REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 46/2017

In the matter between:

SUSANNE HOFF **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Hoff v S* (CA 46/2017) [2018] NAHCMD 366 (31 October 2018)

Coram: ANGULA DJP *et* OOSTHUIZEN J
Heard: **6 July 2018**
Order delivered: **31 October 2018**
Judgment released: **16 November 2018**

Flynote: The court a quo erred in its approach to mutual destructive versions and standard of proof required for a verdict of guilty for a criminal offence.

Summary: Appellant was charged with an offence in terms of section 18(2)*(a)* of the Riotous Assemblies Act, Act 17 of 1957 (conspiracy to commit murder) – Appellant was found guilty of attempted murder.

Held, 'No onus rests on the accused to convince the Court of the truth of any explanation which he gives. If he gives any explanation, even if that explanation is

improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal'.

'The Court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true'.

(*R v Difford* 1937 AD 370 at 373 and *R v M* 1946 AD 1023 at 1027)

Held, in *S v H N* 2010 (2) NR 429 HC, paragraphs (113) and (114), Liebenberg, J approached the evidence where conflicting versions presented itself by keeping in mind the *adagium* in *Difford* and *R v M* and guarding against compartmentalization of the evidence. He stated that the court must measure the totality of the evidence, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the State's case excludes any reasonable doubt about the accused guilt.

Held, after appreciating the tests to be applied when confronted with mutually destructive versions and the standard of proof in criminal cases, it is perhaps apposite to summarize with a metaphor borrowed from the Namibian Coat of Arms. All the evidence requires a Fish Eagle's (trial officer's) piercing overview of the evidential panorama in order to establish guilt or innocence. It is not enough for a Court to be satisfied that the defence version is improbable. The court must be satisfied that the defence version is beyond reasonable doubt false.

Held, the Court *a quo* erred and misdirected itself in finding that the probabilities weigh in favour of the State and rejecting appellant's version as false and not probable.

ORDER

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1. The appellant's appeal against the conviction is upheld.

2. The respondent's (counter) appeal is dismissed.

3. Respondent shall restore and return the appellant's two cellphones and the amount of N$5 000 within three days of the release of the judgment.

4. The judgment will be release within 10 days of this order.

JUDGMENT

ANGULA DJP *et* OOSTHUIZEN J

Historic background

[1] Appellant, Susanne Hoff, was the accused *a quo*. Respondent, the State, was the prosecuting authority *a quo*.

[2] Appellant was charged with a contravention of section 18(2)*(a)* of the Riotous Assemblies Act, Act No. 17 of 1957 in that she wrongfully and unlawfully conspired with one Malima and/or Haiduwa and/or Shipepe to murder her husband Egbert Eugen Hoff between 17 and 30 November 2011 at or near Windhoek.

[3] Appellant was arrested on 30 November 2011.

[4] Appellant launched a bail application on 20 December 2011, which was unsuccessful.

[5] The High Court on appeal granted bail to appellant during April 2012.

[6] On 9 June 2014 the trial commenced. It was partly heard and postponed to 23 March 2015 for continuation.

[7] During October 2014 the case docket was allegedly stolen. It was tendered to appellant for money. Appellant refused to buy the docket and reported the incident to the investigating officer.

[8] On 23 March 2015, the Regional Court was informed by the investigating officer. Appellant supplied a full copy of the case docket discovered to her to the prosecutor.

[9] The case was further postponed to 8 May 2015.

[10] On 23 May 2015 the case was again called and postponed for the docket to be reconstructed and for the case to start *de novo* before another Regional Magistrate on 7 March 2016.

[11] On 7 March 2016, the trial of the appellant started *de novo* before Regional Magistrate Diergaardt (Ms).

[12] On 11 March 2016, continuation of the trial was postponed to 27 April 2016. On 29 April 2016 the case was postponed for continuation on 6 June 2016. On 6 June 2016 the State's case was closed (without calling the investigating officer Nghinanundova).

[13] From 27 July 2016 to 29 July 2016 the appellant's case was presented, and then closed.

[14] Submissions were made on 14 December 2016.

[15] On 23 February 2017, the appellant was found not guilty as charged, but guilty of attempted murder (which is only competent on a charge of murder).

[16] On 31 March 2017, the appellant filed a notice of appeal against her conviction.

[17] During April 2017, the respondent appealed the finding of guilty on attempted murder as incompetent and said the appellant should have been found guilty of an

attempt to conspire to murder her husband. Respondent crossed-appealed against the sentence. Respondent was subsequently granted leave to appeal by the High Court (by a single Judge).

[18] The full appeal was heard on 6 July 2018.

Brief factual background

[19] Prior to appellant's arrest and during the trial in the court *a quo*, appellant was married to the first State witness, Egbert Hoff.

[20] She suspected him of selling her horses without her knowledge or consent. Appellant conveyed her suspicion to her counsel during consultations prior to her arrest. She consulted counsel in order to have particulars of claim in divorce proceedings prepared.

[21] Appellant also instructed her counsel concerning a serious assault perpetrated against her by her husband during 2010.

[22] Appellant denied the charge against her, although she admitted that she paid money to Malima and Shipepe who accused her of the conspiracy to kill her husband. The appellant’s version was that she advanced money to them to enable them to pay a deposit on a simulated horse sale transaction which she intended the two State witnesses to conclude with her husband. She wanted to secure proof or evidence of her husband’s wrongdoing and confirmation of her suspicion.

[23] Malima and Shipepe denied that there was such a thing as a planned simulated horse sale transaction with the appellant’s husband. Their version was that Appellant wanted them to kill her husband and gratuitously gave them N$12 000 to do what they please with over and above the agreed remuneration of N$25 000 as a reward for killing her husband.

[24] It is common cause that Malima and Shipepe appropriated the sum of N$12 000 they received form the Appellant.

Proceedings before the Regional Court

[25] The State called six witnesses. They were Egbert Hoff, Frans Nakangombe (a Police Officer present during the arrest), Fanuel Haiduwa (a business acquaintance of appellant), Sakaria Amakali (the Commanding Officer of Nakangombe, who arrested appellant), Jekonia Shipepe and Wilbard Malima.

[26] Appellant testified herself, called Adv van der Westhuizen (who consulted her during November 2011 on the divorce action she intended to institute and prior to appellant's arrest) and Christian Bauer.

[27] Nakangombe, Shipepe and Malima were in the appellant's Golf vehicle with her prior to her arrest on 30 November 2011. Amakali orchestrated the aforesaid meeting and observed same before making the arrest. Haiduwa made a statement to Amakali on 5 December 2011 after he was kept behind a locked door for 7 hours at the Police Station. The Investigating Officer, Nghinanundova, fetched Haiduwa from his house and told him that he was arrested because of his involvement in a plan to kill the appellant's husband. When he made his statement he had already spoken to Malima and had read a newspaper article about the arrest of appellant. Haiduwa was treated as a suspect by the investigating officer and Amakali therefore his statement and evidence required common sense circumspection.

[28] In the judgement of the court a quo the evidence was summarised, the learned Magistrate was alive to the requirements of the applicable legal principles and proceeded to make findings which led to her conclusion that the probabilities weighed in favour of the State and rejected the appellant's version as false and not probable. Consequently, she found the appellant guilty of attempted murder.

[29] Appellant's notice of appeal against the guilty verdict was filed and subsequently the State applied for leave to appeal. Vide paragraphs (16) and (17) above.

[30] It is trite law that a court of appeal shall only interfere on appeal if the court *a quo* made demonstrable errors in finding the appellant guilty and imposed a sentence which is shockingly inappropriate.

Appellant's relevant grounds of appeal

The following constitute the Appellant’s grounds of appeal:

[31] The Court *a quo* erred in finding that the offence of attempted murder is a competent verdict on a charge of conspiracy to commit murder.

[32] The Court *a quo* erred in finding that the respondent had proved the guilt of the appellant beyond reasonable doubt in respect of an offence for which she was not charged.

[33] The Court *a quo* erred in finding that the evidence of the State witnesses was not of such a poor nature and the contradictions not so material for the court to reject the evidence in *toto*, thus attaching insufficient weight to the glaring inconsistencies in the evidence of the State witnesses, in particular, but not limited to the police officers who testified on behalf of the respondent.

[34] The Court *a quo* erred in fact or in law, and misdirected itself by finding that:

34.1 the appellant’s version was false and not probable, without attaching any weight to her explanations, the consistency of her evidence, the absence of proper motive, and the legal principles governing the evaluation of an accused’s evidence (in the light of mutually destructive versions) in the circumstances;

34.2 there was no reasonable possibility that the appellant’s evidence might be true, without providing proper reasons therefor.

[35] The Court *a quo* erred in fact or in law and misdirected herself by failing to meaningfully evaluate the mutually destructive versions of the witnesses, and failing to meaningfully apply her mind to the material discrepancies and/or improbabilities in the evidence of the State witnesses, and more specifically (but not limited to) the following:

35.1 Sergeant Nakangombe testified that he was aware since 16 December 2011 (through the Investigating Officer) that a recording device (allegedly used to record the appellant without her knowledge, and which was never introduced as an exhibit) did not record the conversation, yet the Investigating Officer, Sergeant Nghinamundova, testified during the bail proceedings on 20 December 2011 that he had in fact listened to a cellphone recording in which the appellant (in the Afrikaans language) was desperate to have her husband killed.

35.2 Sergeant Nghinamundova, the investigating officer, never testified at the trial of the appellant.

35.3 The appellant's case was postponed no less than 4 times, each time with the excuse that expert or other evidence relating to the recording device was not finalized.

35.4 Chief Inspector Amakali (the arresting officer) testified that as part of his investigation of the accused, and after being tipped off by Malima (through Shipepe) he personally drove to the appellant's premises in Trift Street, Windhoek on 30 November 2011 where he saw the appellant's white Toyota bakkie parked in the driveway. However, Christian Bauer, a witness for the appellant (who was not cross examined) testified that the vehicle was towed in for repairs on 28 November 2011 and did not leave his workshop until 6 December 2011.

35.5 Chief Inspector Amakali did not follow the proper chain of custody with regard to the booking and collection of evidence for purposes of the trial. This was ignored, alternatively not taken into consideration by the learned magistrate.

35.6 Sergeant Nakangombe and Chief Inspector Amakali also tendered exactly the same evidence regarding what the accused allegedly said on the date of her arrest over the loudspeaker of Malima's phone (and different to that testified by Malima and Shipepe (the alleged co-

conspirators)), when neither of these police officers' statements, made in December 2011, made any reference to anything said by the appellant over the loudspeaker at any time. These police officers together raised this evidence for the first time at the hearing.

35.7 Malima testified that his language of communication with the appellant was Afrikaans and that his text message communication with the appellant was always only ever about killing her husband. He testified that because he cannot read or write English or Afrikaans he was, at all material times, assisted by anyone around him who could respond in Afrikaans to the appellant's text message communication (regarding the killing of her husband) on his behalf.

35.8 Appellant allegedly approached Malima and Shipepe to kill her husband yet there was no evidence that the parties discussed how Mr Hoff should be killed, or that the appellant instructed them to kill him in any particular way. There was also no evidence that the appellant gave Malima and Shipepe a murder weapon or that she suggested or instructed what weapon they should use in committing the act.

35.9 The Court *a quo* erred and misdirected itself by finding that Fanuel Haiduwa had no reason to make up a lie and incriminate the accused person when the uncontested evidence was that he was detained for 7 hours in the serious crime unit and felt intimidated by the police before his statement was taken.

35.10 The Court *a quo* erred by finding that (as part of her reasons for a finding of guilt) that Malima and Shipepe knew about the tyres on the farm before they were taken to the farm, which never formed part of the evidence.

35.11 The court *a quo* erred by finding that Malima and Shipepe effectively did not appropriate the N$10 000 and in any event could have taken that money and disappeared without risk that appellant would find them. The evidence was not before the court.

35.12 The Court *a quo* erred and misdirected itself by ruling that the evidence of the State witnesses was sufficiently credible to prove, beyond reasonable doubt, the offence of an attempted murder, or any other offence, against the appellant.

35.13 The Court *a quo* erred in rejecting the appellant's version especially in light of the finding that she was dealing with mutually destructive versions.

35.14 The Court *a quo* erred, and misdirected itself in accepting evidence of Mr Egbert Eugene Hoff relating to the procedure for sale of horses, which was not tendered by him.

35.15 The Court *a quo* erred and misdirected itself by not attaching any weight to the evidence that the missing or stolen docket was presented to and refused by appellant and the appellant reported it and assisted in reconstructing the record. It was not considered at all by the Magistrate.

[36] We reproduced the grounds of appeal almost verbatim in order to place our assessment of the court *a quo's* approach to the evidence into perspective.

The State's (Respondent's) grounds of appeal in the cross- appeal

[37] The State and appellant are *ad idem* that the court *a quo* was wrong in finding the Appellant guilty of attempted murder and if Appellant was guilty, she should have been found guilty of an attempt to conspire to commit murder in terms of the applicable legislation.

[38] The State has sought to rectify the guilty verdict and insisted that the sentence was too lenient and ought to be replaced with a custodial and more severe sentence.

[39] Due to the view we hold, it is not necessary to discuss the grounds of appeal of the State in more detail.

Applicable legal principles

[40] In *R v Difford*[1] it was explained how courts should approach evidence before it in respect of guilt or innocence of an accused. The court stated:

'No onus rests on the accused to convince the Court of the truth of any explanation which he gives. If he gives any explanation, even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

The Court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.'

[41] In criminal trial matters the versions of the prosecution and the defence are more often than not, mutually destructive.

[42] In *S v HN*[2], Liebenberg, J outlined the approach to evidence where conflicting versions presented itself by keeping in mind the *adagium* in *Difford* and *R v M* and guarding against compartmentalization of the evidence. He stated that the court must measure the totality of the evidence, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the State's case excludes any reasonable doubt about the accused guilt.

[43] After appreciating the approach to be followed when a court is confronted with mutually destructive versions and the standard of proof in criminal cases, it is perhaps apposite to summarize with a metaphor borrowed from the Namibian Coat of Arms. All the evidence requires a Fish Eagle's (trial magistrate or judge) piercing overview of the evidential panorama in order to establish guilt or innocence. It is not

[1] 1937 AD 370 at 373 and *R v M* 1946 AD 1023 at 1027.
[2] 2010 (2) NR 429 HC, paragraphs [113] and [114].

enough for a Court to be satisfied that the defence version is improbable. The court must be satisfied that the defence version is beyond reasonable doubt false.

Reasoning of this court

[44] Applying the above legal principles and after careful review of the record, we find that there is merit in the appellant's grounds of appeal. We shall elaborate and expound thereon.

[45] At the outset it need to be recorded that three pieces of evidence which could have been regarded as critical and objective, were not presented by the prosecution for want of proper treatment, preservation and severe negligence or because it did not exist at all (contrary to the prosecution's evidence). The three pieces of evidence which are absent is the transcription of the cellphone recording (according to the investigating officer), the recording of what appellant has allegedly said just prior to her arrest and the text messages between her and Malima which could easily have been captured from appellant's cell-phone which was at all material times under the custody of Chief Inspector Amakali. Neither was the trial court told why the text messages was not retrieved from Malima's phone.

[46] Sergeant Nakangombe of the serious Crime Unit testified that he was with the appellant, Malima and Shipepe in appellant's Citi Golf vehicle when appellant paid N$5 000to Malima just before appellant's arrest. He sat behind the appellant. Shipepe sat next to him and Malima in front in the passenger seat. He did not offer an explanation why the he gave the recording device (a pen) to Malima (after receiving it from Amakali). He testified that Malima spoke in English during the entire conversation with appellant. His written statement of December 2011 did not mention that the words ‘kill’ and ‘killing’ were used by appellant and Malima. That was only testified during 2016 by him. He did not mention the recording device (a pen) in his 2011 statement. Only during the 2016 cross-examination was it mentioned. He testified that the investigation officer, Detective Sergeant Nghinanundova informed him (on or before16 December 2011) that the recording pen did not record the conversation.

[47] Detective Sergeant Nghinanundova testified on 20 December 2011 during the bail proceedings that he listen to the cellphone recording in Afrikaans and according to recording the appellant was desperate to have her husband killed. Nghinanundova during 2012 and 2013 proceedings used the alleged transcription of the recording as a reason to secure postponements. In other words he was waiting for the recording to be transcribed. During March 2013 he informed the court that the Afrikaans recording was still to be translated in to English. Nghinanundova was not called to testify at the trial during 2016. Consequently, the trial court was not informed what happened to the cellphone recording and why none of the alleged crucial text messages were not retrieved from the respective cellphones. He could also have shed more light on the pen recording. After all, he was the investigating officer.

[48] Chief Inspector Amakali testified that he received information from Shipepe and Malima which prompted him to take preventative action and subsequently arranged the entrapment of appellant. In preparation he allegedly received a recording pen from Chief Inspector de Klerk (who was also not called to testify). On the day of the arrest he gave the recording pen to Nakangombe (who was instructed to join Malima and Shipepe in the vehicle of appellant when she arrived at the rendezvous). He testified that he received the recording pen back from Malima and allegedly hand it back to de Klerk. This recording pen evidence only surfaced during cross-examination. He was silent about whether he ever gave it to the investigating officer, or whether he ever attempted to listen to the recording and whether he at all treated this device as an important exhibit and followed any procedure to protect this ostensibly valuable evidential material. The hearsay explanation of what de Klerk told him about the fate of the recording (only in 2016 a week before the trail), is obviously inadmissible. Nakangombe testified that Amakali told him shortly after the operation on 30 November 2011 that the device did not record. Amakali and Nakangombe are the only two witnesses during the trial who testified that they heard Malima talking with appellant about killing of her husband over the phone. It was not contained in their written statements and neither confirmed by Malima. Amakali also testified about the whereabouts of appellant's white double cab bakkie on 28 November 2011, an allegation successfully refuted by the appellant and her witness, Christian Bauer.

[49] We want to make it clear that for purposes of this judgement we do not consider it necessary to detail all the evidence tendered in their totality. We only point out how the court a quo erred and misdirected itself in some crucial respects. In our view these errors and misdirections have a definitive bearing on the outcome of the trial and the eventual conviction of the appellant.

[50] Shipepe and Malima corroborated each other in their evidence and testified that there was never a discussion with appellant about a simulated horse sale deal. They insisted that discussion was only about the killing of her husband. They testified that the N$12 000 they received from the appellant on the Monday before the 30th of November 2011, was to speed up the killing of the husband and that they were free to spend the money as they wished, which they did. They testified that the agreement was that they would be paid N$25 000 as a reward for killing the appellant's husband. Neither of them testified about the phone call to arrange the meeting with appellant on 30 November 2011, being on loudspeaker or being recorded. In the end both of them testified that the N$5 000, Malima received just prior to appellant's arrest was arranged with appellant to be a down payment on the agreed amount to kill the husband. They testified that the appellant wanted proof of the killing, being the key to the house on the farm, his cellphone and his purse.

[51] Appellant testified that she suspected that her husband was selling horses of the horse stud on the farm behind her back. She met Malima through Haiduwa because she was interested in someone who could assist her with informal debt collection. Malima was willing but wanted to start with the debt collection work sooner as proposed by her, and was quite insistent. She then proposed to Malima that he could assist with trapping her husband in the act of selling their horses, but that she would need proof of such a sale transaction, such as an invoice (which would be the key to the transaction). Through Malima she met Shipepe. She showed them the farm and explained to them how to approach her husband. She paid two amounts to them before paying them N$10 000 on the Monday preceding her arrest. The amount of N$ 10 000 was meant to serve as a deposit on the simulated horse sale transaction to be concluded with her husband. She agreed with Malima to pay him N$2 500 for the simulated horse transaction, which on Malima's insistence became N$5 000.

[52] Van der Westhuizen's evidence for the appellant was not summarised correctly nor applied correctly. The Court *a quo* omitted to take into account that Van der Westhuizen testified that it made perfect sense to her that appellant was trying to obtain proof that her husband was selling of their horses, behind her back. Van der Westhuizen testified that she advised the appellant that it was not enough that she thought her husband was selling the horses; that it might not be sufficient.

[53] The court *a quo*, without evidence to that effect, took into account that Mr Hoff knew who normally approach them to purchase horses. The court then made a finding that it did not make sense for appellant to send unknown people with no knowledge of horses to conclude a horse sale transaction with her husband.

[54] In our view court *a quo's* reasoning about Malima and Shipepe's motive to go to police instead of disappearing with the money, does equally not exclude the possibility advanced by appellant that they went to the police to prevent appellant from charging them with theft or misappropriation of the money which was meant for the horse sale transaction. In our view, the court *a quo* erred in this respect in finding that Malima and Shipepe's version was more probable than the appellant's version.

[55] In our view the court *a quo* erred in finding that the amount of N$5 000 was the final payment for the project of killing the appellant's husband against the evidence by the State that N$25 000 was agreed for the project.

[56] We are also of the view that the court *a quo* did not consider or did not give sufficient weight to the common cause facts that the appellant was approached to buy the original case docket and that she refused the offer and that instead she reported the incident to the investigating officer and subsequently assisted the prosecution in the restructuring of the case docket. In our view this constituted a relevant consideration which ought to have been taken in favour of the appellant.

[57] Taking all the relevant facts into account we have arrived at the conclusion that the court *a quo* did not live up and has failed properly to apply the legal principles referred to ealier in the judgment.

[58] In the result, our finding is that the court *a quo* seriously misdirected itself on crucial areas of the evidence and on its application of the law to the facts. The court therefore erred in finding that the probabilities weigh in favour of the State and in rejecting the appellant's version as being false and not probable.

[59] Our conclusion is that had the court a quo properly evaluated the evidence before it and further properly applied the legal principles with regard to mutually destructive versions, it would have arrived at the conclusion that the appellant's version was reasonable possible true.

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

1. The appellant's appeal against the conviction is upheld.

2. The respondent's (counter) appeal is dismissed.

3. Respondent shall restore and return the appellant's two cellphones and the amount of N$5 000 within three days of the release of the judgment.

4. The judgment will be release within 10 days of this order.

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H Angula

Deputy-Judge President

_____

G H Oosthuizen

Judge

APPEARANCES:

APPELLANT:	E SCHIMMING-CHASE SC (with her K KLAZEN) Instructed by Ellis Shilengudwa Inc., Windhoek
RESPONDENT:	M OLIVIER Of Office of the Prosecutor General, Windhoek