

SOUTH AFRICA / JUDGMENT

S v Ngubeni (SS84/2016) [2017] ZAGPJHC 237 (17 August 2017) [2017] ZAGPJHC 237

COURT

South Gauteng High Court, Johannesburg

BEFORE

L Adams

CASE / FILE NUMBER

SS84/2016

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IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE
NO: SS84/2016
DPP

REF: 10/11/1-001/2016
Not
reportable
Not
of interest to other judges
Revised.
17
August 2017
In

the matter between: THE
STATE
and
NGUBENI,
ZWELABANTU
THEMBA Accused

JUDGMENT

ADAMS J:

[1]. This criminal trial is about the death of a person, a woman, seemingly at the hands of her male partner – a disturbingly regular occurrence in our society. It is but one of the many evils which plagues our society and which is reported on almost on a daily basis. The body of the victim in this matter was removed from the scene of the crime, doused with petrol and set alight.

[2]. Mr Zwelabantu Ngubeni is a 32 year old man, who is charged with a first count of murder, read with section 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997, in that on or about the 29th December 2015 and at or near Trafalgar Flats, Protea Glen, Soweto, he unlawfully and intentionally killed Ms Zestah September (‘the

deceased’), an adult female. The reference in the indictment is to s 51(1) and there is no specific reference to s 51(1)(a) of the said Act. There is also no allegation in the indictment or the summary of the substantial facts that the murder was planned or premeditated. Given the conclusion to which I come to below, nothing turns on this point. Mr Ngubeni pleaded not guilty to this charge and elected in terms of section 115(1) of the Criminal Procedure Act, 51 of 1977 (‘the Act’) not to disclose the basis of his defence. He was warned by the court that in the event of him being convicted of pre – meditated murder as contemplated in the aforesaid s 51(1)(a) of the said Act, there is applicable a minimum sentence of imprisonment for life.

[3]. The second count is that of defeating or obstructing the course of justice read with s 256 of the Act in that during or about the period from the 29th December 2015 to the 1st of January 2016 and at or near Protea Glen and other areas in the vicinity Mr Ngubeni did unlawfully and intentionally perform certain acts, notably destroyed evidence at the scene of the crime in count 1, reporting the deceased as a missing person to the Protea Police and setting the body of the deceased alight in an open veld near Lenasia, well knowing and intending that his actions would foil the police in their investigation and / or avoiding arrest and prosecution, thereby defeating or obstructing the ends of justice. To this charge Mr Ngubeni also pleaded not guilty and similarly elected in terms of section 115(1) of the Criminal Procedure Act, 51 of 1977 (‘the Act’) not to disclose the basis of his defence

[4]. Count 3 is that of violation of a corpse in that on or about the 31st December 2015 and at or near Lenasia Mr Ngubeni did unlawfully and intentionally violate the body of the deceased by setting it alight. Mr Ngubeni pleaded guilty to this charge, and in his written statement in terms of s 112(2) of the Act he confirmed that he understood the nature of the charge against him and that he pleaded guilty freely and voluntarily. He explained that on the 29th of December 2015 a quarrel between him and the deceased, his girlfriend at the time, had developed into a physical confrontation

which resulted in the death of the deceased. He remained with the body of the deceased in their home until the early hours of the 31st of December 2015, whereafter he removed the body and transported same in the car of the deceased to an open veld near Lenasia. There he poured petrol from a plastic container, which he had bought on the previous night from a filling station in the vicinity of their home, over the body of the deceased and set it alight. Immediately thereafter he left the scene with the body still ablaze. He furthermore explained that he knew all along that his actions of burning the body of a human being were wrongful and unlawful. On the basis of his plea of guilty and his s 112(2) explanation, I am satisfied that Mr Ngubeni is guilty on count 3 and he stands to be convicted accordingly.

[5]. Count 4 is a charge of unlawful possession of ammunition in that on or about the 5th of January 2015 and at Protea Glen Mr Ngubeni was unlawfully in possession of 28 cartridges of 5, 56 X 45 mm calibre, without a valid licence to possess such ammunition. Mr Ngubeni pleaded not guilty to this charge and elected in terms of section 115(1) of the Criminal Procedure Act, 51 of 1977 ('the Act') not to disclose the basis of his defence.

[6]. Mr Ngubeni made a number of admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 and these admissions were recorded by me as such with the consent of Mr Ngubeni. These admissions are contained in exhibits 'B', which incorporated by reference exhibits 'C' to 'L'. In summary, Mr Ngubeni admitted that Ms Zestah September is the deceased, and that she died on or about the 29th December 2015 at or near 22 Trafalgar Flats, Protea Glen, Soweto. He also admits that he removed the body of the deceased to a secluded area near Lenasia where he dumped the body and set it alight. The body of the deceased sustained no further injuries from the time she sustained injuries on the 29th and the 31st December 2015 until the post – mortem examination was conducted by Dr Julian Jacobson on the 5th January 2016. The findings and observations of Dr Jacobson as recorded in his post – mortem report dated the 5th of January 2016, are all correct. The autopsy and related admissions are contained in exhibit 'C'. Exhibit 'D' is a photo album containing photographs depicting the scene where the body was found, including some grim pictures depicting the charred body of the deceased as found on the scene. Exhibits 'E' and 'F' are a series of photographs of the inside of the house where the deceased was killed as found by the Forensic Investigators on the two separate occasions they visited and inspected the residence.

[7]. Mr Ngubeni also admitted that on the 1st of January 2016 he reported the deceased as a 'missing person' to the Protea Glen Police Station, as evidenced by a Form SAPS 55(a), signed by him, as the 'reporter', on the 1st of January 2016. Mr Ngubeni furthermore admitted as facts the contents of and allegations contained in affidavits by Dirk Johannes

Booyesen, Raphatla Springbok Moloi and Warrant Officer T Naidoo. The net effect of these admissions is that it became common cause that the blood of the deceased was found on the mattress, pillow and duvet of the bed in the main bedroom at the house of Mr Ngubeni and the deceased. There was also blood on the bottom part of the bedroom curtains, also identified as that of the deceased.

[8]. In substantiation of the charges against Mr Ngubeni the State had tendered the evidence of various witnesses. What follows are summaries of the pertinent and relevant details that emerged from the evidence in chief and cross – examination of each witness.

[9]. Siyabonga Lituka ('Siyabonga'), whose girlfriend, Onela Gamzana ('Onela'), was a friend of the deceased, testified that he met Mr Ngubeni for the first time on the morning of Tuesday, the 29th December 2015. The deceased had introduced Mr Ngubeni as her boyfriend and they, that is Mr Ngubeni, the deceased, and the witness

and his girlfriend, decided to spend the day and have a picnic at a resort called Fun Valley. In preparation for the day at Fun Valley they had bought some drinks and edibles and left from the flat of Mr Ngubeni and the deceased. At that point Mr Lituka explained that the deceased and Mr Ngubeni lived together at this flat. He also explained that from time to time Mr Ngubeni, employed at the time by the South African National Defence Force, would be deployed outside of Gauteng, which would take him away from home for however long he would be required to work. They arrived at Fun Valley at about 13H00 and thereafter proceeded to have a relaxing and enjoyable time in each other's company for the rest of the day. His evidence was that they all consumed alcohol and, by all accounts, their party had an enjoyable afternoon in the sun, swimming, relaxing and drinking. The fun was interrupted for a short period in that Mr Ngubeni, accompanied by the witness, had to leave the resort to go and attend to his son who had been injured and required urgent medical attention. After the medical emergency had been attended to, they returned to Fun Valley and continued the fun in the sun, until after sunset, when they decided to leave.

[10]. They were on their way to the home of the witness and his girlfriend in Dlamini, when driving past a place called the 'old Vista', where people, including Mr Lituka and his friends hang out from time to time. They decided to go there, and on their arrival they found many of his friends, notably one 'Smart', who had at some point proposed to the deceased. They greeted everybody and sat down with a view to sit and relax with those already there. At some point the deceased got up and went to Smart, impishly rubbed his head and greeted him again. This seemingly agitated Mr Ngubeni at least very slightly, who then jestingly enquired from Smart whether indeed he was really smart – all in good spirit. He asked this question to Smart a second time and Smart retorted by asking whether he (Mr Ngubeni) had a problem. Shortly thereafter Mr Ngubeni told the deceased that they should leave. The deceased was not ready to leave the party just yet, but Mr Ngubeni was insistent. By then he was visibly agitated or as Mr Lituka puts it, 'he did not look ok'. In the end, the deceased agreed that they should leave. The witness and Onela decided that they would also leave, and were dropped off at home by Mr Ngubeni and the deceased, who then seemingly went home. In the car on their way home the atmosphere, according to Mr Lituka, was a tad tense in that the deceased was deliberately not talking to Mr Ngubeni, who was trying to engage the deceased in a discussion. She would however have none of that and spoke only to Lituka and Onela. When they were dropped off at home, that was the last time the witness saw the deceased.

[11]. The next day, that being Wednesday, the 30th December 2015, Lituka wanted to go and collect a fan he had left at the house of the deceased and Mr Ngubeni the previous day before they went to Fun Valley. He tried to call the deceased in order to arrange to collect the fan, but her phone, although ringing was not answered. At about midday he went to the flat and knocked on the door repeatedly, but no one answered. He was convinced that there were people at home, and that they just did not want to open for them. His further knocks also went unanswered and after a short while he left. Later on in the day he was able to speak to Mr Ngubeni telephonically and he arranged to have the fan delivered to him. This was done by Mr Ngubeni a day or two later. According to the witness, Mr Ngubeni just handed him his stuff and when he enquired about the whereabouts of the deceased, Mr Ngubeni said he did not know where she was. He had also apparently tried to contact the deceased, but to no avail. Mr Ngubeni also explained that after they got home from Fun Valley on the night of the 29th December, he and the deceased had a small altercation, whereafter the deceased walked out of the house. Although, Mr Ngubeni did not give an indication of the time that the deceased supposedly left their home, he did say that she left on the same night of the 29th December, implying shortly after they had arrived home. He also gave no details of the argument they had. Later, Lituka and his girlfriend heard from the deceased's sister that her body had been found.

[12]. During cross-examination by Mr Matambuye, who appeared on behalf of Mr Ngubeni, the witness confirmed that although he had only met Mr Ngubeni for the first time on the morning of that fateful Tuesday, he had no reason to think of him as a bad person. During the day, he confirmed that the deceased was entertained by Mr Ngubeni and that the mood throughout the day was jolly. He also confirmed that they would probably have spent the night at Fun Valley but for the fact that, on Mr Ngubeni and the deceased making enquiries, they were told that the overnight accommodation had been fully booked. This, so it was suggested to Lituka demonstrated that all was well between the deceased and Mr Ngubeni. The version of Mr Ngubeni was thereafter put to the witness in detail.

[13]. Onela Gamzana ('Onela') was the next state witness. In her words, she and the deceased were best friends. She confirmed the events of the 29th December 2015 as recounted during his evidence by her boyfriend, Lituka, the previous witness. She however denies that she was also drinking when they got to Fun Valley. Her explanation was that she could not have been drinking as she was pregnant at the time. She was also the only one not swimming in the pool at Fun Valley. She was outside the pool all along and had everybody's phones with her. Importantly, she corroborated the version of Lituka relative to the incident with Smart at 'old Vista'. She furthermore testified that in the morning of Wednesday, the 30th December she tried to call the deceased, but her phone was off. She was surprised because normally the deceased would call her early in the morning if they had been together the previous day. On Thursday, the 31st December the sister of the deceased, Sithuli Malota ('Thuli'), called and enquired about when she had last seen the deceased, because, so Thuli told her, Mr Ngubeni was apparently looking for her then, as she (the deceased) had told him that she was going to Lesego. On Friday, the 1st January 2016, Thuli called her and told her that the family had decided that they were going to report the deceased missing at the local Police Station. On that day she also met Mr Ngubeni who

brought the fan and other stuff of her boyfriend, and he asked her to please try and see if she could locate the deceased by for example calling all of her friends, which she did. The friends however were not able to assist as they had also not heard from the deceased. On Saturday, the 2nd January 2016, she received confirmation from Thuli that they had found the body of the deceased, which had been burnt.

[14]. Her evidence with reference to the Smart incident was that, although Mr Ngubeni seemed fine whilst they were sitting there, he just said shortly after the said incident that they should leave. The deceased clearly did not want to leave at that stage, and the atmosphere in the car on the way home was a little tense. The deceased was only talking to them and not to Mr Ngubeni. On the morning of the day they went to Fun Valley the witness had noticed that the ear of the deceased was reddish in colour, and the deceased explained to the witness that this was because Mr Ngubeni had 'pinched' it. The deceased did however not give more details.

[15]. Under cross – examination Onela explained that she also met Mr Ngubeni for the first time on the day of the outing to Fun Valley. Whilst at Fun Valley the mood was fine. The other three swam and drank alcohol and she sat on the side, drinking soft drinks. There were no obvious problems between the deceased and Mr Ngubeni. She confirmed that the deceased and Ngubeni had tried to book overnight accommodation for them, which, she confirmed, suggests that their party, in particular the deceased and Mr Ngubeni wanted to extend the good time and were very likely planning on being a loving and intimate couple. At 'old Vista' she confirms that, despite the incident involving Smart, Mr Ngubeni seemed ok, except that at some point he insisted that they should leave. She also reiterated under cross – examination that in the car on the way home, the deceased did not speak to Mr Ngubeni, as

she was clearly upset.

[16]. Thereafter the state called Edward Ngwagamobe ('Edward'), a petrol attendant at a filling station in the Protea Glen area, who confirmed that on the night of Wednesday, the 30th December 2015, Mr Ngubeni came to buy petrol from their garage, which he was required to pour into a plastic container he had brought with him to the filling station. Mr Ngubeni had persuaded him to pour him the petrol by telling him a lie that he had left his grandmother on the road, and that he needed to take her to the hospital, he also confirmed that a photo album, received into evidence by agreement between the parties as exhibit 'G', depicted Mr Ngubeni buying and receiving the petrol at the garage just after 19h00.

[17]. The next witness for the state was Ms Thato Takadi ('Thato'), another friend of the deceased, who knew Mr Ngubeni as the boyfriend of the deceased. She painted a picture of a strained relationship between the deceased and Mr Ngubeni. She testified that from time to time the deceased would complain to her about Mr Ngubeni, who she accused of strangling her when he was upset with her. An example given by the witness was of an instance where the deceased called her at four in the morning telling her that she was scared to go to her bedroom because Mr Ngubeni was apparently upset about the fact that she had not gone to visit him in

Mafikeng, where he had been posted, despite the fact that she had agreed to do so. The witness also testified whilst living with Mr Ngubeni, the deceased also had an affair with one Nhlanhla, an antagonist, who features prominently in the version of Mr Ngubeni in relation especially to the events on the night of the death of the deceased. During October 2015 Mr Ngubeni found out about the affair, and chased the deceased out of their common home. A few days later the deceased approached Mr Ngubeni, asked for forgiveness and they reconciled and resumed their lives together. Her evidence was furthermore that on Thursday, the 31st December 2016, she met Mr Ngubeni at the house of the parents of the deceased in Pimville, and he told her that the deceased had left in a red car, and that he thought that she may have gone to a Lesego in Northriding. On the 2nd January 2016 it was confirmed by the family of the deceased that her body had been identified. On the 5th January 2016 the witness accompanied the police and other family members of the deceased to go and collect the personal belongings of the deceased from her house in Protea Glen. When they arrived there they noticed that the bed, a jean belonging to the deceased, a duvet cover, a pillow and a curtain were blood stained.

[18]. Under cross – examination she gave evidence about the deceased and Mr Ngubeni constantly having arguments on occasions where the deceased would insist on going out with her friends, and Mr Ngubeni would try and prevent her from going. Often, so the witness told the court, the deceased would go out anyway notwithstanding Mr Ngubeni's protestations. She confirmed that Mr Ngubeni would not physically assault her, but when it was time for her to go back home after a night out, she would be scared. She did however say that at some point the deceased presented with bruises around her neck, which she explained resulted from being strangled by Mr Ngubeni,

[19]. The next two witnesses for the prosecution were Palesa and Tshepo Mokhele, a husband and wife who hosted the deceased and Mr Ngubeni at their home in Pretoria for Christmas lunch on the 25th December 2015. Tshepo was a colleague of Mr Ngubeni, and they had been working together in Mafikeng up to the 21st of December 2015. This was the first time that Palesa had met the couple. During the course of the day the deceased and Mr Ngubeni were involved in arguments first about the deceased being or not being pregnant and then about whether or not the deceased wanted to marry Mr Ngubeni or not. According to the witness it was unpleasant and made the other guests rather uncomfortable. From what she saw on that Christmas day Palesa described the relationship between the deceased and Mr Ngubeni as toxic. Under cross – examination Palesa commented that the deceased appeared to be very straight forward and a person who was not afraid to speak her mind. From what she could see there was constant tension between them during the course of that afternoon.

[20]. The state thereafter called Buyile Mzolo, who is married to the deceased's sister, Thuli. The import of his evidence was that at some stage, during or about the time the deceased and Mr Ngubeni were having a fight about Nhlanhla and Mr Ngubeni chased her out of the house, he, at the request of his wife Thuli, spoke to Mr Ngubeni to see if they could resolve the problems. During this discussion, Mr Ngubeni said that if the deceased was to continue cheating on him, he (Mr Ngubeni) may end up 'making a flop'. The witness thereupon suggested to Mr Ngubeni that,

if things are not working up between them, they should simply split up, and he seemed to understand and agree with the advice.

[21]. The next witness for the state was the older sister of the deceased, Sithuli Malotsi ('Thuli'), who gave evidence that on Thursday, the 31st December 2015, she received a call from Mr Ngubeni, who told her that the deceased had left on the previous day with a Lesego in a maroon car, and never returned. Thereafter, she called around to all of the friends of the deceased, all of whom were not able to tell her where the deceased was. She was also not able to establish who Lesego was. On the 1st December 2016 they went to report the deceased missing at the Protea Glen Police Station. On the 2nd December 2016 her parents identified the body of the deceased. She confirmed that at some point she suspected that something was amiss. On the 21st November 2015 she had received a message from Mr Ngubeni, which said that he thought that the deceased did not love him as she was, according to him, still involved with an ex – boyfriend of hers, one Claude. This incident was preceded with another in October 2015 when Mr Ngubeni called her and complained about the deceased, and he also told her that he had put her out of the house. She subsequently asked her husband to speak to Mr Ngubeni with a view to assisting in sorting out the problems in the relationship.

[22]. The investigating officer, Sgt Philemon Shiviti, thereafter gave evidence. He confirmed that he was called to the scene where the body of the deceased had been found in the open veld. He confirmed that the photos presented by the state depicted inter alia the charred body of the deceased as he found it at the scene. A part of the left side of the body appeared to have been cut off. He removed the body to the Carletonville Mortuary where the parents of the deceased came to identify on the 2nd January 2016. Shortly thereafter he interviewed Mr Ngubeni, who denied any involvement in the death of the deceased. He was also told by Mr Ngubeni that the deceased had left home on the 30th December 2015 with her friend who came to fetch her in a red vehicle. The witness attended on the residence of Mr Ngubeni and on two occasions inspected the house with the assistance of their Forensic Department. On the 5th January 2016, when he visited the flat with members of the family of the deceased, he noticed blood under the bed, which had not been observed when the Forensic Department examined the place for the first time. There was a lot of blood on the mattress, the duvet and the pillow. This blood was later found by DNA analysis to be that of the deceased.

[23]. Importantly, the witness also testified that the second inspection had clearly showed that the scene had been cleaned up. With reference to photographs Sgt Shiviti indicated in his evidence that the duvet cover, for example, was a clean one, as was the pillow case, although the inner duvet had blood on it as did the pillow. The implication was that the covers had been replaced to hide the fact that someone was injured in the bedroom and had bled on the bed and the bedding.

[24]. He also confirmed that they found the ammunition in the wardrobe of Mr Ngubeni.

[25]. The next witness for the state was Dr Govender, a psychiatrist, who observed and assessed Mr Ngubeni at the Sterkfontein Hospital from the 17th October 2016 to the 15th November 2016. At the time, Mr Ngubeni was also assessed by Dr Fine, a psychiatrist for the defence, and a Mrs Waldeck, a clinical

psychologist. In a Joint Psychiatric Report they had concluded that at the time of the alleged offence, Mr Ngubeni was both able to appreciate the wrongfulness of his actions and able to act in accordance with such appreciation of wrongfulness. Her evidence was that her assessment of Mr Ngubeni revealed nothing that negated his criminal capacity. She also testified that Mr Ngubeni had told her during the interviews that on the night the deceased died, he had put his hands around her neck to stop her from talking, and, according to her, he seemingly remembered that clearly. He also told her that for a minute or two thereafter he cannot remember what happened. Thereafter he regained awareness and realized he had his hands around her neck.

[26]. In her opinion, the claim by Mr Ngubeni is not sustainable from a psychiatric point of view. She describes as unlikely his version that he remembers vividly what transpired up to a point, and then, like magic, he loses it, and then just as suddenly and unexpectedly the proverbial lights come back on. She does not accept that Mr Ngubeni 'blacked out'. According to her, when a person comes out of a 'black out', he is disorientated for at least a few seconds, which was not the case with Mr Ngubeni, who from one split second to the next moved from being completely unaware to crystal clear thinking. She strongly disagreed with the proposition that Mr Ngubeni became so angry and his emotions were raised so high that he completely lost control and his body took over. Her response was that 'he lost his temper, but I do not believe that he lost cognitive awareness'.

[27]. Dr Govender was quite happy to concede that what happened was not planned by Mr Ngubeni or premeditated. This does however not mean that he lost control of his intentions. He had conscious awareness all along and he was aware that he was involved in what was happening. This finding she bases on the premise that if he had suffered a blackout, as he claimed he did, once this state was over he should have done the opposite from what he was doing because he had not meant to do what he did. The fact that Mr Ngubeni attempted suicide in her view had no influence on her opinion that he was aware of his actions at the time.

[28]. The last state witness was the pathologist, Dr David Jacobson, whose report was received into evidence by agreement between the parties. The evidence of Dr Jacobson is uncontradicted. On the basis of the observations he made while carrying out a post – mortem

examination of the deceased he reached certain conclusions. The most important observation he made was that the deceased had suffered a 45cm incisional wound across the left abdomen and left breast exposing the area of burns possibly not related to the burns only but possibly caused by a sharp object. His examination of the body also revealed a 2,5 X 2 cm wound to the left palm of the hand, which the doctor described as a possible defence wound. Although it is not specifically spelt out in his report, the witness testified that the cause of death could be the

multiple injuries suffered by the deceased.

[29]. That concluded the state's case.

[30]. The accused, Mr Ngubeni, elected to testify. At the time of the commission of the offence he was employed by the SANDF. He confirmed that before her death he was involved in a romantic relationship with the deceased. He puts it thus: 'We were in love'. They started living together during June / July

2015. Most of the time he would work outside of Gauteng when deployed for periods ranging between three weeks and two months. He confirmed that as a couple they had had their challenges. During or about October 2015 they were experiencing some serious problems in their relationship when the deceased had admitted to him that she had been

cheating on him with Nhlanhla. This revelation upset him so that he put her out of the house and she returned to her mother's

house. After two days the deceased called him and requested to meet with him to see if they could not reconcile. He met with her, she vowed never to cheat on him again and asked for his forgiveness. Because he still loved her, he took her back and they resume their lives together. After that they were happy, he expressed the view that as a couple they were happy bar the usual hiccups experienced by other normal couples. On Christmas day they had lunch at the house of one of his colleagues, and they had a few arguments whilst there. He believes that those problems were resolved and was of no concern to him thereafter.

[31]. On the 29th December 2015 they went to have a picnic at Fun Valley, and they had a fun filled and relaxing day in each other's company and in the company of their friends. On their way home from the picnic they made a turn at 'old Vista', where they ran into some friends of Mr Lituka. Amongst those friends was a Smart, who, according to Mr Ngubeni, looked at his girlfriend in a way that he did not approve of. He then said that they should just leave. At first the deceased was reluctant to leave, but in the end she agreed. He denies that she was upset and testified that in the car on their way home everything was fine. This was contrary to the evidence of the Mr Lituka and Ms Gamzana. When they arrived home everything was well between them, and they even sat down and had drinks and watched TV together. The unpleasantness however started when she received a call and announced to him that she was going out with friends, including Nhlanhla. This annoyed Mr Ngubeni especially after he suggested that he was going along as well, and she refused, which resulted in a serious altercation. At some point the argument degenerated into a screaming match of note. The deceased then admitted that she was still seeing Nhlanhla and, according to Mr Ngubeni, said seriously hurtful things including an admission that when he is not at home Nhlanhla is the man of the house. And that he satisfied her needs. This made him so angry that he could not even speak anymore. He was stammering and his body was shaking. He ordered her out of the house, but she refused defiantly saying that it is her house too. By then emotions were running high as were their voices, and at some stage he pushed her and she pushed him back. They grabbed each other, and that is his last recall. When he 'woke up'

his hands were around her neck and he was on top of her.

[32]. She was motionless. He shook her. After a while he went outside and had a smoke. He returned to the bedroom and again tried to wake her up. His attempts were to no avail. He found himself in a state of absolute shock and panic, and he did not know what to do. He had an overwhelming feeling of guilt. In the hours and days following the incident, he contemplated suicide and in fact attempted taking his life on two occasions. He remained with the body until about 01H00 on the morning of the 31st December when he removed the body from their flat and drove it to a secluded veld near Lenasia. There he poured petrol over the body, set it alight and left with the body still on fire. The petrol he had purchased from a near – by petrol station the night before at about 19H00. In the days following the death of the deceased and the burning of her body, Mr Ngubeni pretended to the family and friends of the deceased that he did not know her whereabouts. He was arrested on the 5th January 2016, but before that he, with other members of the deceased's family had gone to the police station and reported

her missing.

[33]. As regards the ammunition, he testified that he knew nothing about it. His explanation was that it probably belonged a friend of his, one Kabelo, who at some stage had slept over at his place and forgot his bag when left the next morning.

[34]. During cross – examination by Mr Ngodwana, Mr Ngubeni was invited to let his conscience speak and to tell the truth. He remained adamant that he was telling the truth,

[35]. The last witness for the defence was Mr Oscar Modipa, a clinical psychologist, who had observed and assessed Mr Ngubeni on the 28th and 29th of June 2017. Pursuant to his assessment he had prepared a report. In sum he concluded that at the time of the killing of the deceased Mr Ngubeni lacked the necessary criminal capacity to understand and appreciate the wrongfulness of his actions. His analysis was based to a large extent on what he was told by Mr Ngubeni about the events on the night in question.

[36]. That concluded the case for the defence.

Findings

[37]. Having considered all the evidence and the admissions made by Mr Ngubeni in terms of s 220 of the Criminal Procedure Act, I am of the view that the salient facts of this matter are the following.

[38]. The deceased and Mr Ngubeni had been in a romantic relationship from 2014 until the date of her untimely death on the 29th December 2015. At the relevant time they were living together at what was previously Mr Ngubeni's house. By all accounts theirs was somewhat of a tumultuous relationship, characterised by arguments from time to time and allegations of infidelity. In the days leading up to the date of the death of the deceased there was at least one example of the continuous and ongoing arguments between them, that being the very unpleasant and public fall – outs they had whilst visiting with friends on Christmas day.

[39]. Also, on the day in question there was an altercation of sorts between them relating to one Smart, whom Mr Ngubeni viewed rather antagonistically because of the way he had looked at the deceased shortly before they arrived home.

[40]. They arrived home on the night of the death of the deceased, and the indications are that there was an incident, the details of which are not altogether clear from the evidence, but which resulted in the death of the deceased. At the time of her death the only people at their house was the deceased and Mr Ngubeni, and Mr Ngubeni is therefore the only person who really knows what happened there that fateful night. The deceased was killed at about 20h00. The cause of death is not altogether clear. However, I am of the view that she had been cut very severely with a knife or other sharp instrument across the abdominal area and there were other

deep flesh wounds on the left hand side of her torso. These open flesh wounds, together with the other multiple injuries reported on by the pathologist, probably caused and / or contributed to the death of the deceased.

[41]. Mr Ngubeni remained in their flat with the body overnight and during the course of the next day without leaving the house. At about 19H00 in the evening of Wednesday, the 30th December 2015, he went to the petrol station and bought petrol which he had poured into a petrol container. At about 01H00 on the morning of Thursday, the 31st December 2015, Mr Ngubeni loaded the body into the car of the deceased and went to dump it in an open veld near Lenasia. There, he poured petrol over the body, and set it alight. He left the scene with the body still burning.

[42]. In the days following the death of the deceased Mr Ngubeni weaved a tangled web of lies, pretending to the family of the deceased that she had left home after a small argument. He started the deceit by telling Mr Lituka and Ms Gamzana that the deceased had left shortly after they had arrived on the night following the picnic at Fun Valley. On the 31st December 2015 he told the sister of the deceased, Ms Malotsi, that the deceased had left on the morning of the 30th December with a Lesego in a maroon Polo. On the 1st of January 2016 he was shown pictures of the burnt body of the deceased, and he told the police officer that the pictures were not of the deceased, knowing full well that they were of the body of the deceased. At some point Mr Ngubeni cleaned up the scene of the crime by removing blood stained bedding, duvet covers and generally clearing the flat of any evidence of what happened there on the night the deceased lost her life.

[43]. The missing piece of the puzzle is what happened between the deceased and Mr Ngubeni when they arrived at home.

[44]. I turn now to consider Mr Ngubeni's version of events and to determine whether same is reasonably possibly true. A significant aspect of his version is that at the crucial moment he lost complete control over his actions due to an inability to retrain himself and to resist his emotions.

[45]. Mr Ngubeni's version I have alluded to in detail supra. He has a vivid recall that they arrived home and all was well in the land. They even had more drinks and were relaxing and watching TV together. At some point the deceased received a call, whereafter she told him that she was

going out with friends including the Nhlanhla referred to above and who had caused a previous break – up between them. This resulted in an argument which deteriorated into a serious verbal altercation during which emotions reached fever pitch. Mr Ngubeni pushed the deceased, she pushed back and then they ‘went for each other’. He recalls stretching out his arms in the direction of her upper body and then ... nothing. His next recall and awareness is of him on top of the deceased, lying on the bed, with his hands around her neck. At that point she was motionless and seemingly not breathing. Importantly there is this lacuna, this gap, in his version, which Mr Ngubeni attributes to his completely losing control. Everything is crystal clear up to the point when he loses it and equally lucid after he regains awareness.

[46]. This version is not reasonably possibly true. By all accounts, the deceased was upset with Mr Ngubeni when they were travelling home from the ‘old Vista’. Why would she so suddenly change and become loving with Mr Ngubeni when they arrived home. Even more telling is the fact that on Mr Ngubeni’s version the deceased, knowing how strongly Mr Ngubeni feels about Nhlanhla, had the gall to throw into his face the fact that she was still having an affair with him. This, in the context of the scene sketched by Mr Ngubeni of them sitting together all relaxed, is highly improbable.

[47]. I also have no hesitation in rejecting Mr Ngubeni’s version of the events. He was an extremely poor witness and on numerous occasions tried to correct his evidence when he realised his answers were incriminating. In his evidence there were many contradictions, inconsistencies and improbabilities. On the crucial aspect of what happened during the struggle Mr Ngubeni claims that he blacked out. He was an untruthful witness and his testimony is unreliable.

[48]. This means that the matter has to be decided on inferences. In that regard, and if one considers the incisional wound the irresistible conclusion to be drawn from all the proven facts is that Mr Ngubeni intentionally killed the deceased, and subsequently tried to cover up his unlawful conduct.

[49]. In drawing these conclusions I am fully aware of the warning by Smalberger AJA in *S v Mtsweni*, 1985(1) SA 590 AD at 593I – 594D against inferring guilt necessarily from dishonest testimony by an accused person. However, Mr Ngubeni, by his own admission unashamedly lied to and deceived the members of the family of the deceased and the police. In addition, there are a number of discrepancies in his version. For example, in his bail application in the Magistrates Court Mr Ngubeni stated that he saw himself wrestling with her and then he realized that they are on top of the bed and she lay motionless underneath him. He also stated that he then realized that both his hands were holding firmly around her neck. This statement was in contradiction to his viva voce evidence in court that he does not recall making contact with her before losing awareness. His Last recall was of him stretching out his arms and then he lost awareness.

[50]. In my view Mr Ngubeni lied about what he recalls happened on the night the deceased died. He did so in an attempt to avoid the compelling inference, which inference negates all other reasonable inferences, that he was upset with the deceased for all the many times he felt betrayed by her infidelity, which culminated in his becoming really angry about the way she rubbed Smart's head earlier on, and then attacked her and caused her death.

[51]. The evidence of Mr Lituka and his girlfriend regarding the Smart incident and the tension in the car on their way home, Ms Mokhele's evidence that the deceased and Mr Ngubeni were involved in serious arguments mere days before she died and that she thought that their relationship was a toxic one and the evidence by Ms Malotsi that they argued about a Claude during November 2015 further strengthen the case for the state that Mr Ngubeni was angry with the deceased and begrudged her the fact that, according to him, she cheated on him.

[52]. In my view, the failure of the state to establish exactly what happened between the deceased and Mr Ngubeni on the night she was killed other than through the combined evidence of Mr Lituka, Ms Gamzana and Ms Malotsi, read with the relevant admissions, does not detract significantly from the strength of the state's case.

[53]. In *R v Blom*, 1939 AD 188 at 202 – 203 it was held that when reasoning by inference the inference sought to be drawn must be consistent with all the proved facts and these facts must be such that they exclude every reasonable inference from them save the one sought to be drawn. By no stretch of the imagination is Mr Ngubeni's guilt inconsistent with any proven fact. In my view, no reasonable inference may be drawn from any proven fact which points to his innocence. In that regard what weighs heavily on my mind is the serious 45cm incisional wound sustained by the deceased, as well as the fact that Mr Ngubeni went to great lengths to erase any trace of evidence which could have given clues on what transpired there that night.

[54]. In any event, the version of Mr Ngubeni amounts to a defence by him of temporary non – pathological criminal incapacity. The principles relating to this defence are enumerated properly in the leading case on the topic that being *S v Eadie*, 2002(1) SACR 663 (SCA). I can do no better than to quote from paras [43] and

[44] of the judgment, which read as follows:

'[43] The decisions in the preceding paragraphs show that this Court has approached defences of non-pathological criminal incapacity with caution. In the *Henry* case the phenomenon is said to be "most uncommon". In dealing with a natural inference that people act consciously and voluntarily this court has repeatedly stated that the inference is disturbed in "exceptional cases". In the *Wiid* case, *supra*, the only case in this Court in which the defence was upheld, there was doubt whether the appellant had the ability to distinguish between right and wrong and to act in accordance with that distinction. In that case not only were the stressors severe and aggravated by the intake of a sedative, but also the immediate circumstances and the concussion suffered by the appellant were so extreme so as to persuade the psychiatrists and the Court that there was a reasonable doubt about her criminal capacity. It is perhaps because of his repeated exposure to the asserted defence that Dr Kaliski is so sceptical. His call for a set of compelling facts before he

concedes the validity of the defence in a given case is in line with the dicta referred to above. Dr Kaliski equated automatism with the defence asserted by the appellant in the present case and his explanation makes it clear that in his view the only circumstance in which one could "lose control"

is where one's cognitive functions are absent and consequently one's actions are unplanned and undirected. His view is in line with the decisions of this Court.

[44] The approach of this Court in the decisions discussed in this judgment, has been to carefully consider the accused's actions

before, during and after the event. It took into account whether there was planned, goal-directed and focused behaviour.

In the decisions referred to, a determination was made about whether an accused was truly disorientated - an indicator of temporary loss of cognitive control over one's actions and consequent involuntary behaviour. This Court has repeatedly stated that a detailed recollection of events militates against a claim of loss of control over one's actions.'

[55]. Applying these principles in this matter, I am of the view that Mr Ngubeni's defence of temporary non – pathological criminal incapacity should fail. The factors mentioned by the SCA as negating the defence are present on his version, notably his actions before, during and after. Importantly, his actions before the blackout and his actions after the blackout are inconsistent with an absolute and complete loss of control by him during that short period. That is so even from a psychiatric point of view, and is the view taken by the panel of psychiatrists and psychologist at Sterkfontein. I agree with that opinion. I do not accept the view of the clinical psychologist, Mr Modipa, who testified on behalf of the defence, to the effect that because of his heightened emotional state, Mr Ngubeni lost control of his actions. His view, as I indicated above, is based almost exclusively on the report by Mr Ngubeni of what transpired on the night of the 29th December 2015. In view of my finding that the version of Mr Ngubeni should be rejected as unreliable and not reasonably possibly true, the opinion based on that version also stands to be rejected.

[56]. I now consider the likelihood that the murder was planned or premeditated.

[57]. As indicated, I am satisfied that the evidence adduced by the State proves beyond a reasonable doubt that Mr Ngubeni is guilty of the crime of murder. However, the evidence falls short of proving that he acted with premeditation or had planned the murder. It appears he may have acted on the spur of the moment because of the circumstances which had culminated in the events at 'old Vista'. It is by no means enough for there to be a suspicion in regard to whether he acted in a premeditated manner or not. The onus rests on the State to prove this beyond a reasonable doubt. I do not consider that the evidence goes far enough in this respect and I therefore cannot find that the murder was either planned or premeditated.

[58]. On the second charge of defeating or obstructing the course of justice, the facts on which the state bases this charge are common cause. Mr Ngubeni had deliberately misled the police, as a law enforcement agency, by destroying the evidence at the scene of the crime, reporting the deceased as a 'missing person', knowing full well that he had killed her on the night of the 29th December 2015 and that he disposed of and burnt her body. The inescapable conclusion is that he did all of the foregoing in order

to foil the police in their investigation and to avoid being arrested or prosecuted. The only question is whether these facts translate

into the crime of defeating or obstructing the course of justice, read with s 256 of the Criminal Procedure Act 51 of 1977.

[59]. If Mr Ngubeni is guilty on the count of murder and having regard to the evidence adduced and the foregoing common cause facts, then it follows that he ought to be guilty of defeating the ends of justice. The police officers at the police station understood him to convey to them unambiguously that he was reporting the deceased as a 'missing person'. This caused the police machinery to click into gear with a view to locating the deceased, which process was kicked off by the circulation of the particulars of the deceased as a missing / unidentified person.

[60]. Mr Ngubeni was given the benefit of the doubt from the 1st of January 2016 to the 5th January 2016 when he was arrested and subsequently charged with the murder of the deceased after a full, thorough, scientific and fair investigation was carried out.

[61]. In *S v Pakane and Others*, 2008 (1) SACR 518 (SCA) the Supreme Court of Appeal observed at 532 a - c (para 34):

'I turn to deal with the second appellant's challenge of his conviction for defeating the ends of justice. This offence consists in unlawfully and intentionally engaging in conduct which defeats the course or administration of justice. In this respect the State relied on the following - the contact shot, the swapping of the R4 rifles, the torn pages of the occurrence book and second appellant's instructions to Ngxumza to rewrite entries without informing a superior officer about the state of the book. State counsel argued that the appellants had fabricated a version for their return to the police station, knew that rifle 295 would be swapped and that documentary evidence linking the second appellant to it would be altered or destroyed with the deliberate intent to defeat the course of justice.'

[62]. At 533 c-f [para 38] the Court went on:

'Equally striking is the fact that the torn pages related to fresh events of that very morning. A perusal of the relevant entries, starting from the previous evening, shows that but for the Lang report, it was an uneventful shift. For what conceivable reason then could one remove the missing pages and who else (except someone involved in the contentious shooting incident) in the circumstances would have an interest in those pages? ---. There is no doubt in my mind that [second appellant's] version in this regard is false. I agree with the conclusion of the court below that he tampered with the occurrence book to remove proof that he had booked out rifle 295,

which, very conveniently, was subsequently not sent for a ballistics test. Therefore, his conviction for defeating the course of justice was proper.”

[63]. See also Minister of Justice and Constitutional Development & Others v Moleko, 2009 (2) SACR 585 (SCA) at paras 21 & 22 where the SCA stated:

‘[21] Mr Moleko was charged with defeating or obstructing the course of justice. The essential elements of this crime at common law are described by JRL Milton South African Criminal Law and Procedure vol II Common Law Crimes 3 ed (1996) as follows (p 102):

'Defeating or obstructing the course of justice consists in unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice.' [Footnote omitted.]

[64]. Applying these principles to this case I am satisfied that Mr Ngubeni is guilty of having defeated or obstructed the course of justice.

[65]. As regards count 3 of violating a corpse, I have already indicated above that, on the basis of Mr Ngubeni's plea of guilty and his s 112(2) statement, I am satisfied that he is guilty of this charge. The evidence led during the trial has also confirmed the guilt of Mr Ngubeni beyond a reasonable doubt.

[66]. Lastly, as regards the charge of unlawful possession of ammunition, the defence of Mr Ngubeni is to the effect that he was completely unaware that a friend of his, one Kabelo, had inadvertently left the ammunition in an army bag at his house when he slept over on their way from an assignment. The first time he became aware of this charge against him was when he made his last appearance in the Magistrates Court, and he was advised of the charges against him. He maintained that he was unaware of any ammunition in his house, as he had never looked to see what was inside the bag which he had established belonged to Kabelo.

[67]. He assumed that the police when searching his house had stumbled onto the ammunition either in the bag or in one of the cupboards. If it was found in the cupboards, then his explanation was that it had probably been taken out of the bag by the deceased, who assumed that it was his army issued ammunition when she was cleaning the house and packed it away neatly.

[68]. The version of Mr Ngubeni in that regard is contradicted by the evidence of the investigating officer, Sergeant Philemon Shiviti, who denied the claim by Mr Ngubeni that he was unaware of the ammunition in his house. When he confronted him with the fact that they had found the ammunition in his house during the time of his arrest, his explanation was that when he returned from an exercise, he had forgotten to hand bag the ammunition.

[69]. Mr Ngodwana, who appeared on behalf of the state, submitted that I should reject the version of Mr Ngubeni on the basis that it is highly improbable that he would have been unaware that there was ammunition in his house. His version also does not explain why Kabelo had not bothered to come and collect the magazines and ammunition for what was presumably not a short period of time.

[70]. I agree with the submission by Mr Ngodwana. In coming to this conclusion I am mindful that it is trite that the State bears the onus of establishing the guilt of Mr Ngubeni beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford*, 1937 AD 370 at 373, 383). In *S v Van der Meyden*, 1999 (2) SA 79 (W), which was adopted and affirmed by the SCA in *S v Van Aswegen*, 2001 (2) SACR 97 (SCA), it was reiterated that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.

[71]. I am therefore satisfied that the state has proven beyond a reasonable doubt that Mr Ngubeni is guilty of unlawful possession of ammunition.

order

In the result, my verdict is as follows:-

1. Count 1 – The murder of Zestah September: Guilty.
2. Count 2 – Defeating or obstructing the course of justice: Guilty.
3. Count 3 – Violation of the corpse of Zestah September: Guilty.
4. Count 4 – Unlawful possession of ammunition: Guilty.

L ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 31st July to 16th August 2017

JUDGMENT

DATE: FOR THE STATE: 17th August 2017 Adv L Ngodwana INSTRUCTED BY: Office of the National Director of Public Prosecutions, Gauteng Local Division, Johannesburg FOR THE DEFENDANT: Adv C Matambuye INSTRUCTED BY: T Mahashe Attorneys

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Prepared on 12 October 2026 · Esheria