

**IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION**

Case No:474/85

In the matter between:

SAGREN PERUMAL GOVENDE Appellant

And

THE STATE Respondent

Coram: JOUBERT, VAN HEERDEN JJ.A. et BOSHOFF AJA.

Heard: 22 August 1986

Delivered: 25 September 1986

JUDGMENT

JOUBERT, JA

Before FRIEDMAN J. and two assessors in the Durban and Coast Local Division the appellant was charged as accused no 1, together with Maduray Jayapragasen and Frank Ganas Govender as accused nos 2 and 3 respectively, bwith having murdered the deceased Gopaul Iyer on Tuesday 31 January 1984 in the district of Chatsworth (count 1)The appellant was also charged alone on count 2 with having committed a fraud upon Norwich Union Life Insurance Society by making out that the deceased on 12 August 1983 completed an application form (Exhibit "F") for insurance on his life for the insured sum of R75 000-00 in favour of accused no 3 (falsely alleged therein to be

his nephew' whereas the deceased in fact did not apply for a life policy which was issued during September 1983 by Norwich Union Life Insurance Society in pursuance of its acceptance of the said application form. The appellant and accused no 3 are first cousins since Lutchmee Govender, the mother of accused no 3, is the sister of the appellant's father.

On count 1 the appellant was found guilty of murder without extenuating circumstances and accordingly the mandatory death sentence was imposed. Accused no 2 was found guilty of assault with intent to do grievous bodily harm and was sentenced to 2 years' imprisonment half of which was suspended for five years on certain conditions. Accused no 3 was found guilty of murder with extenuating circumstances and was sentenced to 15 years' imprisonment- On count 2 the appellant was found guilty of fraud and sentenced to 4 years' imprisonment. With leave of the Court a quo the appellant now appeals to this Court against his convictions. on both counts.

On Wednesday morning, 1 February 1984, the body of the deceased was found near the side of Bul-Bul Drive in Silverglen, Chatsworth. According to a post mortem examination which was performed the next day on him by the district surgeon Dr Misra the cause of death was attributed to multiple penetrating wounds of the chest. It was common cause that the concentration of alcohol in a blood specimen of the deceased was 0,31 grams per 100 millilitres. According to Dr Misra that would, generally speaking, be indicative of the deceased having been fairly heavily intoxicated when death ensued. The appellant conducted the business of an insurance broker in his home office at Isipingo. Through the agency of the appellant the deceased applied on 12 July 1983 to Norwich Union Life Insurance Society for insurance on his life for the insured sum of R34 000-00 in favour of his wife Selvanayagie Iyer as beneficiary (Exhibit "H"). This application was replaced by an amended application (Exhibit "G") signed by the deceased on 1 September 1983 to rectify an error. The monthly, premium was R40-00 in respect of the issued life policy. The appellant kept photo-copies of the three applications (Exhibits "F", "G" and "H") in his office file at his home. The appellant opened at the Isipingo branch of the South African Permanent Building Society a transmission account in the name of the deceased to enable the appellant to pay the premiums, collected by him from the deceased, into the said

account for remittance to Norwich Union Life Insurance Society, On 1 February 1984 the appellant paid R100-00 into the transmission account of the deceased but he claimed to have done so before he was apprised of the death of the deceased. On Thursday 2 February 1984 the investigating officer Naidoo interviewed the appellant in his home office. The appellant claimed that he was the whole of 31 January 1984 at his home. The appellant also told him that he last saw the deceased during December 1983. Later the appellant admitted under cross-examination that he told this lie in order to protect himself (Vol 4 p 374 of the record). Upon being asked to produce insurance documents relating to the deceased the appellant produced photo-copies of Exhibits "G" and "H" as well as a policy in which the wife of the deceased was stated to be the beneficiary. It is significant that he put Exhibit "P" and the policy for the insured sum of R75 000-00 into an envelope which he handed to his attorney later that morning. The appellant was instructed to drive his red Mazda vehicle to the Chatsworth Police Station where two very small blood stains were found in the Mazda, viz one on the upholstery of the right hand back door and the other one on the back of the front passenger seat. The appellant was arrested as a suspect, On Saturday 4 February 1984 the appellant took the police to the house of accused no 2 where the latter was arrested.

Accused no 2 in turn took the police to the house of accused no 3 where the latter was apprehended. The police kept accused nos 2 and 3 in separate cells until they appeared in the Magistrate's Court at Chatsworth. They co-operated fully with the police by admitting having themselves taken part in the killing of the deceased and also by implicating the appellant therein. The learned trial Judge gave the following correct summary of the course of conduct adopted by accused nos 2 and 3 after their arrests, including the tenor of their evidence:

"In brief, the version given by accused No 2 and accused No 3 in their statements to the police and at the Section 119 Proceedings, and then again in giving evidence on oath in this court, was to the following effect. They claim that prior to the afternoon of Tuesday the 31st of January 1984, accused No 1 had told them that he had a job for them. He also arranged to take them out on the evening of the 31st of January 1984. They claim that, on the evening of Tuesday the 31st of January 1984, accused No 1 fetched them

outside the house in which accused No 2 resided in Road 9[...] Chatsworth, at about 7,30 pm. He fetched them in a red motor vehicle. In the car was another person, a front seat passenger, who was obviously very much the worse for liquor. They claim that accused No 1 then told them that this was the person upon whom the job was to be performed. At first they hesitated to get into his car but later, when accused No 1 assured them he was just joking, they did so and they drove off. After a variety of activities or movements, which it is not necessary now to detail, and during the course of which accused No 1 plied them, that is to say accused 2 and 3, with a considerable quantity of liquor, accused No 1 drove them, including the deceased, to a quiet spot in Bul-Bul Drive, Chatsworth. There he stopped the car, produced or handed to them a knife and a stick and ordered them to assault the deceased, saying that the deceased was his enemy. After some persuasion accused No 3 assisted the deceased out of the car and held him up, while he was struck by accused No 2 wielding a stick. Thereafter accused No 2 returned to the car and accused No 3 allowed the deceased to fall down. Accused No 3 was then ordered to stab the deceased and, having commenced stabbing him, it is claimed that accused No 1 then ordered or instructed accused No 3 to stab the deceased until he was dead. After the deceased had been killed, his body was left in the grass at the side of the road and they drove off. A little further on the car was again stopped, and accused No 1 then told accused Nos 2 and 3 to dispose of the stick and knife in the grass at the side of the road. Thereafter accused No 1 took the two of them to accused No 2's house, but on the way he advised them that the deceased had been insured and that he would be paying them R2 500,00 each for having assisted him in killing the deceased-Accused No 3 claims further that the following day accused No 1 called at his house and handed him R500,00, which he thereafter gambled away and/or spent."

The following correct summary of the appellant's evidence in regard to his activities during the evening of 31 January 1984 was given by the learned Judge:

"According to this version accused No 1 on .. the 31st of January 1984, was travelling in his red Mazda Motor-vehicle along Westcliffe Drive in Chatsworth at about 6,30 pm when he saw accused 2 and 3 and the deceased at a bus

shelter. He stopped and gave them a lift to the corner of Silverglen Drive and Grassmere Road in Silverglen, and he was told by them that they had intended going to Bul-Bul Drive. He claims that, after dropping them off, he went to see a client, a Mr K Naidoo, at a house at 1[...] Grassmere Road, Silverglen. It now transpires that the house in question was one occupied by a Govender family and accused No 1 went to the house not only to see K Naidoo, who was a friend of the Govender family, but also a member of that family one Ronnie Govender. Accused No 1 explained that he left 1[...] Grassmere Road at about 8,30 pm on his way home and, whilst, driving along Silverglen Drive where it intercepted with Bul-Bul Drive, he observed accused 2 and 3 running down Bul-Bul Drive. They waved to him, he stopped, they got into the car and he gave them a lift. He claims that accused 2, at this stage, was carrying a knife. As soon as the two of them, accused 2 and 3, entered the car, accused No 3 said to him words to the effect, 'Drive on and ask no questions.' Because accused No 2 had a knife and because accused Nos 2 and 3 had clearly been drinking, he asked no questions and drove on. Eventually he dropped off accused Nos 2 and 3, but not before accused No 2 had in the car mentioned words to the effect that they had assaulted somebody. He then proceeded home."

In the course of a very comprehensive judgment the learned trial Judge painstakingly reviewed all the evidence adduced at the trial- He also carefully assessed the merits and demerits of the witnesses who testified for the State and the defence. The trial Court had the advantage of seeing and hearing the witnesses when they testified. The learned trial Judge commented as follows on the appellant (Vol 7 p739-740) :

"Accused No 1 was clearly an intelligent and reasonably articulate person. His articulation, however, in the witness box had about it, in very many instances, a certain suggestion of glibness. He was at times confident, but at other times when he found himself in difficulty in explaining his action or certain events, that confidence gave way to an appearance of unease and discomfort, and this in turn led him on occasions to become more than a little evasive. His final impression on us was a most unfavourable one. He was, as Miss Thomas who appeared on behalf of the State has submitted, a particularly bad witness.

He was, however, clearly a person with a great deal of agility of thought; a person who is quick-witted, able to think quite well and quite quickly on his feet, and a person with a ready answer to most things. When one examines the contents of his evidence, and I shall at the moment confine myself to matters of general import, one finds aspects of his evidence which are not only unsatisfactory but patently false. . One also finds aspects of his evidence, (and this is something again which I shall discuss more fully later), where accused No 1 has, from time to time, deliberately, what I might call, 'tailored' his evidence to fit the facts as they were known to him, or as they were suspected by him at any given time."

His relevant commentary on accused no 2 and accused no 3 was the following (Vol 7 p 746):

"Accused No 2 is an uneducated person. He claims to be illiterate and that his schooling went no further than standard four. He is, without doubt, an unintelligent person. He is, without doubt, a most inarticulate person. He is also, without doubt, an untruthful person. For example, his evidence that he only participated in the assault on the deceased because of threats to his physical well-being made against him by accused No 1, seems to us to be a lie. If this had been true one would have expected him to have made mention of it when he made his statement to the police or at the Section 119 proceedings-or, at any rate, well before he first placed . so much emphasis upon it in the witness box. At one stage his evidence became so bad that he was asked whether he had ever suffered a head injury and he replied to this in the affirmative.

Accused No 3 fared little better. Although better educated and perhaps a little more intelligent than accused No 2, he likewise gave the appearance of being not only an unintelligent person but a most unintelligent person, and of being not only an inarticulate person but a most inarticulate person. He too was not a good witness. He too, more particularly when it came to evidence of, for example, the threats made against him, was undoubtedly not telling the truth."

The only direct evidence which implicates the appellant in the murder is the evidence of accused no 2 and accused no 3. The trial Court was fully conscious of, and paid due regard to, the cautionary rule applicable to the acceptance of their evidence which incriminated the appellant in the planning and perpetration of the murder. A factor which reduces the risk of accepting the incriminating evidence of accused no 2 and accused no 3 against the appellant is where the latter has shown himself to be a lying witness. The trial Court then proceeded, correctly in my view, to approach the incriminating evidence of accused no 2 and accused no 3 along the following lines (Vol 7 p747-748):

"As I have already said we find that all of the accused were not only bad witnesses in the extreme but were also, in certain respects, lying witnesses. There is however, in our view, one important difference between accused no 1 on the one hand and accused 2 and 3 on the other hand- The difference is this. Most of the lies told by accused 2 and 3 were stupid lies told by stupid people. The lies which were told by accused No 1 however, were, in our view, the product of a quick and fertile mind, the product of a person who would say anything, irrespective of its truth, in order to extricate himself from any difficulty in which he found himself, a product of a person who was quick to adapt his evidence to deal with and counter any new difficulty, real or illusory, which might arise. Whereas, therefore, we reject almost everything told to us by accused No 1 , in the case of accused 2 and 3 the same does not hold true, or at any rate not to the same extent. The position, in short, with regard to their evidence, is that we are prepared to rely upon it but only, and I stress only, where the evidence is not in dispute, accords with the probabilities, or is corroborated by other acceptable evidence."

The trial Court then considered evidence of a circumstantial nature which tended to a greater or lesser extent to corroborate the evidence of accused no 2 and accused no 3 after having satisfied itself that all the proven proven or acceptable facts were consistent with the guilt of the appellant and that they also excluded any other reasonable inference to the contrary. The circumstantial evidence relied upon was found mainly in the acceptable evidence of Lutchmee Govender (mother of accused no 3), D[...] I[...] (a young boy who stayed with his parents with whom the deceased

also lived), Urvassi Pillay, Krishna Jayapragasen (brother of accused no 2), Selvanayagie Iyer (widow of the deceased) and Devendra Pillay. The latter was found by the trial Court to be a most impressive witness and his evidence was accepted without hesitation. He testified that at about 9 p.m. on 31 January 1984 he drove his van up along Bul-Bul Drive to the depot of his transport business situate on the summit of the hill. On his way up he noticed in his headlights a parked vehicle on his right-hand facing downwards in the direction of Klaarwater Drive. It was parked somewhere near the scene of the murder. He described the vehicle as a four-door new shaped Mazda 323. He has knowledge of spray paint and described its colour as "burnt orange". The colour and shape of the vehicle was similar to the red colour and shape of the appellant's vehicle as shown on Exhibits "D1" and "D2" He could see the shadows of passengers inside the parked vehicle. On returning a few minutes later he noticed the vehicle was still parked at the same spot. A left-hand door was open and someone of medium height wearing an overcoat was standing outside. He did not take notice of the vehicle's number plates. The learned trial Judge correctly stated the importance of this evidence in the following terms (Vol 7 p 760-761):

"What is, however, important about his evidence is that both with regard to the place where the Mazda was parked, as to the time it was parked there and as to the activities around that car, his evidence provides very strong corroboration of the evidence of accused 2 and 3 as to what occurred at the most important time in the case, namely the time when they say they killed the deceased."

I may also add that his evidence that he went up and down Bul-Bul Drive is corroborative of the evidence of accused no 2 that a white truck went up Bul-Bul drive and came down again while the appellant's vehicle was parked alongside Bul-Bul Drive (Vol 5 p 547,550). Accused no 3 testified that they were sitting in the appellant's vehicle when the white truck went up Bul-Bul Drive but he did not thereafter see or hear it again (Vol 6 p 664, Vol 7 p 686). The trial Court also considered the question :

"- - - why should accused No 2 and accused No 3, who was not only accused No 1's first cousin but also, so it would seem, on very cordial terms with him, both implicate accused No 1 as the person behind the killing and as the person who

instigated the killing?" (Vol 7 p 761). After scrutinising the probabilities the trial Court came to the conclusion that "- .- - we regard it as improbable' in the extreme that accused 2 and 3 would have implicated accused No 1 in the manner in which they implicated him unless it were true" (Vol 7 p 762). The trial Court, correctly in my opinion, dealt with the evidence of Jagatheesan Adessan Naidoo (also known as Kay) and Nithianandhan Govender (also known as Ronny) who testified in support of the appellant's alibi as follows (Vol 7 p 744):

"Accused No 1 also called on his behalf K Naidoo and Ronny Govender with a view to establishing his alibi and more particularly his movements between about 7,00 pm and 8,30 pm or 8,45 pm on the fateful night, that is to say the night of the 31st of January 1984. Both k Naidoo and Ronny Govender gave their evidence-in-chief reasonably well, but both deteriorated drastically and completely in the course of cross-examination. Counsel for accused No 1 was constrained to concede in argument that certainly K Naidoo was a most unsatisfactory witness and he made little attempt to suggest that Ronny Govender's evidence perhaps was not quite as bad as K Naidoo's. No good purpose, I think, can be served by trying to determine which of K Naidoo or Ronny Govender was the worst witness. It is a task which is utterly futile. What is clear, and a reading of the evidence of these two witnesses will establish this quite clearly, is that both were not only unsatisfactory witnesses but gave every, appearance of being lying witnesses."

On appeal before this Court appellant's counsel contended that the Court a quo erred in accepting the evidence of some of the witnesses who testified on behalf of the State. I have given careful consideration to counsel's contentions, but I do not consider his criticisms of sufficient impact to find that the Court , a quo erred in accepting their evidence and rejecting that of the witnesses who testified on appellant's behalf I can find no misdirection on fact by the Court a quo. Nor am I convinced that it is wrong in its finding on the acceptable evidence as a whole that the version given by accused no 2 and accused no 3 as to the actual killing of the deceased and the appellant's involvement in that killing, is substantially true and that the evidence of the appellant's

wife to the extent that it is inconsistent with those findings, falls to be rejected. As a consequence of the rejection of the appellant's version it follows that the presence of the two small blood stains in the back of the appellant's Mazda lends credence to the version of accused no 2 and accused no 3. As regards extenuating circumstances the appellant's counsel submitted that because accused no 3 was the sole beneficiary in the policy issued for the insured sum of R75 000-00 the appellant was not motivated by greed or gain. I can find nothing on the record which substantiates this submission.

On the contrary, the accepted evidence is that accused no 3 was never a party to the issue of the policy and that he was unaware of the fact that he was named beneficiary in the policy. The appellant persisted in falsely alleging in his evidence that accused no 3 was related to the deceased. Nor was the appellant able to furnish a satisfactory explanation why the policy was in his possession at the time of the deceased's death. There is nothing to suggest that the trial Court's finding of the absence of extenuating circumstances is vitiated by misdirection or irregularity or is one to which no reasonable court could have come. It follows that this Court cannot interfere with the trial Court's finding of the absence of extenuating circumstances.

In regard to the fraud count the State was unable to prove that the apparent signature of the deceased on the proposal form Exhibit "F" was not a genuine signature of the deceased, as appeared from the evidence of Lieutenant Cloete, the handwriting expert, who testified on behalf of the State. On this count the State also relied upon circumstantial evidence and the inherent probabilities of the case. According to Selvanayagie Iyer, the widow of the deceased, she knew only of the one insurance policy in which she was the beneficiary. Although she had no clear idea of the deceased's financial position, she claimed that she and the deceased did not pay its premiums because they could not afford to do so. According to the witness Gobind Mahabir who worked with the deceased at Frametex the deceased was an irregular worker. It is quite apparent from their evidence that the deceased was not a man of means. It was not disputed that all payments into the transmission account were made by the appellant who was at all times in a position to ascertain whether the premiums on the two policies were up to date or not. It is also significant that the appellant handed over to the deceased the policy in which the wife of the deceased was named the beneficiary. As I have already stated, the appellant was unable to

furnish a satisfactory explanation why he retained possession of the policy in which accused no 3 was named the beneficiary. The trial Court accepted the evidence of the widow of the deceased and of the mother of accused no 3 that the latter was in no way related to the deceased. In my judgment the trial Court correctly came to the following conclusion (Vol 7 p 755):

"We are satisfied, therefore, that all the proved facts are consistent with a fraud having been committed and that no other reasonable inference can be drawn from the facts. Likewise we are satisfied that all the proved facts are consistent with accused No 1 having committed that fraud and are inconsistent with any other reasonable inference to the contrary."

The main thrust of the argument of the appellant's counsel in this Court was that the joinder of the appellant and his two co-accused was irregular in terms either of section 155 or section 156 of the Criminal Procedure Act 51 of 1977. According to his argument either all the accused, including the appellant, should have been charged jointly with murder only or the appellant alone should have been charged with murder and fraud as separate counts.

This argument was raised for the first time when the appellant applied for leave to appeal to this Court. At no stage during the course of the trial was it alleged on behalf of the appellant that there was such a misjoinder. No application was made on his behalf or on behalf of accused no 2 and accused no 3 for a separation of trials in terms of section 157(2) of the Criminal Procedure Act 51 of 1977. Nor was application made on behalf of the appellant for an order in terms of section 81(2)(a) of the said Act that he be tried separately in respect of the fraud charge. In the circumstances of the present case I do not consider it necessary to pronounce on the soundness or otherwise of this legal argument concerning the alleged misjoinder for the following reasons:

1. even if there was a misjoinder as alleged no prejudice' has been shown to have resulted therefrom. Nor does it appear that a failure of justice has in fact resulted from such alleged misjoinder or irregularity as to render section 322(1) of the said Act applicable, and

2 the appellant's counsel, correctly in my judgment, conceded that had the appellant been charged jointly with accused no 2 and accused no 3 with murder only, evidence concerning the fraud would have been admissible to establish a motive on the part of the appellant for the perpetration of the murder.

In the result the appeal against the convictions on both counts 1 and 2 is dismissed,

C.P. JOUBERT JA.

VAN HEERDEN JA

BOSHOFF AJA

Concur.