



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: K/S29/2023
Heard on: 13 – 14/02/2024
Delivered on: 15/02/2024

In the matter of:

THE STATE

and

DAVID FRANS BASTER

ACCUSED

JUDGMENT ON CONVICTION

Tyuthuza AJ

INTRODUCTION

1. The accused stands accused of a charge of housebreaking with the intent to kill and murder read with the provisions of section 51(1) of the Criminal Law Amendment Act¹, in that it is alleged that on 13 October 2021 and at Marydale, the accused unlawfully and intentionally broke into and entered the

¹ Act 105 of 1997

residence of Petronella Jacobs without her permission, with the intention to kill Elmarie Maria Van Wyk by stabbing her multiple times with a knife.

2. The accused pleaded guilty to the murder and provided this Court with a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977. The accused pleaded not guilty to the housebreaking charge.
3. Adv Engelbrecht, on behalf of the State, indicated that the State does not accept the plea of guilty as presented by the accused. She indicated that the State's case would be that the accused's intention was that of *dolus directus*.
4. The postmortem report, the affidavit of Sergeant Moqhoishi with the photo album and the statement in terms of section 112 were accepted as exhibits "A", "B" and "C" respectively.
5. The following admissions were made by the accused in terms of section 220 of the CPA:
 - 5.1. That the identity of the deceased is Elmarie Maria van Wyk;
 - 5.2. That the postmortem report accepted as exhibit "A" indicated the cause of death to be bilateral haemopneumothorax;
 - 5.3. That the body of the deceased did not sustain any further injuries until she reached the mortuary;

5.4. That the photo album accepted as exhibit "B" is a true depiction of the crime scene.

5. Adv Engelbrecht and Mr Biyela for the accused conceded that the only issues in dispute were the housebreaking and the intent of the accused in relation to the murder of the deceased.

6. The state bore the *onus* to prove beyond reasonable doubt that the accused had committed the act of housebreaking with the intention to kill and murder the deceased.

7. The State led the evidence of one witness, Petronella Jacobs. Her evidence is that on the evening of 13 October 2021, she was at her residence with the deceased Elmarie Van Wyk and a man called Buddysheep. One of her children and one of the deceased's children were sleeping on the floor in front of the bed. Petronella sent Buddysheep to buy some cigarettes with the R10.00 she had given him. The deceased was in the process of undressing, whilst she was sitting on the bed breastfeeding her baby. According to her the accused kicked open the door to her house. Her bed was close to the door and when she turned her head, she saw that it was the accused. She testified that the accused entered into her home with a knife in his hand and stormed towards the deceased. The accused continuously stabbed the deceased. She told the accused that fighting would not solve anything and that they should communicate instead. She testified that the accused turned towards her and told her to keep quiet because she was also involved. He then turned back to the deceased and continued to stab her. When he

stopped stabbing the deceased, he asked the witness where Buddysheep is and ran out of the house. According to her she did not see the accused again that evening.

8. She further testified that she asked her neighbor Clarina to take the three children from the house. She called another neighbor, Sisika, to come and see that the deceased was not responding to her. Sisika also tried to get a response from the deceased, but there was none. She then requested Sisika to call the police, who arrived at the scene.
9. She testified that the accused had damaged her door when he had kicked it open.
10. Under cross-examination, she testified that the accused and the deceased were involved in a relationship but that the deceased would stay with her during the seasonal work period. She testified that the deceased had informed her mother that she would be staying with her. She further testified that the accused did not visit the deceased during the period when she was living with her, as the deceased had informed her that she was no longer interested in the accused. She testified that she had accompanied the deceased to the police station earlier that evening to report the accused to the police to warn him to keep away from the deceased and that she also advised that she did not want the accused at her residence. She testified that Buddysheep returned from the shop whilst the accused was still there stabbing the deceased but that she had gestured to him to go away. She disputes that Buddysheep was outside the house with the accused and had

opened the door to him to allow the accused into her house. She testified that she informed the police about the damage to her door. She reiterated that the accused had the knife in his hand when he entered the house.

11. The state closed its case.
12. The accused, Mr Baster elected not to testify and closed his case without calling any witnesses to testify.

Analysis of evidence

13. The fundamental principle of our law in criminal trials is that the burden of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt. This burden will rest on the prosecution throughout the trial. The State must also discharge an evidential burden by establishing a *prima facie* case against the accused. Once a *prima facie* case is established, the evidential burden will shift to the accused to adduce evidence to escape conviction. However, even if the accused does not adduce evidence, he will not be convicted if the Court is satisfied that the prosecution has not proved guilt beyond a reasonable doubt.²
14. It is not in dispute that the deceased was stabbed numerous times by the accused and that the deceased's injuries were the cause of her death. Most of the facts are common cause. The only issue the State needed to prove is whether the accused had indeed committed the act of housebreaking and further to prove the form of intent when he killed the deceased.

² Principles of Evidence, PJ Schwikkard et al, 4th Edition, 2015

15. The State alleges that the accused's act was premediated.
16. According to the accused's written statement, he, whilst approaching the house of Petronella Jacobs, met a gentleman by the name of "Sheepdog", whom he had heard was involved in a relationship with the deceased. He states that he asked Sheepdog about the deceased and Sheepdog simply opened the door to Petronella's shack house. According to the accused he "was overwhelmed with anger" thinking about the rumor and just "lost it", took out a knife which he had with him and stabbed the deceased a number of times on her body (*dolus eventualis*), whilst the state submits that the murder was premediated alternatively that there was *dolus directus*.
17. It is common cause that the accused went to the house of Ms Jacobs, with the knife in his possession, which he used stab her numerous times. A knife which the accused alleges in his statement he always carried on his person in order to defend himself.
18. Adv Engelbrecht submitted that the evidence of Ms Jacobs in regard to the housebreaking can be relied upon, in that she was in a position to make an observation of how and when the accused had entered the house. Furthermore, that she had reported the damage to the police but that she has no control over the work of the police and that the manner wherein she gave evidence does not speak to a person who would fabricate evidence. Ms Jacobs had also informed the police that she did not want the accused at her home.

19. The State submits that the Court can draw the inference that the accused had gone to the residence of Ms Jacobs with the purpose of murdering the deceased in that he had had the knife in his hand when he entered the house. It is the State's case that the accused had the premeditated intention to murder the deceased.
20. The State further submitted that should the Court not find that the murder was premeditated in terms of section 51(1) on the basis of the wounds inflicted and the fact that the accused had stabbed the deceased numerous times, it is alleged by Ms Jacobs that he had stopped to interact with her and thereafter resumed with stabbing the deceased, is indicative that the accused had the direct intent to murder the deceased.
21. Mr Biyela on behalf of the accused, submitted that Ms Jacobs had sent Buddysheep to the shop and was thus not able to tell whether the accused had met him at the door and had in actual fact opened the door for the accused. Buddysheep was not called to testify.
22. He furthermore submitted that there was no evidence before the Court regarding the damage to the door and no corroboration therefor.
23. Mr Biyela submitted that the two points of dispute have not been disproved by Ms Jacobs and that the accused's version is probably true and should be accepted in that the accused had met Buddysheep outside Ms Jacobs's home, that Buddysheep had opened the door for him to enter the house and

that he had stabbed the deceased out of anger and as such did not have the direct intent to kill her.

24. The accused is charged with housebreaking with the intent to kill and murder. The evidence clearly established that the accused's intention was to murder the deceased. The accused went to the home of Petronella Jacobs, where the deceased was staying, with a knife in his possession and upon arrival there he did not have any discussion with the deceased to at the very least enquire about the alleged relationship or the rumors. The accused did not have any altercation with the deceased or the man he suspected her of having an affair with. In my view the accused had the direct intention to murder the deceased.

25. In *S v Sauls and Others*³ it was stated:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told".

26. I am of the view that Ms Jacobs who witnessed the events gave a detailed and clear account of the events and that her version was truthful.

27. As alluded to above, the elements of the crime of the offence of murder are not in dispute. What is in dispute is whether there was intent *dolus eventualis* or *dolus directus*.

³ 1981 (3) SA 172 (A)

28. *“...Premeditation refers to something done deliberate after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, while planning refers to “a method of acting, doing, proceeding or making - which is developed in advance as a process, calculated to optimally achieve a goal”⁴*
29. It has been established by our courts that to prove premeditation where there is evidence or proven facts, the State must lead evidence to establish the period of time between the accused forming the intent to murder the deceased, and the carrying out of his intention.
30. In my view, the State failed to prove pre-mediation. There is no evidence that the accused had planned to end the life of the deceased or that the accused had the knife with him to specifically kill the deceased on the day and it was not disputed that the accused had, at all times, carried a knife which he used to defend himself.
31. An evaluation of the evidence does not support the suggestion that the accused acted with premeditation to murder the deceased.
32. I find that the accused had the direct intent to kill the deceased. The indisputable evidence before court is as follows:

⁴ Taunyane v The State case number A140/2015, South Gauteng Division (28 September 2016) at para 27

- 32.1 The accused unlawfully entered the house of Petronella Jacobs,
 - 32.2 The accused had a knife in his possession;
 - 32.3 The accused stabbed the deceased multiple times;
 - 32.4 The deceased died as a result of the actions of the accused.
 - 32.5 The accused was fully conscious of his actions when killing the deceased.
33. I am of the view that the accused's intent was that of *dolus directus* in that he had the direct intention to kill the deceased. The accused continuously stabbed the deceased and even when he did stop to speak to Ms Jacobs, he resumed stabbing the deceased. After committing this act, the accused ran to his mother's house and there is no account that the accused had called either the police or an ambulance.
34. In the premises, I made the following order:
- (a) The accused is found guilty of housebreaking with the intent to commit an offence unknown to the State read with the provisions of section 262 of the CPA;
 - (b) The accused is found guilty of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997 with the intent form of *dolus directus*.

T TYUTHUZA
ACTING JUDGE

APPEARANCES:

On behalf of the State: Adv M Engelbrecht
On behalf of the Accused: Adv Biyela