REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA & R 74/2012

SIYABONGA JANTJIES **Appellant**

And

THE STATE **Respondent**

Coram: **Alkema and Lowe JJ**

Heard: **27 February 2013**

Delivered: **1 March 2013**

Nature of matter: Appeal against conviction – case of murder –

Order: Appeal dismissed

JUDGMENT

LOWE, J:

[1] On 17 September 2009, Sergeant *Nothemba Sobandla* (*Sobandla*), on routine patrol duty with a colleague, Constable *Makehle*, responded to a radio complaint concerning an alleged murder proceeded to the Middleburg police station where she encountered the appellant, his father and a cousin taking to the CSC Commander, Inspector *Ackerman*. Shortly thereafter *Ackerman* related what had been conveyed to him by the appellant's father viz that the appellant had stabbed his girlfriend. That evidence was provisionally admitted on the assurance by the prosecutor that *Ackerman* would be called as a witness. He was however not called. His communication to them was hearsay and inadmissible.

[2] *Sobandla* further testified that the appellant's father asked that they accompany him to the appellant's home to which they proceeded in convoy, the appellant, his father and cousin in their vehicle. When they arrived at the house, the appellant opened the front door and then the door to his room. *Sobandla* noticed a figure covered with blankets laying on the double bed in the bedroom. When *Sobandla* elicited information from the appellant as to what had occurred the latter's response was that following an argument he stabbed his girlfriend. At this juncture the magistrate queried the admissibility of this tittle of evidence to which the appellant's counsel responded by saying that the appellant would deny making any such statement.

[3] Although there was a discussion between the parties and the magistrate whether the appellant's utterances amounted to an admission or a confession it matters not for the purposes of this judgment. The fact of the matter is that prior to entering the appellants room, *Sobandla* had been apprised that a murder had been committed. The visit to the appellant's home was for the express purpose to confirm what she already knew. It is not in issue that during her examination in chief there was no suggestion that she at any stage warned the appellant of his constitutional rights as enshrined in s 35 of the Constitution[1]. Although the magistrate *mero motu* raised the admissibility of her evidence hereanent and a discussion eventuated between him, the prosecutor and the appellant's counsel, even at that stage there was no suggestion that she had issued the requisite warning. It was only under cross-examination that she admitted that she only warned the appellant of his rights after he had retrieved the knife from behind the bed. *Sobandla's* belated attempt to show that the appellant's rights were explained at the charge office thereafter is disingenuous. It would serve no purpose whatever to appraise an accused person of his rights after he/she has already made incriminating statements following upon questioning. The trial court, had it applied its mind to the evidence, could have been under no illusion that the appellant's rights had been explained to him. The State bore the onus to establish that the appellant's statement to her were admissible. Where, as here, those rights were not explained to the appellant, the very fairness of the trial was called in question. On the acceptable evidence, the appellant appears to have been highly distraught and he should have been warned not only of his rights to

[1] Constitution of South Africa Act, No 108 of 1996

silence but that he was entitled to the services of an attorney. Had that been done, the very real possibility emerges that the appellant may not have made any statement to *Sobandla*. Her evidence hereanent must consequently be disregarded.

[4] Did the acceptance of her evidence however render the trial unfair to the extent that the entire proceedings were vitiated thereby? In my judgment it did not. The remaining evidence established beyond any reasonable doubt that the appellant in fact murdered the deceased. The appellant's evidence that the deceased herself inflicted the stab wounds was so far fetched and fanciful that it can be rejected out of hand. It is common cause that a Dr *Willem Jacobus Schmidt* (*Schmidt*) conducted a post mortem examination on the body of the deceased on 23 September 2009. At the trial his post mortem examination report was handed in as exhibit "B", without demure from the appellant's counsel. Although *Schmidt* had since died, his clinical findings were never contested. It is not in dispute that the deceased sustained three (3) penetrating chest wounds anterior, two (2) stab wounds to the neck and a posterior stab wound. One (1) of the stab wounds penetrated the left ventricle.

[5] During the trial the State tendered the evidence of Dr *Jan Antonie de Beer* (*de Beer*) on the issue whether the injuries sustained by the deceased could have been self inflicted, as suggested by the accused and as put on his behalf to various State witnesses by his counsel. The import of his evidence was that it was improbable that these stab wounds were self inflicted. The appellant's

suggestion is plainly nonsensical. The common cause facts, the admitted argument between the appellant and the deceased, the appellant's admission to his father, notwithstanding the latter's contrived disavowal of having communicated this fact to the police and the appellant's conduct the following morning compels the inference, as the only reasonable one, that he stabbed the complainant to death. There is no merit in the appeal and, in the result the following order will issue: -

The appeal is dismissed.

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M.J. LOWE
JUDGE OF THE HIGH COURT

ALKEMA, J:

I AGREE.

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S. ALKEMA
JUDGE OF THE HIGH COURT

On behalf of the Applicant/Appellant/Plaintiff: D. Ngoqo

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