

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

Case No. A242/22

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE:...**29 August 2024**

SIGNATURE:..

In the matter between:

FOX, EDWARD KENNEDY

APPELLANT

And

THE STATE

RESPONDENT

Coram: Neukircher, Millar et Kooverjie JJ

Heard on: 5 August 2024

Delivered: 29 August 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 29 August 2024.

ORDER

It is Ordered:

- [1] The appeal is dismissed.
- [2] The appellant's bail is revoked, and he is ordered to report to the De Deur Police Station within 48 hours of the handing down of this order in order to commence serving the sentence of life imprisonment imposed upon him by the Court *a quo*. If he does not so report, the South African Police Services are directed to forthwith arrest him for that purpose.

JUDGMENT

MILLAR J, (NEUKIRCHER AND KOOVERJIE JJ CONCURRING)

- [1] On 12 December 2016, the appellant was arraigned before the High Court on a single charge of murder. In addition, the State sought, in the event of a conviction, the imposition of a minimum sentence of life imprisonment.¹ The appellant was subsequently, on 22 August 2017, found guilty and thereafter on 2 October 2017 sentenced to life imprisonment. The appellant was granted bail and is presently out on bail.
- [2] On the day that the appellant was sentenced, he applied for leave to appeal against both his conviction and sentence which was refused by the Court *a quo*. Thereafter, on 19 March 2021, leave to appeal to the Full Court of this

¹ In terms of s 52(1) of the Criminal Law Amendment Act 105 of 1997.

Division was granted by the Supreme Court of Appeal against the conviction only.

- [3] The delay in the hearing of the present appeal was in part occasioned in consequence of the need for the record to be reconstructed. After the reconstruction, a question remained as to whether or not the appellant was satisfied with the reconstruction. During the present hearing, Counsel for the appellant confirmed that the appellant was satisfied with the reconstructed record and that the appeal could be decided on such record.
- [4] Save for the evidence of the ballistic expert who testified for the State and the expert for the appellant, the evidence of all the other witnesses that were called was uncontentious. For this reason, I do not intend to deal with the evidence given specifically by each witness. The Court *a quo* set out and evaluated the evidence of each witness that was called in the trial. It is not necessary to repeat this exercise for purposes of the present appeal.
- [5] In the early hours of the morning of 6 November 2014, Ms. Che (Shedodel) Lesley Fox (the deceased), the wife of the appellant, was killed. The appellant and the deceased had been married since 2008. They had married on the day that she turned 21 and had two children together. At the time, the eldest (a girl) was 7 years old and the youngest (a boy) was 3 years old. The appellant worked as a police officer and the deceased in an office.
- [6] According to the appellant, on the evening of 5 November 2014, often referred to as “Guy Fawkes Night”, the family had shared a meal, and the children had gone to bed. The appellant and the deceased had stayed up later watching a soccer match on the television and chatting. They too thereafter had retired

for the night. The doors of the house were locked, and all the windows were closed.

[7] During the early hours of the morning on 6 November 2014, at some time after 02h30, the appellant and deceased had been awoken by a loud noise. They sat up and the deceased had asked the appellant what had made the noise, and he said that he thought it was probably firecrackers. He then heard two further loud noises.

[8] The appellant had then got up out of bed and gone to the lounge window to look outside to see the cause of the noise and whether or not there were any fireworks or smoke from them in the air. He did not see anything, so he went to switch on the light outside the front door, but it did not work (although he recalled that it had been working before, he had retired for the night).

[9] He opened the front door slightly and peered outside. It was very quiet outside. He saw that the driveway gate was slightly ajar and had then gone outside to close it. While outside to close the gate, his dog had come running back into the property. He looked up and down the road and over the walls of his property but saw no-one. While walking back into the house, he noticed that the driver's door of the deceased's car was slightly ajar. He went back into the house to fetch a torch and the car keys so that he could lock it.

[10] On his way back to his bedroom, he heard a sound which he described as "water dripping" and which he thought was coming from the bathroom. When he entered the bedroom and switched on the light, he saw blood dripping from the deceased onto the carpet. He saw a wound on the deceased's forehead and blood coming from it. He went to the deceased and shook her and became overwrought when she did not respond. He immediately went to the safe in his bedroom (where he kept his service pistol) and took the service pistol out of the safe.

- [11] He then called the emergency services and at the same time dressed himself. He ran out of the house and across the road to his neighbour Mr. Venter and also called his colleague, Colonel Van Wyk, who lived nearby. He told them that there had been a shooting at his house.
- [12] Mr. and Mrs. Venter accompanied him back to his house. When they entered, they found the appellant's son standing in his bedroom doorway. Mrs. Venter took his son and put him back to bed and closed the bedroom door and also closed his daughter's bedroom door.
- [13] He thereafter called both his own family as well as the family of the deceased to inform them of what had happened. Mr. Venter kept company with him until Colonel van Wyk arrived which was at approximately 03h00. While they were walking around the property, the appellant noticed two holes in the bedroom window. At some stage, Colonel van Wyk took the appellant's service pistol from him. Thereafter, both his mother and brother arrived as did the paramedics as well as his mother-in-law, brother-in-law and sister-in-law.
- [14] There was an altercation in the house when his mother-in-law and sister-in-law accused him of having killed the deceased. The deceased's mother subsequently testified that the marriage was an unhappy one and that the deceased had told her that she intended to leave the appellant. The appellant testified that while they had been standing in the doorway of the main bedroom, he heard the paramedics tell his brother-in-law, who had apparently picked something up, to drop what he had picked up as it was evidence (although he did not see him pick up anything and did not know what he had picked up).
- [15] It was at this stage that Colonel van Wyk had asked everyone inside the house to go outside. The appellant said that, whilst they were standing

outside, he saw his brother-in-law kick a cartridge which was lying on the ground. He testified that there were three cartridges lying on the ground outside.

[16] When the police arrived, they *inter alia* took a statement from the appellant, took photographs of the scene and conducted gunshot residue tests on the appellant. Once the deceased was removed to the mortuary, the appellant left the house with his children and went to his mother's house.

[17] Some hours later, Captain Blignaut, the South African Police Service Forensic Ballistic Examiner, attended the scene. By the time she attended, the three cartridge cases found outside the main bedroom window had been removed, the deceased had been removed and two bullets (found inside the main bedroom) had also been removed.

[18] Insofar as these three items of evidence were concerned, Captain Blignaut was constrained to conduct her investigation based on her observations at the scene together with the photographs that had been taken earlier of the aforementioned. While investigating the scene, Captain Blignaut also found a third bullet on the floor underneath one of the curtains.

[19] Besides her investigation on the scene, Captain Blignaut had also attended the autopsy of the deceased and given the opportunity to observe and determine both the entrance and exit wounds on the deceased.

[20] In the consideration and evaluation of the evidence of both Captain Blignaut and Mr. De Klerk, a noteworthy feature of the present case is that by the time Captain Blignaut arrived at the scene, some hours after the appellant had left, the crime scene had been cleaned. The appellant testified as follows:

“My Lord like I said earlier on my brother’s ex-wife brought the keys, my house keys and gave it to one of the family members in the house and she told them

that they finished cleaning the house. I do not know who gave them permission. She did not say who gave them permission, she just came and said they finished cleaning the house.”

- [21] There was no evidence before the court in regard to how or why this had occurred. It did however impact upon the investigation of Captain Blignaut who, together with Mr. De Klerk, was constrained to have greater regard to the photographs than they might necessarily have done.
- [22] The gunshot residue testing was of no assistance in the matter by virtue of the fact that the appellant had gone to the safe and retrieved his service pistol. The evidence established that although the appellant had last fired his service pistol at a range in July 2016, gunshot residue could remain on both the pistol and its holster for some time and so the positive findings of gunshot residue on the appellant were inconclusive.
- [23] It is not in dispute that 3 shots were fired or that the deceased was struck by only one. These are incontrovertible facts. It is also incontrovertible that the windows of the main bedroom were closed at the time the deceased was killed and that only two holes were discovered in the window.
- [24] Captain Blignaut testified that in respect of these two holes, each had been caused by a single bullet passing through it. She was able to match the trajectory of two of the bullets which had struck the wall in the bedroom with the holes in the window. For the third shot, she had no hole in the window. She testified that besides the probability of someone being able to fire two shots through precisely the same hole in a window (at night) being so remote as to render it almost impossible. She had attempted to replicate such a feat

in a laboratory setting but had been unable to do so. It was her conclusion and her evidence that only 1 round had passed through each of the two holes and that accordingly, since the windows were all closed, the third round could only have been fired from inside the bedroom.

[25] Additionally, based on her observation of the position of the entrance wound on the deceased and her position on the bed, as demonstrated on the photographs, she concluded that the third shot was fired from within the room and not on the same trajectory as either of the two other shots that had been discharged. It is apposite to mention that although the appellant testified that after hearing the first noise, both he and the deceased sat up. This version was never put to Captain Blignaut.

[26] In my view the evidence of the deceased sitting up also seems to me to have been an afterthought in order to cast doubt upon the evidence of Captain Blignaut regarding her finding that because of the angle at which the fatal shot had entered the head of the deceased, it must have been fired from inside the room. This evidence was presumably tendered in order to change the position of the deceased so as to reconcile the defence of two shots having been fired on the same trajectory through the same hole in the window.

[27] Since the only two persons who were in the room at the time that the deceased was shot and killed were her and the appellant, the ineluctable inference was that it was the appellant who had shot and killed the deceased.

[28] The appellant sought to impugn the evidence of his mother-in-law that the deceased had told her that she had planned on leaving him and that the marriage was over. His evidence was that his mother-in-law had a motive to lie about the marriage because he had previously arrested one of her sons who had been convicted and imprisoned. He also testified that he believed

that the person who may have shot the deceased was someone that had an axe to grind with him because of his work as a police officer. Beyond the bare assertions of the appellant in this regard, there was no further evidence led in this regard.

[29] The appellant tendered the evidence of Mr. De Klerk, to counter that of Captain Blignaut. Mr. De Klerk was also a Ballistic Forensic Examiner in the South African Police Service who had gone into private practice. While Captain Blignaut had the advantage of attending the scene shortly after the death of the deceased and also attended the autopsy, Mr. De Klerk was limited in his evidence and the opinion he was able to give to the photographs taken at the scene as well as the evidence and reconstruction of Captain Blignaut.

[30] By the time Mr. De Klerk had been instructed to attend the scene, the bedroom had been “*already repaired and repainted*”. In other words, the evidence of Mr. De Klerk was predicated entirely on what was available to Captain Blignaut and to her observations and reconstruction.

[31] Mr. De Klerk, in his initial written opinion, found:

*“Due to the damage inside the bedroom (3 x Shots) I must also conclude at this stage with all the information/evidence available to my disposal, I have to agree that a third shot other than the two (2) through the window were fired, from outside (Open window) **and/or** inside the room. Although no other evidence collaborates, proof or disproof of this fact other than the damage against the wall, at this stage **I cannot dispute that the fatal shot was or was not fired from within the room or not.**”* [Mr. De Klerk's emphasis].

[32] He concluded his opinion by stating:

“Please take note that if we cannot find any other collaborating evidence in the complete set of photos of a third shot through the window, we will not be able to dispute a third shot fired inside the room.”

- [33] Mr. De Klerk was cross-examined at some length. Although he testified that there was a possibility that two shots could be fired through the same hole in the window, he later conceded² that there had been three shots, two being single shots fired through the bedroom window from the outside and the third from inside the bedroom. This concession was correctly made.
- [34] Two shots were fired from outside and made two holes through the window. The trajectory of these two bullets was matched to where these bullets were found in the wall of the bedroom. If a third shot was fired from outside and went through one of the two holes that was already there, it was the evidence of Captain Blignaut, and not disputed by Mr. De Klerk, that for a third shot to have gone through one of those holes and leave absolutely no trace, was so improbable as to be impossible.
- [35] However, there is one aspect which was not specifically addressed by either Captain Blignaut or Mr. De Klerk: this was the probability of a third bullet travelling at a different trajectory passing through an existing hole in the window but leaving no trace of having done so. In the former situation, the experts agreed that this was so improbable as to be impossible but in the latter situation, it is as a matter of logic even more so.
- [36] Both Captain Blignaut and Mr. De Klerk were cross-examined at length on whether or not the curtains were open at the time that the shots were fired and about holes that were observed in the curtains. This to my mind was a

² He was asked –*“U moet toegee dat die derde skoot binne in die kamer afgevuur is?”* and answered *“Ja”*. The translation of the question is – *“You must concede that the third shot was fired from within the bedroom?”* and the answer – *“Yes.”*

red herring. Before the bullets fired from outside would have passed through the curtains, if they were closed, they would have had to have passed through the glass of the window and so it is at that point that the determination of whether or not two shots were fired from outside or three shots were fired from outside was to be made.

[37] Before dealing with the court a *quo*'s evaluation of the evidence, it is apposite to mention that at the hearing of this appeal, an application was made for the "*entry of new evidence*" on appeal. The new evidence was a further opinion by Mr. De Klerk obtained some three years after conviction and sentence of the appellant and shortly before the granting of leave by the Supreme Court of Appeal.

[38] Mr. De Klerk, explained the circumstances under which this new evidence came to light as follows:

"I was contacted by Advocate Shapiro and during our consultation on the 3rd of December 2020, was instructed to review the case that I reconstructed in January 2017 of a shooting incident that took place on the 6th of November 2014 at 2[...] T[...] Street Rustervaal. During this meeting I was informed of evidence by Mr Fox (the Accused), during the trail (sic) that he saw one of the State witnesses kick one of the fired cartridge cases found outside the window at the crime scene."

[39] With this information, Mr. De Klerk opined that since one of the cartridge cases had been kicked or moved, that it "would be impossible to determine an accurate firearm position during the shooting of any of the three (3) cartridge cases." He then goes on to say:

"Based on this fact my view is:

That it is possible to fire 2 shots through one hole. Due to the undetermined position of the firearm and/or fired cartridges - I would even call it a simple shot to get 2 shots through 1 hole, where the muzzle of the firearm is held close to the window – I cannot exclude contact, or closed contact.

*Three (3) bullet cores (According to Captain Blignaut statement marked “LAB226749/2014(2)(3) page “3” par “3,3” and “3,4”) were collected from the shooting scene inside the Main bedroom at 2[...] T[...] Street, Rustervaal. According to me these must have been fired bullets and not “Bullet Cores” as indicated. The main reason being that according to all the evidence that was collected at the scene **NO bullet jackets or jacket fragments** could be found at the shooting scene, as well as during the Post-mortem no bullet fragments were found by the Doctor in the wound track as per his statement.*

A bigger concern is that no burnt powder partials (Not even one particle) could be found on any of the clothing of the deceased (According to Captain Blignaut statement marked “LAB226749/2014(2)(3) page “5” par “8.1”)

[40] The test for the admission for new evidence on appeal is that set out in *S v de Jager*³. In order for new evidence to be admitted, it must be demonstrated that:

[40.1] there is a reasonably sufficient explanation which is based on evidence that may be true;

³ 1965 (2) SA 612 (A) at 615A-D.

[40.2] there is a *prima facie* likelihood of the truth of the evidence;

[40.3] the evidence should be materially relevant to the outcome of the trial.

[41] The reference to “*one of the State witnesses*” referred to in para [38] above is erroneous and the instructions to Mr. De Klerk in this regard are simply not correct. The deceased’s brother, whom the appellant in his evidence alleged had kicked the cartridge, was never called as a witness.

[42] Furthermore, this version of the appellant was never put to Captain Blignaut and was never disclosed to Mr. De Klerk prior to his evidence for the defence. Whether or not the appellant understood the significance of this alleged evidence is irrelevant. Leaving aside his background as a policeman, there can be no doubt that the decision to call Mr. De Klerk to testify before the appellant was a deliberate one and the appellant must bear the consequences of this choice.

[43] If it had been disclosed to his counsel it would have been put to Captain Blignaut and Mr. De Klerk would have dealt with it in his evidence. The inference is irresistible that this particular assertion was an afterthought on the part of the appellant. It is the peg upon which he and his counsel have opportunistically sought to hang the argument that the evidence of Captain Blignaut ought not to be accepted, ostensibly on the basis that if one of the cartridges had in fact been moved this was somehow relevant to the position of the gun when it was fired.

[44] The absence of bullet jackets or fragments was dealt with by Mr. De Klerk in his evidence and it was undisputed on the evidence that since the appellant had taken his service pistol in hand, no inference could be drawn from the presence of gunshot residue on his hand. Whether or not there was any gunshot residue on the clothing of the deceased is neither here nor there.

The attempt to rely on the report of Captain Blignaut in this regard is misplaced. There was no forensic test of the presence of gunshot residue on the clothing of the deceased as was done with the hands of the appellant. The conclusion drawn by Captain Blignaut was based upon her observation that *“During the optical examination of the clothing, no burnt or partially burnt propellant residue could be found on the clothing.”*

[45] The proximity of the gun to the window when it was fired was dealt with by both Captain Blignaut and Mr. De Klerk. Both testified that the appearance of the holes in the bedroom window was consistent with each having been caused by a single shot.

[46] In the present matter however, the further opinion of Mr. De Klerk which the appellant seeks admitted, is nothing more than that – a further opinion. It is not based on any facts that were not known to the appellant at the time of the hearing. Mr. De Klerk testified that when he had attended at the scene, the appellant had been present but that he had not consulted with him at all at that time.⁴ His evidence was that when instructed, he did not want to know the version of the appellant as it would make no difference to his opinion. However, he was present during the testimony of Captain Blignaut and heard the appellant’s version when it was put to her.

[47] His new opinion is accordingly of no relevance let alone material relevance to the outcome of the trial. For these reasons, the application for the admission of the so called *“new evidence”* must fail.

[48] In evaluating the evidence before it, the Court *a quo* found that the case was to be adjudicated on the totality of the evidence that was before it and in so

⁴ “Hy was teenwoordig op toneel, maar ek het nie met hom gekonsulteer nie. Ek het nooit met die beskuldige gekonsulteer nie as ek ’n instruksie kry, wil ek nie weet wat beskuldigde se weergawe is nie. As ek eers ’n konsultasie met die advokaat het se ek dit maak nie saak wat die beskuldigde se weergawe is nie, ek bepaal dit so.” The translation is: “He was present on scene, but I did not consult with him. I never consult with the accused when I take my instructions, I do not want to know what the accused version is. I first have a consultation with the advocate but it does not make a difference what the accused’s version is, I determine it.”

doing, was guided in the process by the *dicta* in *R v Blom* ⁵ where, in regard to inferential reasoning, it was held that:

“(1) *The inference sought to be drawn must be consistent with all the proved facts.*

(2) *The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”*

[49] In *R v Mthembu*,⁶ expressed the test for the evaluation of the evidence in a case such as the present as follows:

“I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond reasonable doubt. Otherwise the verdict could not properly be arrived at. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be drawn are not fit material for consideration in a criminal case on the general issue whether guilt has been established beyond reasonable doubt, even though, if the existence of each such fact were to be treated by the test of reasonable doubt, mere probabilities in the Crown’s favour would

⁵ 1939 (AD) 188.

⁶ 1950 (1) SA 670 (A) at 679-680.

have to be excluded from consideration and mere probabilities in favour of the accused would have to be assumed to be certainties. Circumstantial evidence, of course, rests ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work. But the border-line between proof and probability is largely a matter of degree as is the line between proof by a balance of probabilities and proof beyond a reasonable doubt. Just as a number of lines of inference, none of them in itself decisive, may in their total effect lead to a moral certainty (Rex v. de Villiers) (1944, A.D. 493 at p. 508) so, it may fairly be reasoned, a number of probabilities as to the existence of the facts from which inferences are to be drawn may suffice, provided in the result there is no reasonable doubt as to the accused's guilt."

[50] The evidence in the present matter establishes the following facts:

[50.1] the deceased and the accused were alone in their bedroom;

[50.2] the deceased was shot in the head and died as a result;

[50.3] the windows to the bedroom were closed at all material times;

[50.4] three shots were fired, one striking the deceased and two striking the bedroom wall;

[50.5] there were two holes in the bedroom window indicating that two of the shots had been fired from outside;

[50.6] expert evidence established that one of the three shots had been fired from inside the bedroom.

[51] On the basis of the evidence, the Court *a quo*, correctly in my view, reasoned that in the above circumstances the only inference to be drawn from these facts⁷ was that the appellant had fired the fatal shot, and it is for this reason that the appeal must fail.

[52] There is one other aspect which requires comment. While it is accepted that it is the duty of the appellant's legal representatives to act with the utmost care and diligence in pursuing the interests of the appellant, in the present matter counsel for the appellant was unrestrained by any sense of collegiality in casting aspersions upon the honesty, integrity and professionalism of not only the counsel who had represented the appellant at the trial, but the State Counsel and also the Judge *a quo*.

[53] Counsel's intemperate conduct went on to include ill-considered and unnecessary remarks about the conduct of the judge *a quo*'s conduct of the proceedings during the reconstruction of the record, the absence of one of the State Counsel during the reconstruction and continued on to include counsel who appeared for the respondent in this appeal. Such aspersions ought never to have been cast. There is nothing on the record⁸ to suggest that any of the persons who participated in the proceedings conducted themselves in any manner other than one which was fair, professional and consonant with their respective oaths of office.

[54] In the circumstances, I propose the following order:

[54.1] The appeal is dismissed.

⁷ *S v Sigwahla* 1967 (4) SA 566 (A) at 569H.

⁸ *S v Jaipal* 2005 (1) SACR 215 (CC) at para [13].

[54.2] The appellant's bail is revoked, and he is ordered to report to report to the De Deur Police Station within 48 Hours of the handing down of this order in order to commence serving the sentence of life imprisonment imposed upon him by the Court *a quo*. If he does not so report, the South African Police Services are directed to forthwith arrest him for that purpose.

**A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I AGREE AND IT IS SO ORDERED

**B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I AGREE

**H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON:	5 AUGUST 2024.
JUDGMENT DELIVERED ON:	29 AUGUST 2024.

COUNSEL FOR THE APPELLANT:	ADV. P SHAPIRO.
INSTRUCTED BY:	S SHAPIRO ATTORNEYS.
REFERENCE:	MR. S SHAPIRO.

COUNSEL FOR THE RESPONDENT:

INSTRUCTED BY:

REFERENCE:

ADV. PCB LUYT.

THE DIRECTOR OF PUBLIC
PROSECUTIONS – PRETORIA.

10/2/5/1/3-VB5/2021.