REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: A79/2011

In the matter between:

JEROME EARL KING **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT DELIVERED ON 22 AUGUST 2014

GOLIATH, J.:

[1] On 26 October 2010 the appellant, Mr Jerome Earl King, was convicted of murder in the Regional Court Bellville. He was subsequently sentenced to ten years imprisonment on 9 December 2010. The appellant applied for leave to appeal against the conviction and sentence, but the regional magistrate granted leave to appeal against sentence only. On 13 May 2011 Dlodlo, J and Olivier, AJ dismissed the appeal against sentence.

[2] The appellant thereafter proceeded to file an application for condonation in terms of Section 309C of the Criminal Procedure Act 51 of 1977 and for leave to appeal against his conviction, which was dismissed by Samela, J and Henney, J on 12 March 2012. This was followed by an application for leave to appeal the Court's refusal to grant the s 309 C petition, which was dismissed on 13 February 2013. The appellant thereafter applied to the Supreme Court of Appeal that the order of 13 February 2013 be set aside. On 21 May 2013 the Supreme Court of Appeal ordered that leave be granted to the appellant to appeal to the Full Court of this Division against his conviction.

[3] The murder charge arose from an incident which occurred on 8 January 2007 at 01h00 when the appellant, who was officially on duty as a member of the South African Police Force, shot and fatally wounded Benito James, an eighteen year old male. It is common cause that the deceased died as a result of a single gunshot wound to the head.

[4] The appellant and his colleague Constable Quma responded to a complaint of a housebreaking that was taking place at the Bonteheuwel Post Office. The appellant testified that on the fateful day he and Quma arrived at the scene where they immediately apprehended a suspect who was standing at the door. He ordered the suspect to lie down and instructed Quma to guard him while he proceeded towards the Post Office. He observed a small broken window, opened it, and in a bended position looked through it inside the Post Office. He observed a male trying to hide behind the counter at the back of the Post Office. This was the deceased.

[5] The appellant verbally warned the deceased to come out, but he failed to respond. He was bobbing or moving up and down behind the counter. He then proceeded to fire a warning shot into the roof of the Post Office. The deceased still refused to comply. After firing the warning shot he observed another suspect running towards the back of the Post Office, in the direction of the deceased. He kept the deceased under observation and saw that he was still moving behind the counter. He reacted by firing two successive shots in the direction of the deceased, but in an upward direction. The suspect collapsed and he noticed that he was bleeding. He asked Quma to call for an ambulance. He then saw the security guard, Mr Laykers, on his right hand side, who informed him that he had the keys to the premises. He waited for back up and entered the premises with Sergeant Van Der Heever and Mr Laykers. The deceased was lying on the floor surrounded by blood. A knife was found on the deceased.

[6] The State called Constable Quma and the security guard Mr Laykers who were in close proximity to the scene. Constable Quma confirmed that she accompanied the appellant to investigate the housebreaking complaint at the Post Office. On their arrival they apprehended a suspect, and the appellant instructed her to guard him. The suspect was instructed to lie on his stomach on the ground. She was in a standing position and pointed her firearm at the suspect. The appellant proceeded to a broken window and she heard him speak loudly in Afrikaans, which she did not understand. Thereafter she heard three shots. After the shooting incident they waited for the manager and supervisor to arrive, who opened the premises. The suspect she guarded was arrested at the scene and put into a van. She also contacted the ambulance

and later observed the deceased lying on the floor inside the Post Office. She confirmed that a second suspect was also found inside the Post Office.

[7] During cross-examination she explained that she had heard the appellant shout, and then she heard the first shot, and after a minute two successive shots were fired. She confirmed that she was standing on the left front side of the Post Office, where she was pointing her firearm at the suspect while guarding him. She subsequently entered the premises after the shooting incident where she saw the deceased lying on his back on the floor. She confirmed that she saw two suspects inside the Post Office, of which one was subsequently arrested. It is common cause that she did not witness the actual shooting.

[8] Mr Laykers was posted as a security guard inside the Post Office because of the broken window. He testified that he was on duty this particular night after the Post Office was broken into during the weekend. While inside the Post Office he observed four persons outside who subsequently left. He decided to report the incident to the Metro Police. At approximately one o'clock the morning he observed a group of four or five people outside. From his testimony it is evident that he initially switched the lights inside the Post Office off, but later saw it was switched on by the intruders who had returned to the building. According to him two intruders went inside, and two stayed outside.

[9] Laykers testified that he subsequently reported the matter to the police who arrived shortly thereafter. The lights inside the Post Office were on when

the police arrived. The appellant and a female colleague arrived, and the appellant moved towards the broken window. He heard one shot went off. He stated that after the first shot was fired, he saw the female police officer lying flat on her stomach. There was another suspect also lying on his stomach at the same time. Thereafter another shot was fired. At some stage the appellant shouted "*Julle kom uit daar*" and a third shot was fired. The suspects refused to surrender. He informed the appellant not to shoot since he had the keys to the premises. He testified that at the time the second and third shots were fired he observed someone standing on the safe. After the second shot was fired the man fell off the safe. After the shooting he opened the Post Office. The appellant asked him to provide backup and the two of them entered the Post Office, where they found the deceased lying on the floor.

[10] During cross-examination he conceded that he saw the suspects inside the Post Office. He explained that the second and third shots were not fired in quick succession. The appellant first shouted, and a shot was fired. He shouted again and another shot was fired.

[11] The State also called various police officers who were involved in the investigation of the case. Inspector Lombard compiled a photo album and sketch plan of the scene on the day of the incident. He took the photographs of various points pointed out to him by the appellant. He also collected three empty cartridges at the scene. He estimated the distance from the window where the appellant fired the shot, to the safe behind the counter to be approximately fifteen metres. Inspector Smit testified that when he arrived at the scene of the shooting incident on 8 January 2007 he observed one

suspect on the floor, and another injured person. He confiscated the gun of the appellant.

[12] Captain Blumerus is a ballistic expert who attended to the crime scene three days after the incident to do further investigations. He observed two marks in the counter area, and two marks at the top of the safe which, according to him were caused by gunshots. He expressed the view that the trajectory of the shots fired was from the window, through the counter, against the wall above the safe. He also indicated that it appeared to him that the shots were fired from a lower position, aimed at a higher position. He examined the gun of the appellant and confirmed that three shots were fired from his gun, and that the three spent cartridges were fired from the same gun. He took a set of photographs which were handed in as an exhibit.

[13] Captain Joubert, a forensic crime scene investigator, visited the scene of the shooting incident two years later on 21 July 2009. With the assistance of Blumerus he compiled a 3-D presentation of the crime scene indicating the bullet trajectory upwards from the window, through the mesh area on top of the counter, to the wall behind the counter. He expressed the view that the deceased must have been on top of the safe, possibly in a bent position at the time he was shot.

[14] Lieutenant Colonel Johannes Kok re-examined the scene on 21 July 2009. He also concluded that the deceased must have been on top of the safe when he was shot. He indicated that the deceased could not have been standing on the floor since the bullet trajectory is higher than the height of the

deceased. He based his opinion on photos of the incident presented to him two years after the incident.

[15] The regional magistrate evaluated the evidence and found that the key witness, Mr Laykers, made a good impression as a single witness, and was credible and reliable regarding his version of events. Furthermore, that on the probabilities, his evidence was supported by the police witnesses. The court rejected the version of the appellant as improbable, and found that the appellant should be convicted of murder on his own version. From the judgment it is apparent that the appellant was found guilty of murder on the basis of *dolus eventualis*.

[16] The appellant attacks the conviction on the basis that the evidence does not sustain a conviction of murder. It is contended that the regional magistrate misdirected himself as to the relevant elements to establish *dolus eventualis*. Furthermore, that the evidence of Mr Laykers, who was a single witness should have been treated with the utmost caution. The regional magistrate erred in accepting it uncritically. The State on the other hand contends that the conviction is in order and that the elements of *dolus eventualis* had been complied with.

[17] It is trite that in determining the guilt or innocence of an accused all the evidence must be taken into account. The court must assess whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance “weighs” so heavily in favour of the State as to

exclude any reasonable doubt about the accused's guilt (**S v Chabalala** 2003 (1) SACR 134 (SCA) para 15; **S v M** 2006 (1) SACR 135 (SCA) para 189).

[18] In my view there are four issues that required careful consideration by the regional magistrate. The first is the position of Laykers at the time of the shooting. He indicated that he came running from someone's front yard when he heard the first shot. He testified that after the first shot was fired he observed Quma and a suspect lying on the floor. This evidence is contradicted by Quma who stated that she was standing at all times, whilst pointing a firearm at the suspect who was lying on the floor.

[19] Laykers indicated that he was on the corner of the Post Office when the second shot went off. This was the only time he could see through the window. In his evidence in chief he stated that after the second shot was fired the man fell of the safe. There appears to be a contradiction in his version since it would not have been possible to be on the corner near the window of the Post Office and see the deceased at that stage. He indicated that there was a wall on the corner, which meant that he could not see inside the building when the second shot was fired. He testified that he was next to the appellant when the third shot was fired. It appears that the version of Laykers is that he saw the deceased fall after the second shot, which was the only time he looked through the window. However, he also indicated that he was next to the appellant on the left side of the Post Office next to the window when the third shot was fired.

[20] When asked if he could see where the appellant was aiming his firearm he stated "*I didn't concentrate which shot went where*" and *"my mind wasn't even there, at that time".* It appears that when the second shot was fired, he was on the corner at the wall and could not see inside the building. He was only next to the appellant when the third shot was fired. However, if he was on the corner at the time the second shot was fired, it is unlikely that he actually saw the deceased on the safe at the time.

[21] The sequence of the verbal warning(s) and shots fired by the appellant is the second aspect which required careful consideration of the Magistrate. During cross-examination he states that "*after the first shot, then the accused said, like he was shouting to the inside of the Post Office, you must come out there*". However, during cross-examination Laykers stated that a verbal warning was given to the persons inside after the first shot was fired. In response to a question from the court he repeats the statement that the warning was given after the first shot was fired. However, during his evidence in chief he clearly stated that:

> *"the shot went off, and then there was another shot after that, went off, but then the accused started shouting from the outside to the inside "julle kom uit daar, kom uit" and then another shot went off (p 107 line 5-10)".*

Quma on the other hand, testified that the appellant shouted loudly in Afrikaans before the first shot was fired. It is therefore evident that Laykers initially testified that a warning was issued only after two shots had been fired and thereafter changed his version.

[22] Laykers did not dispute that he stated the following in a statement he made shortly after the incident: *"die beampte het toe hard en duidelik na binne geskree, staan vas en kom uit, hande in die lug. Die beampte het die woorde 'n paar keer herhaal".* However, he indicated that the above warning was issued after the first shot was fired. The testimony of Laykers in court regarding the verbal warning does not correspond with parts of his written statement which refers to repeated warnings. His version also contradicts Quma's evidence that the appellant spoke loudly to the suspects inside the building before the first warning shot was fired. In any event, Laykers is not consistent and contradicts himself by first stating that the verbal warning was issued after the first two shots and thereafter changing his version to state that the warning was issued after the first shot was fired. The court should therefore have exercised great caution in assessing his evidence on this aspect. In response to a question as to whether the second and third shots were fired in quick succession, he confirmed that the appellant verbally directed the suspect to come out, fired the second shot, issued another warning and fired a third shot. This is in line with the statement which refers to various warnings that was issued.

[23] The third aspect that required careful consideration was the evidence relating to the position of the deceased at the time of the shooting. The court concluded that the appellant must have seen the deceased on top of the safe, and deliberately directed the shot at the deceased. The appellant himself never testified that he saw the deceased on top of the safe, but conceded that it could have been possible that he was on top of the safe.

[24] Laykers testified that he saw the deceased fall from the safe after the second shot at the time when he was still on the corner. Laykers indicated that the deceased fell after the second shot, but he joined the appellant at the window when the third shot was fired. He also estimated that the safe was quite near the window, at approximately one metre, contrary to the fifteen meters estimate of Inspector Lombard. Considering the configuration of the counter it is questionable whether Laykers or the appellant had an unobscured view of the safe from where they were standing at the window at the time of the incident. An examination of the scene shows that the Post Office counter had small openings and windows covered with burglar bars. The safe was behind one of the burglar barred windows, hence it cannot be said that Laykers or the appellant had a clear view of the safe.

[25] Taking into account the configuration of the counter, the fact that the safe was behind the counter and the circumstances prevailing at the time it is indeed plausible that the appellant did not see the deceased on top of the safe. The appellant testified that he saw movement behind the counter and this prompted his reaction to fire warning shots when the suspect refused to surrender. The evidence of the police witnesses placing the deceased on top of the safe is purely based on speculation due to the bullet trajectory, assumptions based on the height of the deceased and possible blood that was never analysed. Based on the unreliable evidence of Laykers who is a single witness, it cannot be found beyond reasonable doubt that the deceased was in fact on top of the safe.

[26] Considering the unsatisfactory features in the evidence of Mr Laykers it is clear that the court a quo erred in accepting his evidence as credible and reliable in all material respects. Furthermore, the refusal of the magistrate to admit the written statement of Laykers on spurious grounds created fertile ground for prejudice to the appellant. The magistrate ruled that it was not necessary to hand in the statement and consequently found the evidence of Laykers to be credible and reliable. Had the court a quo followed a proper approach in respect of the admissibility of the statement, it could have altered the court's view regarding the credibility findings relating to Mr Laykers.

[27] The final and most important aspect to be considered is whether the appellant acted with *dolus eventualus* when he caused the death of the deceased. The test for *dolus eventualis* is twofold namely:

(i) whether the appellant subjectively foresaw the possibility of the deceased being killed by one of the bullets.

(ii) reconciled himself with that possibility.

(See: **S v Sigwahla** 1967 (4) SA 566 (A) at 570 B-E; **S v Humphreys** 2013 (2) SACR 1 (SCA) at 8 a-b).

[28] The test for intention is subjective and not objective. (**S v Van Wyk** 1992 (1) SACR 147 (Nm) at 161 a-b). The fundamental question is not whether the appellant foresaw that the consequences would possibly follow, but whether in actual fact he reconciled himself with the possibility that it would follow. The enquiry is therefore whether, in view of the circumstances of the case, there is any reason to conclude that the appellant did in fact subjectively foresee the possibility that his actions would result in the death of

the deceased, and nevertheless reconciled himself with such possibility. (**S v Dube** 1972 (4) SA 515 at 520 G-H**; S v Nhlapo** 1981 (2) SA 744 at 750 H – 751 C**; S v Shaik and Others** 1983 (4) SA 57 at 62 A-B; **S v Makgatho** 2013 (2) SACR 13 at para 10; 11). The subjective foresight, like any other factual issue, may be proved by inferential reasoning. (**S v Van Wyk** (supra) at 164 d-h; **S v Sigwahla** (supra) at 570 E; **S v Humphreys** (supra) at para 13).

[29] Counsel for the appellant correctly pointed out that the Magistrate overlooked the critical second element of *dolus eventualis*, namely reconciliation with the foreseen possibility. The Magistrate consequently failed to conduct an enquiry into the existence of this element. The second element is sometimes described as "recklessness" such as in this particular case where three shots were fired by the appellant. However, in **S v Humphreys** (supra) at para 17 the Court stated that this is not what the second element entail but rather:

> *"whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible [consequences] he subjectively foresaw would not actually occur, the second element of dolus eventualis would not have been established".*

[30] The appellant and Quma were called to a notoriously dangerous area after a report was made by Laykers of criminal activity at the Bonteheuwel Post Office. Laykers testified that he observed four to five suspects inside the Post Office and reported same to the police. The appellant and Quma were merely responding to the call in the execution of their duties as police officers.

The evidence of Laykers and Quma clearly establish that the appellant was on high alert when he arrived at the scene. One suspect was immediately apprehended and held under guard by Quma. The appellant was focussing on the movement of other suspects, while his colleague was guarding another. Appellant himself immediately drew his firearm and approached the broken window, whilst pointing his gun inside the premises.

[31] On appellant's version he saw movement behind the counter, which is partially obscured by windows covered with mesh or burglar bars. He fired a warning shot to no avail. The suspect continued to move and still refused to surrender. He then fired two more shots. The trajectory of the bullets in an upward position from the window to the wall is not in dispute. The appellant testified that he did not see the deceased on top of the safe, and considered it safe to fire the shots in an upward direction towards the roof.

[32] Taking into account the circumstances of this case, where the appellant was faced with an unknown number of suspects, one under guard by his colleague; a moving scene where one suspect is seen inside the building, followed by a second suspect; a failure to respond to verbal warnings and a refusal to surrender after the first warning shot, it cannot in my opinion, be found beyond reasonable doubt that the appellant fired the second and third shots with the intention to kill the deceased. He was on high alert, concerned about his colleagues safety, as well as his own due to the uncertainty as to what was transpiring inside, and whether the suspects were armed or not. This case is clearly distinguishable from **S v Makgatho**, (supra)

where the accused discharged his firearm twice in a tavern where there had been a number of people present.

[33] In this case the appellant was merely performing his duty as a police officer and attended a crime scene in a notoriously dangerous area. According to the appellant the purpose of firing the shots in an upward direction was to warn the suspects, and avoid the possibility of harming someone inside the Post Office. He acted reasonably in his attempt to apprehend suspects who had unlawfully broken into the Post Office. In my view there is a reasonable possibility that the appellant did not subjectively foresee that a suspect would be killed as a result of the precautionary measures he took when firing the warning shots in an upward direction. It also cannot be found beyond reasonable doubt that the appellant subjectively accepted that by taking those precautionary measures when firing the warning shots, that the deceased would be fatally wounded in the process. The requirements for *dolus eventualis* were clearly not established. The onus is on the State to prove all the material elements of an offence beyond a reasonable doubt. In the circumstances I am satisfied that the State had failed to prove its case against the appellant.

[34] In the result I propose that the following order be made:

(1) The appeal against appellant's conviction succeeds.
(2) The conviction on the charge of murder and the resultant sentence are set aside.
(3) The orders of the regional magistrate are set aside and substituted with the following order:

“The accused is found not guilty and discharged.”

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GOLIATH, J
Judge of the High Court

I agree.

_____

MANTAME, J
Judge of the High Court

I agree. It is so ordered:

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BLIGNAULT, J
Judge of the High Court

CORAM:	Justice A P Blignault, Justice P L Goliath *et* Justice B P Mantame
Counsel for the Appellant:	Adv Norman Arendse [SC] & Adv Penelope Magona

Instructed by:	State Attorney: Mr M Mhlana
Counsel for the State:	Adv Pulane A Thaiteng
Date of Full Bench Appeal:	31 July 2014
Date of Judgment:	22 August 2014