THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 871/13

In the matter between:

SIYABONGA JANTJIES **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Jantjies v S* (871/13) [2014] ZASCA 153 (29 September 2014)

Coram: Shongwe, Majiedt and Mbha JJA

Heard: **10 September 2014**

Delivered: **29 September 2014**

Summary: Criminal law – whether on the proved facts the deceased committed suicide or whether she was killed by an intruder or by the appellant – circumstantial evidence sufficient to found a conviction on murder – proved facts sufficient to infer that the appellant killed the deceased.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Lowe J and Alkema J, sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Shongwe JA (Majiedt and Mbha JJA concurred)

[1] This appeal is against a conviction on a charge of murder (dolus eventualis) by the Regional Court Middelburg (Eastern Cape). The appellant, Mr Siyabonga Jantjies, was sentenced to 10 years' imprisonment. Leave to appeal against the conviction was granted to the High Court (Eastern Cape, Grahamstown), which appeal was dismissed and the application for leave to appeal to this court suffered the same fate. This appeal is with leave of this court.

[2] The issues in dispute will be best understood in the context of the following facts, which are mostly common cause or beyond dispute. Regarding the incident itself, the facts emanate from the appellant's plea explanation and his testimony, since there were no other eyewitnesses. The deceased was the appellant's girlfriend. During the afternoon of 17 September 2008 they were together at the deceased's place of residence. The appellant received a phone call from an ex-girlfriend which phone call upset the deceased. A heated argument ensued. The deceased grabbed a big knife and tried to stab the appellant who managed to grab her and they both wrestled for possession of the knife. The appellant succeeded in dispossessing her of the knife and he threw

the knife on the bedside. The appellant left the room to calm down. According to him, as he was leaving the deceased told him that she was going to kill herself, because he was now going to his ex-girlfriend.

[3] The appellant's version is that, upon his return to the deceased's room approximately half an hour later, he found the lights off. The deceased was lying under a blanket on the bed. He took off his clothes and slept next to the deceased. He alleges that he was not aware at that time that the deceased was injured. In the morning he tried to awake the deceased, because she had to go to school but she did not respond. He tried several times unsuccessfully. He noticed that she was injured and bleeding. According to the appellant he decided to go to his cousin whom he informed of what had happened the night before, though his cousin denies having been told the details. His cousin phoned the appellant's father who turned up without delay. The appellant says that he told his father the whole story of what had happened. His father also denied that he was told the whole story, more particularly that the deceased was bleeding and appeared to have been injured. The three of them decided to go to the police station to report that the deceased would not wake up.

[4] At the police station, they made a report and two police officers were then assigned to accompany them to the deceased's place of residence. They found the deceased lying on her stomach on the bed under a blanket in a pool of blood. An ambulance was summoned and the deceased was certified dead right there. The details of what happened further will be unravelled as the story unfolds.

[5] The State led the evidence of Mthobeli Fuzani, the appellant's cousin who confirmed that the appellant arrived at his place and reported that his girlfriend, the deceased, would not wake up when he tried to awaken her. He further testified that the appellant did not tell him why the deceased would not wake up. The prosecutor brought to his attention that he was deviating from his statement he made to the police, for instance that in his statement he had said that the appellant said to him that he (appellant) had done 'kak'. The witness denied having said that and said that was not his statement and also denied having signed the statement. The prosecutor did not impeach the witness, but simply left it at that. The defence did not cross examine this witness.

[6] The next witness was the appellant's father (Mr Jantjies Senior) who confirmed that he was called and upon arrival, he found the appellant crying and was told that the appellant's girlfriend, the deceased, would not wake up. The appellant did not know why she would not wake up and he then suggested they all go to the police station. Mr Jantjies was asked several times what the appellant said was the reason for her not waking up – he replied persistently that the appellant never disclosed the reason. The prosecutor brought to his attention that in his statement to the police he said that the appellant said he had killed his girlfriend, the deceased. He denied having said that, although he admitted making a statement and signed it, but denied that it was read back to him.

[7] The State led the evidence of Sergeant Sobandla (SAPS). She testified that she and Constable Makehle received a murder complaint while patrolling and drove to the police station. At the police station they found the appellant and his father and cousin. Commander Ackerman (SAPS) told them that the appellant's father told him (Ackerman) that he had brought his son to the police

station because his son had stabbed his girlfriend, the deceased. This evidence was provisionally admitted as it was hearsay evidence, until Ackerman came to testify and confirm it. Ackerman was not called to testify – hence this piece of evidence was correctly disregarded by the trial court. They all proceeded to the deceased's place of residence and found her lying on her stomach under a blanket on the bed. Upon questioning by Sobandla, the appellant is alleged to have made certain admissions which the trial court found to be inadmissible, because Sobandla had not warned or informed the appellant of his right to remain silent prior to questioning him. The knife was also found and she testified that she noticed stab wounds on the front of the deceased's body. The appellant was then arrested.

[8] Dr de Beer testified by reading and explaining the contents of the post mortem report because he did not compile the report. Dr Schmidt, who is now deceased, performed the post mortem examination and compiled the report. Dr de Beer testified that the deceased sustained six stab wounds, three of them on the chest, (one penetrated the heart), two on the neck and one on her back. He also expressed an opinion that it was improbable for the deceased to have stabbed herself six times and specifically on her back. He explained that the three wounds penetrated the chest – therefore she could not have had the power to do it three times. In his opinion someone else must have inflicted the stab wounds.

[9] The appellant testified that he had recounted the details of the incident to his cousin and to his father, as set out in paragraphs 2 and 3 above. There is a clear contradiction on this aspect, as the cousin and the father said that the appellant did not disclose the details of what had happened. More will be said

later in the judgment regarding this aspect. He denied having told his father that he had done 'kak'.

[10] The trial court concluded that the appellant, his father and cousin were mendacious witnesses. The appellant had told the court that when he spoke to his cousin and father he related the whole episode of what had happened after he received a phone call from his ex-girlfriend. The appellant's version was rejected by the trial court.

[11] On appeal before us the conviction was attacked on the grounds that at the close of the State's case there was no evidence that the appellant had committed the murder or had committed any offence, which is a competent verdict on a charge of murder. He argues further that his application for a discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 was unjustifiably refused. Therefore, so the argument went, the refusal to discharge him amounted to a breach of his rights guaranteed by the Constitution. It was submitted that there was no possibility of a conviction other than if the appellant entered the witness box and incriminated himself. The provisions of s 174 do not refer to a possibility of a conviction but clearly state that '… the court is of the opinion that there is no evidence that the accused committed the offence …' In *S v Luxaba* 2001 (2) SACR 703 (SCA) at para 9, the court observed that the refusal to discharge an accused at the conclusion of the State's case entails the exercise of a discretion and is not subject to appeal. In my view s 35 (3) of the Constitution 108 of 1996 which guarantees to every person the right to a fair trial, has not removed this discretion. Admittedly, the discretion must be exercised judicially.

[12] The high-water mark of the appellant's counsel's submissions was in respect of the evidence of Dr De Beer. Counsel argued that the post mortem report says nothing about the deceased's lungs collapsing – whereas Dr de Beer opined that one of the three stab wounds to the chest of the deceased would have caused the collapse of the lung immediately. This comment was elicited by a question from the defence to the effect that it was possible for someone to stab himself or herself six times. Dr de Beer testified that 'all things are possible' but that it was improbable, because the injured person would have lost a lot of blood and would therefore be powerless.

[13] The respondent contended that the trial court as well as the court a quo was alive to the fact that it was not the appellant's case that the deceased committed suicide; this much counsel for the appellant conceded. The respondent further correctly contended that the matter must be decided on circumstantial evidence.

[14] It is common cause that the crux of this matter is about drawing a reasonable inference from the proved facts. (See *R v Blom* 1939 AD 188 at 202 – 203) where Watermayer JA observed that:

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored:
(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
(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.'

The common cause and proved facts are – the appellant and the deceased were lovers; on 17 September 2008, an argument ensued between them; the deceased grabbed a knife and attacked the appellant; a struggle over the knife followed.

The appellant's evidence is that he overpowered her and threw the knife away and left the room – he came back later and slept next to the deceased without waking her up or talking to her. In the morning he says he tried to wake her up as she was to go to school, but she would not wake up. He noticed blood on her and decided to involve the elders.

[15] A peculiar feature is that the appellant, after realizing that the deceased was injured, did not seek medical assistance. There is evidence that one of the inhabitants of the house was a lady employed by an ambulance service. The appellant did not even attempt to invoke the assistance of this lady or to call the police for help, instead he went to his cousin who later telephoned the appellant's father.

[16] It is common cause that on their way to the police station, the appellant, his father and his cousin passed the deceased's house. The defence argued that the appellant was shocked and could not think properly – therefore justifying his failure to call for medical assistance first. However, it gets more intriguing because the cousin and his father also never thought of first going to where the deceased was first before reporting to the police, though they were not as shocked as the appellant. The reasonable response to be expected from the appellant was to seek medical help and, while waiting for such help, he could then have called the elders and the police – more especially since on his version the deceased had threatened to kill herself the previous night.

[17] It is folly to think that circumstantial evidence means some sort of weaker or less reliable evidence. (See DT Zeffertt, AP Paizes & A st Q Skeen: *The*

South African Law of Evidence at 94; *S v Mcasa & another* (delivered 15/9/2003 – unreported, case no. 638/2002) para 8; and Hoffmann: *S A Law of Evidence* (1st ed 1963) at 31). In the present case there is compelling circumstantial evidence. Dr de Beer, an experienced medical practitioner, is an expert. We were urged by counsel for the appellant not to accept Dr de Beer's evidence at face value. Dr de Beer confirmed what is contained in the post mortem report and that the stab wound to the heart was the cause of death. Most scientific evidence is circumstantial – for instance DNA and fingerprints evidence, are all scientifically determined by experts. I cannot, for a second, ignore Dr De Beer's evidence because it is moreover logical. (See *S v Van der Meyden* 1999 (2) SA 79 (W) at 82D-E). In this case circumstantial evidence is the only evidence linking the appellant to the crime of murder, over and above his explanation.

[18] I associate myself with the conclusion of the trial court that the appellant's cousin and father are mendacious witnesses, clearly trying to protect the appellant. Appellant's counsel conceded that the contradiction between the appellant, his father and cousin, referred to above, is crucial. The appellant testified that he told them the details of what had happened prior to him calling them – the cousin and the father denied that he did, all they said, was that he said to them, that his girlfriend, the deceased would not wake up. One is driven to the conclusion that they were untruthful on this aspect in order to protect the appellant.

[19] I am unable to find that the trial court as well as the court a quo misdirected themselves in the analysis of the evidence. Davis AJA in *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705 observed that:

'The trial Judge has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.'

The possibility that the deceased stabbed herself six times to death is excluded by the medical evidence and the location of the wounds. The further possibility that she could have been killed by an intruder can also be excluded – no forced entry was evident. Thus the only reasonable inference to be drawn on the proved facts and circumstances is that the appellant is the killer and that he had the requisite intent to kill the deceased. It was held in *R v De Villiers* 1944 AD 493 at 508 – 9 that a court should not consider each circumstance in isolation and draw inferences from each single circumstance but that taken as a whole, the evidence is beyond reasonable doubt inconsistent with innocence. (See Schwikkard PJ and Van der Merwe SE: *Principles of Evidence* at 505; *R v Mthembu* 1950 (1) SA 670 (A)).

[20] For the reasons stated above the appeal must fail.

[21] I propose the following order:

The appeal is dismissed.

_____

J B Z SHONGWE
JUDGE OF APPEAL

Appearances

For the Appellant:	J W Wessels
	Instructed by:
	S.B Maqungu Attorneys, Port Elizabeth;
	Lovius Block, Bloemfontein.
For the Respondent:	M September
	Instructed by:
	The Director of Public Prosecutions, Grahamstown;
	The Director of Public Prosecutions, Bloemfontein.