REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: SS21/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

20/3/2023.
DATE

SIGNATURE

In the matter between:

GEORGE BARKHUIZEN **APPELLANT**

and

THE STATE **RESPONDENT**

MABESELE, MOOSA JJ et JOHNSON AJ

J U D G M E N T

JOHNSON AJ:

[1] The appellant was indicted in the High Court, Johannesburg sitting at Palm Ridge on counts of Murder (count 1), Fraud (count 2), Unlawful possession of a firearm (count 3) and unlawful possession of ammunition (count 4).

[2] He was sentenced to life imprisonment for murder, 15 years imprisonment for fraud, 6 years imprisonment for the unlawful possession of a firearm and 2 years imprisonment for the unlawful possession of ammunition

[3] He applied for leave to appeal against the convictions and sentences, and which were refused. On petition, he was granted leave to appeal the murder charge, as well as the unlawful possession of a firearm and ammunition. His petition for leave to appeal the fraud conviction was refused.

[4] The appellant and the deceased were married to each other, and had experienced marital problems. They planned to get divorced. The State called numerous witnesses to testify about the acrimonious relationship between the deceased, her family, and the appellant. Shortly before her death the appellant took out a life policy on both his and the deceased's lives, without her knowledge.

[5] In the summary of substantial facts to the indictment, the State set out its case as follows: *"The state's case is circumstantial in that no-one but the accused could have committed the murder and the fraud in casu".*

[6] The State doggedly pursued its case and called numerous witnesses regarding the policy, and the strained relationship between the parties from which it wanted the court to draw an inference that the appellant killed the deceased.

[7] Because of our ultimate decision, we do not deem it necessary to sum up the evidence *in toto*. We will however refer to it where it is necessary to explain our findings.

[8] On 11June 2015 at around 13:00, or 13:15, the deceased was shot dead outside a business she owned with the appellant. The appellant was absent according to the eyewitness Mr Kenga ('Kenga').

[9] The State's allegation that there was no direct evidence, and that its case was based solely on circumstantial evidence, is of course incorrect, as there was direct evidence of Kenga regarding the murder of the deceased. Our concern is how that evidence was dealt with, or not, by the trial court.

[10] On 19 September 2019 the trial court convicted the appellant on all the charges and found as follows on page 44 of its judgement:

> *"81. So if we take this by the law or in our circumstantial evidence the only inference to be drawn from all this is that the accused killed the wife. Why? Because if he killed the wife then he will be able to cash, because that policy was the ATM. He tells the son that the policy for, in respect of Mrs. Odette Barkhuizen was 3,5 in respect of one of the insurance companies and the two were two million each. Add them together, that accords with the situation when he tells the son that we have got the 6 million.*
>
> *82. So the only inference is that he killed the wife in order to cash their insurance policies."*

[11] The trial Court with respect lost sight of the fact that there was direct evidence of Kenga in respect of the murder charge, but dealt only with circumstantial evidence and not the direct evidence.

[12] Kenga was an eyewitness to the murder of the deceased. Not only was his direct evidence simply ignored in the judgment of the court *a quo*, the trial court with respect did not evaluate it. To this end it is trite that a trial court must take all the evidence into account when considering the guilt of a person, even if it might exonerate him. In *S v Van der Meyden* 1999(1) SACR 447 (W), the principle was set out as follows:

> *"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond doubt, and the logical corollary of that is that he must be acquitted if it is reasonable possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached*

(whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[13] From Kenga's initial written statement to W/O Msomi, there was not a shred of evidence that the Appellant shot the deceased. He stated as follows: *"I looked at the driveway area and I saw an unknown black male wearing a tracksuit. He was standing next to the deceased's car pointing his firearm down at the ground. The robber must be about 1,67 m and slender looking."* Accordingly therefore, the killer could not have been the Appellant; who is not slender and not a black man. Kenga knows the Appellant very well and testified that he would recognize him from a distance.

[14] Shortly thereafter his factual statement was surprisingly changed under suspicious circumstances. He then declared in his second statement, after consultations with Constable Weideman, who we need to mention was a dishonest witness, and a private investigator, that he was at his place of employment on 11 June 2015 when he heard a gunshot at around 13:15. He opened the sliding door and stepped out. He saw the deceased's car and another shot went off. He saw the shadow of a person wearing a black top. He saw a person just outside the driver's door of the deceased's vehicle. It was difficult to say whether the person was male or female. He wore a hoodie. He did not have a clear vision. The person drove off with the deceased's vehicle.

[15] The haste and carelessness with which the initial statement was changed, is apparent. If one sees a shadow, the whole image is black. It would be impossible to see whether a shadow wears a black top or not.

[16] What is significant in his two statements, is that his initial statement proved that the appellant was not the killer. After he changed his statement, it did not prove that the appellant was not the killer. One can only surmise that the question regarding identity had to be left open, in order to allow for an inference

that he was the killer. If these material contradictions did take place, it leaves a further question mark in respect of the evidence of Constable Weideman and the investigating team. The question that begs to be asked is: Why was the witness not charged with contravening section 319 of Act 56 of 1955 for making two conflicting statements under oath, and if he did commit the crime referred to, why was he favoured by no criminal action being taken against him?

[17] The circumstances surrounding the statements were highly suspicious and needed scrutiny by the Court *a quo*, especially in view of the suggestion that the investigating team was not looking for the real killer, but for evidence to falsely implicate the appellant. There were many inconsistencies in Kenga's evidence and that of W/O Msomi who initially interviewed him and took down his first statement. These inconsistencies were with respect ignored by the trial judge.

[18] Kenga also had a two-hour interview with a private investigator, the transcript of which had strangely gone missing, and during which time Weideman also interviewed him and changed his statement.

[19] W/O Msomi testified that he had an interview with Kenga on the scene after the deceased was killed. Kenga said that he stood on the balcony after the gunshot and that he watched the whole incident from the balcony. He could not say whether the person was white or black. He said that it might be a black person, and he was not sure. This evidence is extremely suspect and wreaks of dishonesty. It is unexplainable, and not consistent with reality, that the witness would initially say that there was an unknown male person looking at the deceased on the ground, and straight thereafter in his statement say: *"I looked at the driveway area and I saw an unknown black male wearing a tracksuit…. He was standing next to the deceased's car pointing his firearm down at the ground. The robber must be about 1,67 m and slender looking."*

[20] It is also peculiar that he mentioned in his statement that the black person was a robber. It is strange that he did not mention this in his interview with Msomi, and straight thereafter, make a statement to this effect. It was evident

that he perceived the person to be a robber. If there were these contradictions between the interview and the statement that Msomi took down, why was it not cleared up in the statement? It does not bode well for the honesty of Msomi.

[21] The question is, why was the initial statement of Kenga changed in which he gave a clear description of the attacker. The description of the attacker in the second statement is a vague and contradictory description. It leads to the unfortunate conclusion that, no matter to what lengths he and the investigating team went to change and explain away his initial statement about the accurate description that he gave, it did not suit their narrative that the attacker was black. That would make it impossible to pin the crime of murder on the appellant. The statement needed changing to a vague description of the attacker in order to implicate the accused by way of inferential reasoning and circumstantial evidence. We are not convinced that the initial statement was changed because it was incorrect. It was changed because it did not suit their narrative.

[22] It is clear to us that the attacker that Kenga saw with the deceased was not the accused.

[23] The State relied heavily on the fraud charge, which it regarded as circumstantial evidence that the appellant killed the deceased. It also relied on an allegation by the accused's son, that the appellant told him after the murder, that they now have the 6 000 000 (six million). This allegation is suspect because the witness (Wade Barkhuizen) did not mention it in his statement. Counsel for the State conceded during argument of the appeal that the appellant would not have been indicted for murder, had it not been for the fraud charge. If regard is had to the totality of the evidence, we agree that the concession was well made.

[24] We have considered the inference that the Court *a quo* had drawn, but could not come to the same conclusion that the only inference was that it was the appellant who killed the deceased. From the evidence is seems that the area where she was killed, is considered a crime infected area where serious crimes are often committed or have been committed in the past. Kenga has encountered suspect people shortly before the incident hiding on the premises,

which he had to chase away. A further inference, that she could have been the victim of a violent crime by unknown criminals, was also possible. In fact, this was confirmed in the initial statement of Kenga.

[25] As far as the life policies are concerned, it appears that the appellant took out policies for his and his wife's protection. If he was planning to kill her for the life policy benefit, one would not have expected him to also take out a policy where she would be a beneficiary in the event of his death. This aspect was unfortunately not considered by the Court *a quo*, when it grappled with the evidence.

[26] It is clear upon a conspectus of all the evidence that there is no evidence to link the appellant to the unlawful possession of a firearm (count 3) and ammunition (count 4).

ORDER

[27] In the result the following order is made:

[a] The appeal against both the convictions and sentences imposed is upheld.

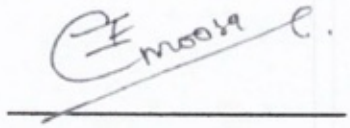
[b] The convictions and sentences on counts 1, 3 and 4 are set aside.

P JOHNSON
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree and it is so ordered.

M M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree and it is so ordered.



C I MOOSA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG