrahim v Minister of Justice 2000 (2) SACR 173 (W) at p 175 d – g]. Other aspects of her evidence are, however, not in dispute or were corroborated by Ally and accused 1, such as that she was a neighbour of Ally, that she arrived at the scene of the incident, that two young coloured males, apart from Ally and the deceased, were present, one of whom was accused 1, that the two males were with the deceased, that the deceased fell down, that the two males got into the deceased's vehicle and drove off, that she was flagged down by Ally, and that she rendered assistance to the deceased. Her evidence that she performed CPR on the deceased was supported by the evidence of the deceased's son.

[23] Elliot made a good impression upon us as a witness. He was a credible witness and his evidence is accepted. His evidence incriminates both accused, which demonstrates his impartiality as far as both accused are concerned. His evidence that

both accused drove past him in a vehicle when he stood outside the flat, that they parked the vehicle behind Nicholas Court, that accused 1 carried a spare wheel and a tool box into the flat, that accused 2 carried sunglasses and a cellular phone, that Elliot was assaulted by the police in the flat, and that Elliot and accused 1 were arrested at the flat. Elliot's evidence that the firearm was handed to him by accused 2 is corroborated to the extent that accused 1 testified that accused 2 was the one in possession of the firearm during the attack on the deceased, and the common cause fact that such firearm was found in the possession of Elliot when he entered the flat after the police had arrived on the evening of the incident.

[24] In his evidence in chief he testified that accused 2 waved at him and called his name at the stage when the two accused drove past him where he stood outside the flat smoking a cigarette. His evidence on this aspect is in conflict with the written agreement in terms of section 105A of the Act that had been concluded between him and the state (exhibit "I") wherein it was recorded that accused 1 called out Elliot's name and waved at him. When he gave his evidence in chief, he could not tell which of the accused drove the vehicle past him, but when cross-examined by counsel for accused 2, he could remember this material fact and he then testified that it was accused 2 who drove the vehicle. He mentioned for the first time that he saw accused 2 with the car keys. Such contradiction does not, in our view, in any way affect his credibility as a witness and no reliance will be placed on this aspect of his testimony.

[25] Viewed in the context of all the evidence. accused 1's evidence implicating accused 2 is, in our view, reliable. It is corroborated by Ally and Kieser to the limited extent that two young coloured males were present at the deceased throughout the

incident. It is corroborated by Elliot's evidence that he observed both accused driving past him when he stood outside the flat on the same evening of the incident, that accused 1 carried a spare wheel and tool box, that accused 2 carried sunglasses and a cellular phone, that both accused entered the flat, and that accused 2 was in possession of the firearm. Accused 1's version is further corroborated by accused 2's own admission of the presence of his finger print on the driver's door of the deceased's vehicle.

[26] Accused 2 suggested that Elliot and accused 1 wanted to implicate him falsely since he was responsible for them having lost their vehicle. This is improbable since there can be no doubt that the police had indeed recovered the vehicle. No motive has been revealed as to why Elliot would falsely implicate accused 1. It is accepted, however, that a co-accused may have a desire to falsely implicate his or her co-accused and we have accordingly approached the evidence of Elliot implicating both accused and the evidence of accused 1 implicating accused 2 with the necessary caution [see: S v Radloff 1978 (4) SA 66 (A) at p 74 A – B]. There is, in our view, adequate corroboration for their evidence on the disputed issues to which they have testified and I have referred to our views on their credibility as witnesses and the reliability of their evidence.

[27] The evidence of accused 2 is unsatisfactory in major respects:

(a) Under cross-examination accused 2 said that accused 1 asked him to find a buyer, which is in conflict with his version in chief that Elliot asked him to find a buyer.

(b) Most of the statements made in the discussions between Elliot, accused 1, and accused 2 to which he testified were never put to Elliot or accused 1.

(c) Accused 2 denied that he was present when accused 1 arrived at Nicholas Court earlier in the afternoon, but that was not disputed when accused 1 testified.

(d) Under cross-examination accused 2 first said that he was at his mother's flat the whole day on 1 September 2006. Then he said that since his mother arrived back from work, he was not in her flat all the time, but he was present at Nicholas Court, and he only left the vicinity of Nicholas Court when he went to Westbury. He then testified that he and his friend Muzi sat outside the flat during that evening.

(e) Accused 2 first said that Elliot was inside the flat and that he *'went up and down'*, but then that he made an error in giving such evidence and that he did not see Elliot.

(f) In chief accused 2 testified that Elliot said that accused 2 must go alone to find a buyer for the car and that he would find them at the flat, but in cross-examination accused 2 could not remember who said to him where he would find them on his return.

[28] The evidence of accused 2 can simply not reasonably possibly be true in view of the overwhelming weight of the state evidence and the evidence of accused 1 implicating him. Assessing accused 2's version in the context of the full picture presented in evidence, it is inconceivable that accused 2 was falsely implicated. Accused 2's evidence must therefore be rejected as being false beyond a reasonable

doubt. It follows that the state has proved beyond reasonable doubt that accused 2 performed the acts attributed to him by the state witnesses and by accused 1.

[29] The exculpatory evidence given by accused 1 is, in the light of all the evidence, not reasonably possibly true.

(a) The state case against accused 1 is that he was a party to a common purpose to rob the deceased of his vehicle and he therefore associated himself with the actions of his co-perpetrator and the consequences thereof.

(b) Accused 1's version is that when he and accused 2 turned into Sipres Street, Bosmont, they could see the Toyota Tazz vehicle standing in the street. They were on the left side of the street and they crossed over to the right side where the vehicle was standing – accused 2 slightly ahead of accused 1. When they were about 3 – 4 metres away from the vehicle accused 2 pulled out the firearm. Accused 1 said to accused 2 *'wat gaan jy nou maak'* and he replied *'wag man'*. Accused 1 proceeded to the back of the deceased's vehicle and he remained standing there while he observed the events which followed and the assault on the deceased. He thereafter got into the passenger side of the deceased's vehicle, he drove with accused 2 to the flat, and he removed the spare wheel and tool box from the vehicle and carried the items into the flat.

(c) Under cross examination by Mr Nel accused 1 said that he followed accused 2 to the deceased's vehicle because he did not think accused 2 would pull out a gun and shoot the man dead. He said that he was unaware that accused 2 had been armed before he pulled out the firearm. When he pulled out the firearm accused 1 realized there is trouble coming and that accused 2 was up to mischief, but he did not think somebody was going to get hurt or shot there.

He conceded that he had ample opportunity to run the other way. During his evidence in chief he said that he got into the passenger side of the vehicle because he was frightened and shocked and he just wanted to get away, and during the course of the cross-examination he furnished a number of reasons why he remained at the scene of the incident, why he got into the deceased's vehicle, and why he left the scene of the incident with accused 2 in the deceased's vehicle. They were essentially that he was frightened and shocked, he did not know whether to run or what he should do, he just wanted to get away, he was under the influence of drugs, he was not thinking properly, and he *'just came to a standstill'*. When cross-examined by Mr Nel accused 1 said that he was afraid, because accused 2 was under the influence of drugs and he could also shoot accused 1 if he was capable of shooting the deceased in front of accused 1. Accused 1's version is also that accused 2 instructed him to take the spare wheel and tool box out of the deceased's vehicle and to take it into the flat and that he obeyed such instruction since it was the first time that somebody had been shot in front of him and he was scared, because accused 2 still had the firearm with him.

(d) Accused 1, however, conceded that accused 2 did not threaten him at the scene of the incident. On the contrary, it was accused 1 who threatened accused 2 that he, accused 1, wanted to report the matter to the police, and this on accused 1's own version happened either shortly after the incident when they were still on their way in the deceased's vehicle to the flat, or once they had arrived at the flat and before accused 2 had left. In this regard accused 1 testified in chief that before accused 2 left the flat after the incident, he told accused 2 that what he had done was going to get them into trouble and that he

wanted to report it to the police. Accused 2 was very cross and said that he would shoot him if he does something like that. Under cross examination, however, accused 1 testified that he so confronted accused 2 while they were still driving in the deceased's vehicle on their way to the flat. Such threat coming from accused 1 nullifies his version that his inaction and actions were borne out of fear for accused 2.

(e) The fact that he was under the influence of drugs did not prevent him from being able to give an account of the events that happened prior to, at, and after the incident, from getting into the deceased's vehicle, from saying to accused 2 that he wanted to report the matter to the police because he realized they were going to get into trouble, from taking the spare wheel and tool box from the deceased's vehicle, from buying and using more drugs at the flat, and from giving a full account of his movements in the flat and from having the discussion that he had with Capt Kidd.

(f) It is evident from the evidence of Ally and Kieser that accused 1 had actively associated himself with the actions of his co-perpetrator throughout the commission of the offences.

(g) The evidence of the deceased's son that the deceased always kept his identity document in his vehicle and that it was missing from the deceased's vehicle when he identified the vehicle to Inspector Viljoen a few days after the incident, was not disputed. It is common cause that the deceased's identity document was found the same evening of the incident in a plastic bag, which was on a couch on which the accused was sitting in the flat. Capt Kidd's evidence was that when he asked accused 1 for the second time what was inside the plastic bag, he replied *'an ID and stuff'*. Accused 1 denied this. In

his evidence in chief accused 1 said that he was still sitting on the couch when Capt Kidd approached him in the sitting room of the flat and that he removed a plastic bag from behind or under him and pushed it to one side, because he was sitting uncomfortably at the time when Capt Kidd approached him. Under cross-examination by counsel for accused 2, and when confronted with why he did not remove the plastic bag earlier if he was sitting uncomfortably, accused 1 clearly adjusted his evidence by saying that he was first sitting on a couch where he used drugs and he moved out of the way to another couch when the police officers were beating Elliot. Capt Kidd was a credible witness and his evidence on this issue is reliable.

(h) Again, the evidence of the deceased's son that the spare wheel of the deceased's vehicle and the deceased's tools were missing from the deceased's vehicle when it was identified by him was not disputed. Accused 1 admitted that he removed the spare wheel and tool box from the deceased's vehicle and that he carried the items into the flat. Elliot testified that accused 1 enquired from him whether he was interested in purchasing the items. Elliot was hardly cross-examined on behalf of accused 1, and accused 1's denial of Elliot's evidence in this regard was merely put to him. As I have already mentioned, Elliot was a credible witness, and his evidence in this regard is credible.

(i) Significantly, in the statement which accused 1 made to the magistrate (exhibit "E"), no mention was made that he carried the spare wheel and tool box into the flat or that he removed a plastic bag containing the deceased's identity document from under or behind him in the flat. Accused 1, in his statement and in his evidence, cleverly attempted to distance himself from the commission of the offences.

(j) Accused 1 confirmed the contents of his statement, except for the answer to question 11(i) whether he expected any benefits if he makes the statement, where the magistrate recorded his answer as *'that the court might be lenient in sentence.'* Accused 1 testified that what he had said to the magistrate was that he wanted the case to be finalized so that he could go home to his children and family. In his evidence in chief he said that he did not know why the magistrate recorded such answer. Under cross-examination he suggested that the magistrate might have been up to *'tricks'*. There was no factual basis laid or reasonable explanation given for such an allegation.

[30] We accept that accused 1 was not armed himself and that he did not inflict any injuries on the deceased. The acts of accused 2, who inflicted the fatal injury on the deceased, must be attributed to accused 1. The only reasonable inference on the basis of the evidence of Ally and Kieser is that he made common cause with accused 2 who inflicted the fatal injury on the deceased and that he is criminally responsible for the results thereof. He actively associated himself with the attack by following accused 2, who was on his own admission armed even before he got to the deceased's vehicle, by standing behind accused 2 at the driver's door of the deceased's vehicle when accused 2 knocked at the driver's window with the firearm and shouted at the occupants to get out, by accompanying accused 2 in following the deceased 7 or 8 metres away from the deceased vehicle until the deceased was shot. His active association did not stop there and he never disassociated himself with the attack or with the theft of the deceased's vehicle. On his own evidence got into the deceased's vehicle with accused 2, they drove back to the flat where accused 1 removed a spare wheel, tool box and the deceased's identity document from the deceased's vehicle. On Elliot's evidence

he offered the spare wheel and tool box for sale to Elliot, and on his own evidence he carried the items into the flat. On Capt Kidd's evidence the deceased's identity document was found in the immediate vicinity of accused 1. The five prerequisites referred to in S v Mgedezi and Others 1989 (1) SA 687 (A) at p 705I – 706C for holding accused 1 liable on the basis of a common purpose between himself and accused 2 on both the murder and robbery charges are satisfied beyond reasonable doubt. He, by his own admission was present at the scene where the assault and theft were committed, he was aware that accused 2 was armed, and he was aware of the assault on the deceased and the theft of the deceased's vehicle. His active participation is clear. The only reasonable inference that can be drawn is that accused 1 had not only associated himself with the assault on the deceased and the theft of his vehicle, but also that he had the necessary *mens rea* to sustain convictions for murder and robbery. The inescapable inference is that accused 1 foresaw the possibility of the deceased being killed and performed his acts of association with recklessness as to whether or not death was to ensue.

[31] Adv Nel on behalf of the state, correctly in my view, and appropriately submitted that the requirements for joint possession of the firearm and ammunition have not been established and that accused 1 should therefore be acquitted on counts 3 and 4 [see: S v Nkosi 1998 (1) SACR 284 (W) at p 286 h – i; S v Mbuli 2003 (1) SACR 97 (SCA), para 71; and S v Molimi and Another 2006 (2) SACR 8 (SCA) at p 21 b – g].

[32] In the result:

1. Accused 1

1.1 on count 1, murder, accused 1 is found guilty as charged;

1.2 on count 2, robbery, accused 1 is found guilty as charged;

1.3 on count 3, unlawful possession of a firearm, accused 1 is found not guilty;

1.4 on count 4, unlawful possession of ammunition, accused 1 is found not guilty.

2. Accused 2

2.1 on count 1, murder, accused 2 is found guilty as charged;

2.2 on count 2, robbery, accused 2 is found guilty as charged;

2.3 on count 3, unlawful possession of a firearm, accused 2 is found guilty as charged;

2.4 on count 4, unlawful possession of ammunition, accused 2 is found guilty.

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P.A. MEYER, J
JUDGE OF THE HIGH COURT