

SOUTH AFRICA / JUDGMENT

Mvubu v S (A260/2016) [2017] ZAGPPHC 1210 (7 August 2017) [2017] ZAGPPHC 1210

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi VV, Tolmay RG, Ranchod N

CASE / FILE NUMBER

A260/2016

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Source record

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE.

(2)

NOT OF INTEREST TO OTHER JUDGES.

(3)

REVISED

CASE

NUMBER: A260/2016

7/8/2017

In

the matter between:

MATHEWS
PHINEUS
MVUBU
APPELLANT
And
THE
STATE
RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This is an appeal to the Full Court of this Division on conviction and sentence Imposed by Mavundla J. Leave to appeal the convictions and sentence in respect of counts 2 - 19 and against sentence only in respect of count 1 was granted.

The appellant was convicted and sentenced in the following manner:

1. Assault with Intent to do Grievous Bodily Harm : sentenced to 3 years imprisonment;
2. Murder, read with the provisions of Section 51(1) of Act 105 of 1997: sentenced to 18 years imprisonment;
3. Robbery with Aggravating Circumstances, read with the provisions of section 51(2) of Act 105 of 1997: sentenced to 12 years imprisonment
4. Fraud (counts4-19): sentenced to 10 years imprisonment.

BACKGROUND

Counts 2, 3 and 4-19

[2] The deceased and the appellant were in a relationship and they lived together at the deceased's maternal grandmother's house in Daveyton, Benoni. The couple had a minor child and it seems from the evidence

that the deceased had an older other child from another relationship. According to Ms Lesiba, the deceased's mother, the appellant had paid a part of lobola for the deceased and that the deceased's children lived with her. On 19 July 2008 she had attended a friend's funeral with the deceased. On their return, the deceased spent some time with them and left for her home at about 20h00 in the evening. That was the last time she saw her daughter alive. The deceased did not call, as was her usual habit, to inform her that she had arrived home safely.

[3] The following day, Sunday the 20th the deceased failed to pick them up for church, neither did she bring the asthma medication she had promised to buy for one of her children. Ms Lesiba testified that she called deceased's two numbers for a period of about a week without success. She only informed the deceased's father after a week that the deceased had not called or returned her calls since she left on 19th .On Sunday 27 July they decided to go to the deceased's house. The gates were locked, fortunately they had a spare key. The house too was locked and they managed to gain entry by breaking down the door. They encountered the deceased's body lying on the floor in the main bedroom, near the wardrobe. Her head facing a window covered in white lace curtains. The police were summoned. Besides the

house keys which were missing, several items listed in count 3 were missing from the house. The appellant was not present.

[4] Ms Lesiba testified that she had last seen the appellant when the deceased had come to her home after an alleged argument and assault. She had accompanied the deceased back to where she lived to engage with the appellant on their fights and he had sworn at her. He later packed his clothing and left the house. The couple had many fights and the deceased reported the assaults to the police but she would later withdraw the charges. She was aware of the assaults because the couple had often come to her house to discuss their problems. The assaults were addressed with the appellant.

[5] Mr Patrick Mnguni ("Mr Mnguni") testified that he is best

friends with the appellant. The deceased was also known to him. The deceased's sister called to inform him of her death. He undertook to proceed to the deceased's home and he was accompanied by another friend of theirs Mr Michad Zwane ("Mr Zwane"). On arrival they were shown deceased's body in the main bedroom. He immediately tried to contact the appellant, but his phone was off. Both friends tried to call appellant several times. After a while the appellant called but he does not recall whether it was on his phone or that of Mr Zwane. He gave the appellant a report on the incident and he pleaded with the appellant to assist the police with the investigation.

[6] On 29 July 2008 he met with the appellant at Mr Zwane's workshop and they had a discussion with him. The appellant told them that the deceased had failed to keep an appointment on the 191 . After waiting for her, he became frustrated and got drunk and waited for her at the house. The deceased arrived late in the evening. The appellant told him that he hit the deceased with a fist and she fell to the ground.

[7] Now, Mr Mnguni's testimony on how he was told the assault on the deceased took place, differed materially to that contained in his statement to the police. This resulted in Mr Sibara, for the state, making an application that he be declared a hostile witness. Mr Mguni testified that he had a problem with the handwriting of the police

officer who took down his statement. He raised this issue with Mr Sibara during consultation in preparation for the trial. He however

confirmed his statement and signature and the following was read back to him, that:

"Boy Phineas Mvubu confirmed to Michad Zwane and to myself that he is the person who attacked and killed Happy Godisang on 19 July 2008. I then asked him how did he kill Happy. He then informed me that he held her by the head, physically hitting her head

against the floor in the bedroom. He then saw a white substance coming out of her mouth and then he stopped. I then asked why he did not call the ambulance for her to be treated. He told me that he was drunk and it never came to him to call the ambulance. We all drove to the South African Police services, Daveyton where he handed himself to the police with the help of his attorney."

[8] During cross-examination Mr Mnguni testified that the incident

occurred a while ago. He had difficulty recalling what the appellant had told him. The court a quo gave a ruling on grounds of his testimony during such cross examination not to declare him a hostile witness. His statement was to be handed in as an exhibit, to be evaluated together with all the other evidence. In light of the ruling, counsel for the defence was allowed to ask further questions in cross examination. The appellant's version was a denial that he told Mr Mnguni that he had hit the deceased's head against the floor. Mr Mnguni replied that he could not recall actually what happened, all he could remember was that he did not question the appellant any further after he explained that he hit the deceased with a fist.

[9] The investigating officer Mr Magopane took the statements of both Mr Mnguni and Mr Zwane. Mr Zwane died on 7 September 2011, before the trial commenced. The State applied in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, to have his statement admitted and read into the record. Mr Zwane's Death Certificate was made available. There was an objection to the handing in of Mr Zwane's statement. Firstly, on grounds that in both Mr Mnguni and Mr Zwane's statement, it is stated that the appellant called them both while they were at the deceased's home. The appellant's version was that he called Mr Mnguni. Secondly, on grounds that the investigating officer had written down the statements and commissioned them. The court ruled that the statement of Mr Zwane be admitted.

[10] Mr Mogopane testified that the appellant was known to him. They grew up in the same area and attended the same school. He confirmed that the appellant was brought to the police station so that he could hand himself in, furthermore, that apart from Mr Mnguni indicating that he had difficulty reading his handwriting, he read the contents back to him. The problem with his handwriting was only raised in preparation for the trial, but when it was taken down four years earlier, Mr Mnguni had not complained about his handwriting.

[11] Mr Deneka was 76 years old and he lived opposite the deceased's house. The appellant and deceased were known to him as a couple and, he had often seen the appellant at the deceased's place. He testified that on 22 July 2008 at about 21:00 he saw the appellant when he went to close the gate. They greeted each other and the appellant had come closer to where he was. Mr Deneka enquired after the deceased and the appellant had informed him that he had brought the deceased home because she was not feeling well. On 27 July 2008 he saw the police at deceased's house and he informed them about when he had last seen the appellant. Mr Deneka was cross examined at length on him recalling the date he had last seen the appellant.

[12] Dr Pharasi is a forensic pathologist based at the Springs Government Mortuary. He conducted the post mortem on the deceased on 29 July

2008. His report was augmented by illustrations, where the injuries were indicated on the affected parts of the body. He made the following observations and findings:

1 It was reported to him that the death occurred on 27 July 2008.

"the deceased had extensive abrasions on her left arm and forearm and also left collarbone area, the right shoulder and right collarbone area as well. There were neck injuries consistent with burns. She had extensive burns all over her face and neck. She

had extensive bruising below the scalp and on opening the skull there was subdural bleeding in the left occipital and temporal lobes. There was also bleeding from the base of the skull. Examination of the neck revealed a broken neck."

-The abrasions are usually caused by pulling the body over a rough surface.

-The bruising below the scalp would usually be caused by blunt trauma to the head....falling can cause these injuries.....bruising below the scalp meant presence of bleeding below the skin.

-The injuries on the head were caused by a blunt force weapon, a severe blow to the head and the broken neck could have been caused by a fall;

-These findings were inconsistent with being struck once with a single fist and falling to the ground; a single blow can cause a limited bruising around the area where the blow was, that would be maybe one small area of the skull, but here he was dealing with

extensive bruising below the scalp, which means it could be more than one blow, it could be numerous blows...from any blunt weapon it could be fists, it could be anything; a single blow would also not explain the other injuries like the abrasions on both sides of the body and the one shoulder and the arm on the other side.

-The bleeding extends from the occipital lobe to the temporal lobe, it is not minimal. One should remember that she had a broken neck as well, so the blood from the neck itself can injure certain blood vessels flowing into the skull; there is a likelihood

that the blood inside the skull came from the broken neck;

[13] During cross examination Dr Pharasi gave further opinion. He had not been told when conducting the post mortem that the body had been lying in the house for about seven days. Dr Pharasi was shown a photo at the scene of crime depicting a Domestos bottle. It was then put to him that the appellant would testify that he wiped the deceased's

face with Domestos. He opined that the state of decomposition given this version would be relevant to his findings, that there were extensive burns to the face, although he was not certain how long it would have taken the acid in the Domestos to reveal itself.

[14] He was asked whether the bruises seen on the body, which he had said were consistent with the body been dragged over a rough surface, whether similar injuries could not be sustained if the deceased hit her head against a wall and then slid down against the wall. Dr Pharasi confirmed that it was possible. He was asked if a soft punch to the eye could propel the deceased who had a mass weight of 84kg backwards and he confirmed. The appellants version was then put to him, that the appellant would testify that (i) he hit the deceased first with a fist on the mouth and the second fist on the eye, {ii) that she hit the wall next to the window and slid down the wall on her back. Dr Pharasi opined that if the deceased was hit with a fist while moving backwards and hit her head against the wall, that she could have sustained injuries as depicted in the scalp and skull. However, he remained adamant in his opinion that, that would be inconsistent with his findings, in that it would not explain the other injuries sustained. Furthermore that if the deceased had been struck on the mouth and eye those blows would have resulted in injuries which he would have noticed.

Based on photographs 11, 15 and 16 the court a quo posed questions to Dr Pharasi in clarification, which sought to address the position of the deceased's body as against the appellant's version that she hit her head against the wall and slid to the ground with her back.

[15] Sergeant Delanche Mandry is attached to the Forensic Laboratory in Pretoria. She testified that she was requested to attend the crime scene on 27 July 2008 to collect and investigate for the presence of presumable blood in the house of the deceased. The entire house was darkened and sprayed with a sensitive chemical known as Blue Star, which is capable of detecting even very diluted blood, up to 1 in a million parts can still be seen. The said chemical is used to detect

latent blood stains. Evidentiary material was collected from:

(i) the bathroom: in the bath tub, the basin and blue coloured face cloth and

(ii) the main bedroom where the deceased was encountered : They saw the running of the stains on the floor in the form of drops of blood and a mixture of blood and another liquid. No visible stains were detected on the curtain in the bedroom. She further opined that by looking at the position of the body it looked like she was dragged to that position because of the hair which was sticking out at the top of the head 'as if when a person is pulled and the hair drags along at the end such as depicted in photograph 16. This witness was asked to comment on the state of the deceased's clothing. She testified the clothing was disturbed and that it could not be in such state if the deceased had just fallen there must have been some movement. The deceased's top and skirt had been pulled up and that this was consistent with dragging. Furthermore, she had noticed the bottle of Domestos which is a household chemical containing chloride and which is used to discolour. She opined that the discoloration on the clothing of the deceased might have been caused by it.

- [16] Mr Labuschagne is an investigator attached to Nedbank. He testified about certain transactions on the deceased's Nedbank debit card made from 19 July to 2 August 2008, when the card was reported as stolen. There were 18 transactions pertaining to counts 4-19, which occurred in Gauteng and Kwa-Zulu Natal and, these were cash withdrawals; in respect of purchases for clothing and payment for a hotel bill.
- [17] Nxobizitha Ngodisang is the daughter of the deceased. She testified about the relationship between the appellant, the deceased and herself. She had knowledge of the problems between the appellant and the deceased and was witness to an incident of an assault on the deceased during December 2007. Her testimony did not relate to any of the charges.
- [18] After closure of the State's case there was indication by the defence that the appellant would testify in his defence however, an application was made to call appellant's witness Ms Heath, a clinical psychologist first because she had other engagements. Her report was handed in as Exhibit HH. She testified that she compiled her report after she had consulted with the appellant and, conducted psychometric tests on him. She described them as the Minnesota Multiphase Personality Inventory number 2 ('MMPI') test ; the Mini Mental Clinical Multi-actual Inventory number 3 ('MCMI') test; the Beck Depression Inventory and the 16 Personality Factor questionnaire ('16-PF') . She also had other sources which she used as collateral information. She gave a list of about twelve (12) individuals she had interviewed; a newspaper report (Daily Sun) and an earlier report by another clinical psychologist, Mr Kobus Truter. The purpose of the report was to try and understand the personality of the appellant and

the reason why he committed the offence. Her testimony can be summarised as follows:

1 He had memory and concentration problems; tired easily; had a low self esteem; had a dependency on others; was forgetful; was prone

to be abusive to others without thinking of the consequences; was erratic and disorganized during interviews; he displayed paranoiac

behaviour with traits of jealousy and insecurity; he had poor coping skills and under stressful conditions he could not control his anger. The psychometric testing indicated a person ' with serious personality problems, prone to anxiety and depression which made it difficult to think clearly or function effectively under very stressful circumstances.' Ms Heath testified that these too were the findings of Mr Truter.

2 His condition could not be diagnosed as one suffering of mental ill health, rather that due to his personality he functioned better when not exposed to stressful conditions. He did not present with psychopathic tendencies and he demonstrated the ability to show

empathy and remorse. Ms Heath opined that the appellant was in a position to distinguish between right and wrong and act accordingly

however, at the time of the incident he experienced a temporary emotional arousal and he experienced a diminished capability of

judgment. Ms Heath also testified that the tests she conducted were not perfect because they were not measured to the South African

situation. She opined further, that the appellant could perform better even during the trial if treated with patience and understanding.

At end of Ms Heath's testimony it was contended by the defence counsel that in view of the personality problems the appellant had, he would not be able to contribute meaningfully to his defence. It was contended further that the condition of the appellant could be dealt with in terms of sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977 ('CPA') and that the matter be postponed to enable the appellant to be treated for his personality problems before testifying in his defence. The application was refused and the defence case was consequently closed. The State applied for its case to be reopened in order to respond to Ms Heath's report. There was no objection from the defence.

[19] Major Knibbs is attached to the Investigative Psychological Section of the South African Police Services. He testified that he had studied the reports of Ms Heath and Mr Truter. In as far as Ms Heath's report was concerned he was not satisfied that it addressed the requirement of sections 77, 78 and 79 of the CPA. He went on to state that the MCMI-3 and MMP1-2 were not standardized to a specifically Zulu speaking South African population. The MMPI-2 focused on the assessment of malingering psychopathology and it was used to 'direct some hypotheses' which still had to be verified by clinical results.

Furthermore, although the appellant could have been interviewed in the English Language, it was not his first language. The MCMI-3 was used by psychologists in South Africa, even though it was not on the Health Professional Council of South Africa's ('HPCSA') list of acceptable assessment tools. He opined that if such tests were used, caution had to be exercised in interpreting the results, in view of the different standard test scores, with regard to the different genders and races and, in particular, because of the

language aspect and the fact that the 'accuracy of tests have not been verified in the South African context.' Therefore there was a possibility that the opinion by Ms Heath, that the appellant might not be able to contribute to his defence being rendered inaccurate. This fact was conceded to a limited degree by Ms Heath in her report. Furthermore, the partial usage of the 16 Personality Factor

questionnaire by Ms Heath, backed by the Beck Depression Inventory, in order to arrive at a qualitative judgment, was inadequate.

[20] In as far as the score sheets were concerned, since these entailed lengthy questions, it was possible for the psychologist to hand score them or to refer the score sheets to a company known as JVR, which gave results according to a computerized version. Mr Knibbs found that there were discrepancies in the results of Ms Heath and JVR. The JVR results dealt with the response style scores of the Appellant, which were described as having a tendency to exaggerate his level of self-pity, which fact was not dealt with by Ms Heath in her report.

[21] In order to have the full benefit of the test in assessing a person, it was necessary to use the full complement of questions to be effective and, then to interpret the results. He opined that it was not necessary to test the appellant on the Beck Depression Inventory which was used to evaluate mood with depression because the test would not have been responsive to the purpose for which the appellant was assessed. The test would not be able to determine what the mood or depressive state the appellant was in at the time the offence was committed. It tests for depression on the day the test is conducted and a week prior to that. Mr Knibbs also testified that certain conclusions in Ms Heath's report looked similar in wording to the report of Mr Truter.

[22] The grounds of appeal relied upon by the appellant were that:

1 Another court might find that the accused did not have the necessary intention be it *dolus indirectus* or *dolus eventualis* to have killed the deceased....that he killed the deceased negligently and instead he ought to have been convicted of culpable homicide;

Alternatively, the murder was not planned or premeditated, the applicable sentence under section 51(2) Act 105 of 1997 was 15 Years

imprisonment, the court having found substantial and compelling circumstances to be present should have given the accused a lesser

sentence than the 15 years prescribed;

2 Another court might find that it was never the intent of the accused to rob the deceased, however, that it was only after assaulting the deceased that he formulated the intention to remove her belongings; instead the accused ought to have been convicted of theft.

3 Another court might find that there was no intention to defraud; the accused ought to have been convicted of theft; furthermore that the cumulative effect of the sentence in respect of the fraud charges was shockingly harsh and inappropriate.

4 The sentence of 3 years imprisonment on count 1 was shockingly harsh and inappropriate in that the appellant was convicted of the competent verdict of common assault.

[23] In *S v Francis* 1991(1) SACR 198 (A) the trite principle in *R v Dhlumayo and Another* 1948 (2) SA 677 (A) was restated, that, an Appeal Court's powers to interfere with the findings of fact of a trial court are limited. In order to

succeed an appellant must show on adequate grounds that the trial court was wrong in accepting the evidence which it relied upon for conviction. A reasonable doubt is not sufficient to justify interference ' bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony', S v Francis supra at 204E

[24] It is also trite that a trial court in a criminal matter exercises a pre-eminently wide discretion in determining which factors have to be taken into account in its determination and measure of sentence, to be given to an accused person. In S v Kibido 1998 (2) SACR 213 (SCA) at 216 g-i Olivier JA confirmed this trite principle as was enunciated in S v Fazzie and Others 1964 (4) SA 673 (A) at 684 A-8, S Pillay 1977 (4) SA 531 (A) at 535-A-B and he proceeded to state that:

" A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard. Furthermore, a mere misdirection is not by itself sufficient to entitle a Court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. "

COUNT 1: ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM

[25] Count 1 relates to an incident which allegedly occurred on 8 May 2005. Although the appellant had initially pleaded guilty, a plea of not guilty was entered after his plea explanation was considered. In his plea explanation he admitted

the assault after a quarrel with the deceased. The testimony of the deceased's mother and daughter did not deal with this incident. No other evidence relating to the injuries the deceased would have sustained was adduced and no evidence relating to injuries was

disclosed in his plea explanation. Having failed to testify in his own defence, the court convicted him on the competent verdict of common assault, in terms of section 266 of the Criminal Procedure Act 51 of 1977. No submissions on sentence were made by the respondent. I therefore must agree with counsel for the appellant that a sentence of direct imprisonment of 3 years on the competent verdict was exceedingly harsh and I would recommend that the sentence be substituted with a lesser one.

COUNT 2: MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997

[26] It is first of all important to mention that both counsel did not deal with what I believe is a mistake, that is, where in the judgment on page 369 of the record is reflected that the appellant was found guilty of murder

on the basis of *dolus indirectus*, whereas in the judgment on sentence is reflected that he was found guilty of murder on the basis of *dolus eventualis*. In my view it is the latter legal intent that was applicable as stated in the judgment as at page 369 of the record follows:

"In respect of the killing of the deceased I find that the accused assaulted the deceased by hitting her head against the floor. I find that there was no direct intent to kill the deceased, however, when a person hits the head of a person against a hard surface such as the floor, such a person must have foreseen that death might eventuate"

[27] The legal intent, *do/us eventualis* was described in the Director of Public Prosecutions, *Gauteng v Oscar Leonard Carl Pistorius* (96/2015) ZASCA 204 (3 December 2015) as at paragraph 26 as follows:

" *Dolus Eventualis* , .. .although a relatively straight forward concept, is somewhat different. In contrast to *dolus directus*, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of *do/us eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts:

(1) .foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. The second element has been expressed in various ways....the person must act 'reckless as to the consequences or must have been reconciled with the foreseeable consequences... It is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen, when coupled with a disregard of that consequence is sufficient to constitute the necessary criminal intent."

[28] It is important first to mention that the court a quo had refused a postponement of the matter to enable the appellant to receive treatment for his psychological problems. The reports of Ms Heath, Mr Truter and Mr Knibbs were considered and the court a quo found that Mr Knibbs was able to challenge the conclusions reached by Miss Heath. Besides, the appellant had been referred to Sterkfontein Hospital for observation during 2011 and he was declared fit to stand trial. The report was handed in without objection from the defence and such report was not challenged, neither was it raised as a defence that the appellant was 'suffering of a pathological infirmity'.....The defence counsel extensively cross-examined almost all the witnesses, it is highly unlikely that such cross-examination would have taken place had there been no proper or coherent instructions given by the accused (pages 362 and 364 of the record). The appellant declined to testify therefore his version on the murder count is based on his plea explanation, and on what was put to the witnesses in cross examination. In considering his version the trial court, in exercising its discretion on the weight it had to attach to such evidence, had to have regard to the evidence as a whole.

[29] In my view, the court a quo did not misdirect itself on its conviction of the appellant on murder based on *dolus eventualis* . The reasoning of the court a quo appears as follows:

1. Mr Mnguni was not declared a hostile witness. The trial court found that it was in the interests of justice to accept appellant's version as divulged to this witness and restated in his statement, as the more probable version because it was given shortly after the appellant's arrest.
2. The version in the statements of Mr Mguni and Mr Zwane corroborated each other, where it was stated that the appellant had told them that he had hit the deceased's head against the bedroom floor and had seen a substance flow from her

nose. The appellant's version that the deceased hit her head against the wall was rejected as a fabrication. This based on the opinion of Dr Pharasi, that there having been other injuries on the body, it was not reasonably possible that she would have hit the wall without leaving any traces.

3. Captain Mandry testified that if the deceased had hit against the curtain behind her, traces of blood could have been found. From the photographs the curtains which were above the head of the deceased had not been disturbed. It seemed

to her as if the deceased had been dragged to the position where she was found. This according to her, was an impression she had formed from the condition of the body, the hair and that the deceased's clothing was consistent with having been dragged to her resting position. This evidence corroborated that of Dr Pharasi and that this was evident from the photographs (11, 15, 16 and 17), which further indicated that there was no wall behind the curtains but a window. There was therefore no possibility that the deceased had hit the wall and slid down to the position in which she was found.

4. The trial court had this to say about the use of the detergent Oomestos : "The inference is that there was a great deal of an effort to obliterate any trace of blood or evidence. The fact that the body of the deceased was dragged is indicative of an effort to disturb evidence. That can only have been done with a guilty conscience and an effort to obliterate any damning evidence."

[30] Dr Pharasi was cross-examined at length on the possibilities of death resulting from the alleged assault with fists on the mouth and above the eye, thereby propelling the deceased in motion until she hit the wall with the back of her head, this resulting in the breaking of her neck. While Dr Pharasi conceded that there was a probability of injuries as described in the post-mortem occurring from such alleged assault with fists , he was adamant that such version was inconsistent with his findings. He would have found that the deceased had sustained trauma to the face as alleged by the appellant but he did not find any except of the burn marks on the face caused by Domestos.

[31] The prescribed sentence in terms of Act 105 of 1997, for murder which was found not to have been premeditated is 15 years. The court a quo found that there were substantial and compelling factors warranting a deviation from the prescribed sentence. There was therefore in my view a misdirection in as far as sentence was concerned and would recommend that a term of imprisonment for 12 years be imposed.

COUNT 3: ROBBERY WITH AGGRAVATING CIRCUMSTANCES READ WITH SECTION 51(2) OF ACT 105 OF 1997

[32] In my view this was not an instance where the main motive of the perpetrator was that of robbery and of death ensuing as a result. As I see it, and from the evidence, it does not appear as if the motive for the presence of the appellant at the residence of the deceased on 19 July 2008 was to rob her. They had been in a long standing relationship; he had paid lobola in part and they were virtually living together and they had a child. There is evidence that the deceased was in an abusive relationship with several past instances of assault upon her which were reported to her family and at times to the police, only to have the charges against the appellant been withdrawn by her. Mr Mnguni testified that the appellant had, with regard to the incident of the 19 July 2008, told him and Mr Zwane presumably, that the deceased was not one to keep appointments. They had agreed to meet at 6:00 pm and she arrived home late, a quarrel ensued and they fought. In my view then taking of the items should rather be viewed as theft and not robbery with aggravating circumstances. Mnguni was not declared a hostile witness and his testimony, in particular, the contents of his statement to the police, together with the statement of Mr Zwane were admitted by the court. Reasons were advanced by the court as already discussed above. I would therefore recommend that the appeal on conviction and sentence be upheld and set aside and be substituted with a conviction on theft.

COUNT 4-19

[33] Appellant's counsel questions whether these charges were proved beyond a reasonable doubt. It is common cause that the card belonged to the deceased. The appellant did not testify in his defence so the only explanation the court had regarding the money in the bank card is in his plea explanation alternatively from a version which could have been put to a witness in cross-examination. He explained in his plea that the deceased had given him her credit card to pour petrol into his car on 18 July 2008. Furthermore, that after assaulting the deceased he drove throughout the night to Kwa-Zulu Natal and used the card to make purchases. The money he spent did not belong to the deceased because after losing his employment he had deposited his benefits into the deceased's account to pay for the balance on the outstanding lobola.

[34] The appellant described the card, as a credit card and, Mr Labuschagne described it as a debit card. A copy of the bank statement showing transactions on the account from 12 July 2008 to 1 August 2008 was availed. A transaction list which showed details of the locations of the transactions was also availed. No questions were put in cross examination to refute the allegations in the charge sheet relating to the elements which needed to be proved in order to justify a conviction on the charge of fraud. There being no onus on an accused person, it is required that his version need only be reasonably possibly true, in order to justify an acquittal. In my view it was also in the discretion of the court a quo, having considered the evidence as a whole and, in light of the lack of testimony from the appellant, to determine what weight it had to attach to his plea explanation on these counts. The court a quo rejected

his version as lacking any probability that his lobola could have been deposited into the deceased's account,

[35] The State had to prove the following beyond a reasonable doubt:

(i) A misrepresentation: spoken, express or implied, or in writing or by conduct (commission or omission);

(ii) Prejudice or potential prejudice; " Even if the prosecution has not proved that the misrepresentation resulted in actual prejudice X may still be convicted if it is proved that the misrepresentation was potentially prejudicial;" (CR Snyman Criminal Law, fourth edition)

(iii) unlawfulness and;

(iv) intention;

[36] While in the judgment of the court a quo its reasons for convicting are not clearly stated, I am satisfied that fraud and not theft has been proved beyond a reasonable doubt. The misrepresentations to Nedbank by the appellant, were that he was the owner to whom the debit card had been issued, wt10 was effecting transactions on the card which the bank had authorised, (ATM withdrawals, purchases of clothing, paying of hotel bills}, In certain instances the bank had not authorised withdrawals where the daily limit was exceeded. The transactions on the card were repeated on several occasions by the appellant between Gauteng and KZN, until such time that activity on the card was stopped after it was reported stolen and this occurred only after the deceased's death. I therefore do not find that there was any misdirection in the convictions and sentencing on these counts and would recommend that the appeal of both grounds be dismissed.

[37] In the result the following order is given.

1. The appeal on sentence in respect of counts 1 and 2 is upheld;

1.1 The sentence in count 1 is set aside and is substituted with the following: 3 months imprisonment, wholly suspended;

1.2 The sentence in count 2 is set aside and is substituted with 12 years imprisonment;

2. The appeal on conviction and sentence in respect of count 3 is upheld and is substituted with the following:

2.1 The conviction is set aside and the accused is convicted of theft in terms of section 266 of the Criminal Procedure Act 51 of 1977;

2.2 The sentence is set aside and the accused is sentenced to 3 years imprisonment;

3. The appeal on conviction and sentence in respect of counts 4 to 19 is dismissed

4. It is ordered that the sentences imposed in respect counts 1, 3 and 4 - 19 run concurrently with the sentence imposed in respect of count 2 and the sentences are antedated to 24 July 2014;

TLHAPI VV

(JUDGE OF THE HIGH COURT)

I agree,

TOLMAY RG

(JUDGE OF THE HIGH COURT)

I agree,

RANCHOD N

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON

: 09 SEPTEMBER 2016

JUDGMENT

RESERVED ON : 09 SEPTEMBER 2016

ATTORNEYS FOR THE APPELLANT : B P NDABA INCORPORATED

ATTORNEYS FOR THE RESPONDENT : DIRECTOR OF PUBLIC PROSECUTIONS

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