No corpus delicti in Murder Cases: A Review of South African Judgments Dealing with Murder Cases without a Body

D C van der Linde*
Senior Lecturer, Department of Public Law
University of Stellenbosch

Abstract

Reported murder cases where the body of the suspected deceased is missing are quite rare. Although one's inherent sense of logic would militate against prosecuting such a case, no common-law rule or statute prohibits the State from pursuing it. Faced with the onus of proving all the elements of the crime of murder, the State will bear a heavier evidentiary burden to prove that the accused is responsible for not only the disappearance of the suspected deceased but that the accused had in fact killed that person. In this regard, the State will have to rely on the only available evidence which will invariably be circumstantial evidence and inferential reasoning. This article will discuss those South African cases where a court had to determine whether an accused was guilty of murder where the body of the suspected deceased was missing. This discussion will take place against the backdrop of the underlying doctrinal principles in cases involving a missing deceased, specifically the State's burden to prove all the elements of the crime and the principles surrounding circumstantial evidence. The cases are divided into two categories: earlier cases and recent cases. The former were confined to relying on the principles of circumstantial evidence and involved a high degree of inferential reasoning (or postulation). Although the latter

* LLB, LLM, LLD (Stell).
categories of cases also involve an evaluation of circumstantial evidence, the court is assisted by the proliferation of the use of forensic evidence which bolsters the State’s case of murder.

Keywords: no corpus delicti; circumstantial evidence; forensic evidence; inferential reasoning; murder

1 INTRODUCTION

The term corpus delicti refers to “[t]he body, substance or foundation of the offence”\(^1\). In a murder case, the State is compelled to prove that the accused caused the unlawful, intentional killing of another person.\(^2\) Cases involving an absent or missing corpse (or even proof of such) face, at least logically and factually, a significant burden of proof. Preliminary questions arise such as whether the deceased\(^3\) is in fact dead.\(^4\) Furthermore, where there is a significant amount of circumstantial evidence pointing towards death or murder,\(^5\) whether the accused was responsible for it. This has led to healthy judicial scepticism and as Lord Hale once wrote: “I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead”.\(^6\) As Greene points out, this has led some to believe that Lord Hale placed an absolute prohibition on conviction in murder cases absent of a body and ignoring “unless the fact were proved to be done”.\(^7\) Although South African courts approach these types of cases with circumspection, no prohibition, either under the common law or in terms of legislation, exists prohibiting the State to pursue such a case.

This article will discuss five reported South African cases that have dealt with murder where

3. For the sake of convenience and clarity, the person in question shall be referred to as “the deceased” even in instances where the accused was found to be not guilty.
4. See Greene “I ain’t Got No Body: The Moral Uncertainty of Bodiless Murder Jurisprudence in New York after People v. Bierenbaum” 2003 Fordham Law Review 2868–2869; Moran “In Defense of the Corpus Delicti Rule” 2003 Ohio State Law Review 826–835 for an overview of cases from the eighteenth century which led to a confirmation of the scepticism regarding cases of this sort where the supposed victims of murders had reappeared after the latter was convicted, as well as cases subsequently applying this rule in the nineteenth century in the United States.
5. It may be, however, that the State does not elect to prosecute the case at all. Although a comprehensive discussion of the decision to prosecute falls outside of the scope of this contribution, brief mention of it must be made. The National Prosecuting Authority (“the NPA”) is vested with the constitutional mandate under s 172(2) of the Constitution of the Republic of South Africa, 1996 and s 20(1)(a) of the National Prosecuting Authority Act 32 of 1998 “to institute criminal proceedings on behalf of the State”. The State is under no obligation to prosecute all instances of crime. Prosecutors are therefore vested with the discretion to prosecute — see paragraph 2.C of the Prosecution Policy of the NPA. Du Toit et al, however, do point to the general obligation to prosecute instances of prima facie cases. The authors define a prima facie case as one where “[t]he allegations, as supported by statements and real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict”. See Du Toit et al Criminal Procedure Handbook 13 ed (2020) 76. This position is further bolstered by paragraph 3.C of the Prosecution Policy. The Prosecution Policy recommends that a prosecution should follow where “there is sufficient evidence provide a reasonable prospect of a conviction (…) unless public interest demands otherwise”. The court in Nundalal v Director of Public Prosecutions KZN and Others (AR723/2014) [2015] para 24 also refers to the fact that the State may avoid prosecuting weak cases, while preferring stronger cases, in order “to avoid congesting court rolls and to preserve public resources”. Based on these principles, the State likely avoids pursuing murder cases where the body is missing as it may fall short of constituting a prima facie case — and therefore has no reasonable prospects of success.
the deceased’s body was absent. This article will first provide an exposition of the relevant evidentiary principles involved in cases of murder without a corpus delicti and second provide an overview of the reported cases dealing with this issue in South Africa. Against this background, the article will then discuss the most significant themes arising from these cases.\(^8\)

### 2 RELEVANT LEGAL PRINCIPLES

Two sets of legal principles are of importance in this contribution namely, the onus or burden of the State to prove beyond a reasonable doubt that the accused is guilty of murder and the type of evidence, in particular circumstantial evidence, required to make such a finding in the absence of the corpus delicti.

#### 2.1 Circumstantial Evidence

As a matter of course, cases, where the deceased’s body is absent, rely on circumstantial evidence.\(^9\) While direct evidence is used to prove a fact in issue, circumstantial evidence contains “no direct assertions about a fact in dispute”\(^10\) and other evidence is presented that a court can draw conclusions or inferences from.\(^11\) Direct evidence of a murder would usually include eyewitness accounts and confessions while circumstantial evidence may include the proof of (potential) motive, the accused’s proximity to the crime scene at the relevant time, or the fingerprints of the accused being found on the murder weapon close to the deceased’s body.\(^12\) Zeffertt and Paizes assert that despite the reluctance of courts to convict without the presence of a body, “direct evidence is not absolutely essential, and if there is a satisfactory explanation for why the body should be missing, death may be inferred from circumstantial evidence.”\(^13\)

The *locus classicus* to evaluate circumstantial evidence is found in *R v Blom* (Blom).\(^14\) There, the Appellate Division (as it then was) held that the evaluation of circumstantial evidence necessarily entails a process of inferential reasoning whereby “two cardinal rules of logic … cannot be ignored”.\(^15\) First, the inference must be consistent with all the proven facts. Second,
the proven facts must be of such a nature that they exclude “every reasonable inference from them save the one sought to be drawn”.\textsuperscript{16} If the inference is not consistent with all the proven facts (under the first rule) then such an inference cannot be drawn.\textsuperscript{17} In addition, where the inference does not exclude other reasonable inferences (under the second rule), doubt must be cast as to whether such an inference is correct.\textsuperscript{18}

2 2 The Onus or Burden of Proof

As stated above, Zeffertt and Paizes point to the fact that the production of a body is not a prerequisite for a murder conviction. The burden rests squarely on the State to prove the elements of the crime,\textsuperscript{19} and perhaps quite axiomatically, the fact that death had indeed occurred. It is not up to the accused to provide alternate explanations as to where the (body of the) alleged deceased may be. The accused may however face difficulty in controverting the State’s case due to the absence of a body. Such a situation could be regarded as unfair. But this issue can be ameliorated through the drawing of logical inferences and the normal functioning of the evidentiary burden in criminal cases.

The burden of proof in criminal cases lies with the State to prove the elements of the crime and, in this instance, that of murder. If an accused fails to disrupt the \textit{prima facie} case of the State, there is a chance that the State’s case may “harden” to conclusive proof. This issue was pertinently addressed in \textit{S v Brown (Brown)}.\textsuperscript{20} Although the silence of an accused does not \textit{ipso facto} strengthen the State’s case, the court may be left with the “uncontroverted \textit{prima facie} case” by the State if the accused elects not to testify in their own defence.\textsuperscript{21} This, as already alluded to, may lead to the State’s \textit{prima facie} case hardening into proof beyond a reasonable doubt. The accused’s exercise of their right to silence will therefore not prevent the court from drawing logical inferences. In this regard, Schwikkard and Van der Merwe point out that this cannot be attributed to the mere fact of silence on the part of the accused but rather because there was no contradictory evidence to challenge the State’s \textit{prima facie} case. And in particular circumstances, this may be sufficient to become proof beyond a reasonable doubt.\textsuperscript{22} An accused is therefore not penalised for failing to provide a response to the State’s case but by exercising the right to silence runs the risk of the State’s case, dependent on the circumstances, becoming proof beyond a reasonable doubt.\textsuperscript{23} Flemming J and Strafford AJ accurately described the situation in \textit{S v Alex Carriers (Pty) Ltd (Alex Carriers)} as follows:\textsuperscript{24}

An accused will accordingly be discharged if the State’s case is not strong enough and, according to principle, it will sometimes be sufficient if the accused does nothing at all and sometimes it will be sufficient if he relies on pointing out the weaknesses in the State case (by, eg, cross-examination which exposes the unreliability of a witness). The practical effect of the State producing a stronger case might well be that such limited counters to the State case might transpire to be insufficient and that active rebuttal of the State case is necessary to counter the strength of that case. Even then there is no onus of proof on the accused. (As there still appears to be confusion, it might promote clarity to say that an accused experiences a

\begin{itemize}
\item \textit{R v Blom} paras 202–203.
\item \textit{R v Blom} para 202.
\item \textit{R v Blom} para 203.
\item See Schwikkard and Van der Merwe \textit{Principles} 603.
\item Schwikkard and Van der Merwe \textit{Principles} 585. Also see \textit{S v Boesak} 2001 1 SACR 1 (CC) para 24.
\item Schwikkard and Van der Merwe \textit{Principles} 586.
\item Schwikkard and Van der Merwe \textit{Principles} 586–587.
\item \textit{S v Alex Carriers (Pty) Ltd} 1985 3 SA 79 (T).
\end{itemize}
necessity of rebuttal rather than he bears a burden of rebuttal.) The quantity and strength of the rebutting considerations required by the accused to prevent the State producing a convincing case depends, in the nature of things, on the strength of the State case. The accused has to do nothing more than to cause the court, when reaching its decision, to have a reasonable doubt concerning the guilt of the accused.  

3 REVIEW OF OLDER SOUTH AFRICAN CASES

As will be seen in a later section, the use of forensic and electronic evidence played a large role in assisting the courts to make a finding of murder despite the absence of a body. Nevertheless, courts today are still circumspect to make such a finding even with the assistance of such evidence. However, it is clear to see that courts prior to the forensic era had a much more arduous task to make a finding of murder without the murdered body.

3 1 R v Sikosana

Most of the cases under review involve instances where there has been a history of domestic or gender-based violence. R v Sikosana (Sikosana)  is no different as the appellant was found guilty of murder in the court a quo and sentenced to death. Evidence of an assault prior to the murder and during the deceased’s pregnancy was also led. It was alleged, however, that the underlying reason for the murder was that the accused wanted to marry another woman and wanted to clear the path to this new marriage. Although it was suggested that the deceased had fled the country to escape her husband’s abuse, this version of events was rejected as the deceased had received vindication in the form of a guilty finding against the accused which led to his discharge from the police service. Fleeing the country also seemed out of character for the deceased as she would have been welcomed back into her familial home.

The most significant evidence appeared to be that of an account of a house guest on the evening of the deceased’s disappearance. The witness testified that Maria’s (the deceased) husband forced her out of the residence to the bus terminal in the dead of night without any luggage. The witness further indicated that he was unaware of any bus service operating at that time of the night. The witness further alleged that the appellant indicated that the deceased was on her way to Durban to give birth. Finally, it was asserted that the appellant, after returning from the bus terminal, washed his hands of what appeared to be dried blood. Evidence was also led regarding a telegram that was sent from Durban from a fictitious family member indicating that Maria had passed away sometime after giving birth and that the child was doing well. The court found that it “could [not] have emanated from anyone but the appellant”. The appellant had told the deceased’s father that she was in Durban but warned that “[y]ou must not be alarmed for not seeing Maria during these days. I have taken her to hospital in Durban” and also that “[y]our child is hungry in hospital. I have no money to send her. Please help me.” The appellant had also failed to ever report Maria’s disappearance after she never returned from her alleged trip to Durban and arranged to have lobola paid to his mistress. This was especially suspicious
as the appellant was a former police officer. The accused’s confession to his fellow inmates that he had shot his wife with a revolver further bolstered the State’s case.

Counsel for the accused directed the court’s attention to cases involving the absence of the deceased’s body where the “deceased” had “reappeared after their supposed murderers had been executed”. The court however rejected these concerns as there have only been a few accounts of such cases (at that time) over the past 350 years. Ultimately, the weight of the circumstantial evidence all pointed to the same conclusion namely, that the appellant had killed his wife and disposed of her body. The “cumulative effect of these elements of proof” was “overwhelming” and was sufficient for the Crown to prove their case of murder beyond a reasonable doubt. The appeal was consequently denied.

### 3.2 R v Nhleko

A case decided in the same year as Sikosana, was R v Nhleko (Nhleko). In this case, evidence was led, often flirting with the fantastical, that the accused murdered a random man, who may or may not have been the lover of his estranged wife. It was further alleged that the accused had stabbed this unknown man with a sharpened iron. The witnesses stated that they were fearful of the appellant since he was a known witch doctor. This fear intensified after the appellant was said to have consumed the deceased’s blood, smeared some on his face and collected some in a bottle. It was also asserted that the appellant claimed that he would return to the crime scene to remove the deceased’s eyes because the police would be able to ascertain that he had killed him by examining the deceased’s eyes. The appellant’s witchcraft explained why he would want to keep body parts in his possession. None, however, were found on his person or at his residence. The appellant also denied that he was a witch doctor.

A pointing out had then taken place where the appellant had pointed out where the deceased’s body was located. However, the court deemed this pointing out inadmissible as it was induced by an assault on the accused.

Schreiner JA (with Van Blerk JA and Van Winsen AJA agreeing) held that higher degrees of certainty are not imposed on the State where the deceased’s body cannot be presented. Still, the absence of the deceased’s body is a sufficient reason to find that the Crown failed to establish their case beyond a reasonable doubt. The Appellate Division further noted that there was, at that time, no reported cases dealing with a murder where there was not only no body, but also no evidence of a missing person. The Appellate Division referred to its previous decision in Sikosana (which the court indicated was “reported briefly”) and restated the court’s previous finding that a “higher standard of certainty” is not imposed on the State.

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34 R v Sikosana 726.
35 See R v Sikosana 728–729 for the court’s evaluation of the vexed confession.
36 R v Sikosana 729.
37 R v Sikosana 729.
38 R v Sikosana 729–730.
39 R v Nhleko 1960 4 SA 712 (AD).
40 See R v Nhleko 714–716.
41 R v Nhleko 716–717.
42 R v Nhleko 718.
43 R v Nhleko 718–721
44 R v Nhleko 721.
45 R v Nhleko 721.
46 R v Nhleko 721.
47 R v Nhleko 721.
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JA however, differentiates Sikosana from the current case as the court had “a large body of evidence” relating to the circumstances before the deceased’s disappearance.

In Nhleko the Appellate Division emphasised the fact that in the present case no body or portion thereof was found and there was also no evidence of a disappearance in the neighbourhood.\(^48\) This in itself opens up the possibility of making an erroneous finding of murder. This is further exacerbated by the fact that the only available evidence was “supposed” eyewitness accounts and convictions are rarely obtained based on such evidence alone.\(^49\) Schreiner JA was also uncertain about the motive behind the alleged crime. Although not a prerequisite to establishing guilt for the crime of murder, it appears that the court’s underlying rationale for referencing motive is that motive would be increasingly important in cases involving an absent corpus delicti. Establishing a motive would establish a connection between the accused and the deceased.\(^50\) This helps to establish the accused as the most likely perpetrator.\(^51\)

The testimony of the eyewitnesses was also problematic as they were both accessories after the fact.\(^52\) The only confirmatory evidence was that of the inadmissible pointing out. Schreiner JA, however, found that even if this pointing out was admissible, “it was by itself hardly sufficient to provide the corroboration requisite in the circumstances of this case”.\(^53\) Due to especially the general unbelievability of the eyewitnesses, the Appellate Division found that there is a “considerable weight of immobility against” their version of events and consequently set the conviction and sentence aside.\(^54\)

33 S v Bengu

The court in S v Bengu (Bengu)\(^55\) highlighted the multitude of issues facing cases where there is no evidence of a murder and particularly no body proving that a murder took place. In that case, an infant had gone missing. The seventeen-year-old mother of the infant confessed to strangling the child and throwing herself on top of the infant whereafter she fled the alleged scene of the alleged murder.\(^56\) The accused had pointed out a spot where the crime had supposedly taken place. Police searched (with police dogs) for the body of the infant but to no avail.\(^57\) Clothes matching those of the infant (but not confirmed to in fact be that of the infant in question) were found nearby the scene of the alleged crime.\(^58\) There was also a marked absence of blood at the

48 R v Nhleko 715.
49 R v Nhleko 721.
50 R v Nhleko 721–722.
51 R v Nhleko 721–722.
52 See R v Nhleko 722–723 for the brief discussion on the law relating to the cautionary rule and the evaluation of their evidence.
53 R v Nhleko 722.
54 R v Nhleko 723.
55 S v Bengu [1965] 1 All SA 395 (N).
56 S v Bengu paras 396–398.
57 S v Bengu para 397.
58 S v Bengu paras 397, 401.
scene which would have indicated that the body had been devoured by wild animals.\textsuperscript{59}

The accused had made a valid confession before a magistrate.\textsuperscript{60} The court importantly pointed out that this confession was absent of evidence \textit{aliunde} confirming the content of the confession as required by the Criminal Procedure Act 56 of 1955\textsuperscript{61} and warns against the risk of false confessions.\textsuperscript{62} It was submitted on behalf of the State that there was in fact confirmatory evidence namely, the fact that the child was indeed missing and the clothes that were found near the area identified by the accused.\textsuperscript{63} Harcourt J, however, rejected this as sufficient “evidence” to confirm the confession and held that the fact that the body has not been found, does not \textit{ipso facto} mean that the child is missing. The court posited that the child might have been taken in by a Good Samaritan. Even if the infant was indeed missing, it also did not necessarily mean that he was deceased. Similarly, although the father did confirm that the infant was not at the accused’s residence, it was pointed out that there was no evidence by the Kraal Head of the accused that the infant was not at his residence or that he knew the infant’s whereabouts.\textsuperscript{64} The evidence relating to the clothing was also unsatisfactory because there was no evidence confirming that it in fact belonged to the missing infant.\textsuperscript{65} Ultimately, the court found that the evidence did not rule out the possibility (or even probability) that the infant was alive and in the very clothes that the State argued belonged to him.\textsuperscript{66} In this regard, Harcourt J refers to \textit{Nhleko} where the Appellate Division emphasised the fact that “a higher standard of certainty than that required to identify an accused as the killer” despite the absence of a legal prohibition in pursuing cases of such a nature.\textsuperscript{67} The court also referred to Schreiner JA’s sentiments that even eyewitness accounts will not discharge the State’s burden to prove that murder was committed.\textsuperscript{68} The last important aspect pointed out by Harcourt J was the aspect of motive as discussed in \textit{Nhleko} especially in determining that the accused is the “more probable perpetrator”.\textsuperscript{69} Harcourt J in \textit{Bengu}, referencing \textit{Nhleko}, argued that the motive might be that the young mother wanted to rid herself of the burden of a baby whose father did not pay formal maintenance — but this was purely speculative.\textsuperscript{70} This was also not a motive asserted by the State. The court ultimately found that it would be impossible for a reasonable, prudent court to convict the accused of murder, given the absence of alternate possibilities regarding the infant’s whereabouts.\textsuperscript{71}

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\textsuperscript{59} \textit{S v Bengu} para 398.

\textsuperscript{60} The main thrust of the confession relates to the following passage: “Ek vat kind na Hathorn’s Hill. Ek het die kind toe verwurk. Ek het geskrik en bo-op die kind geval. Ek sien kind is dood. Ek gaan na vriende en vra hulle om aan niemand te sê wat ek gedoen het.” Translated: the accused confessed to taking the infant to Hathorn’s Hill and strangling him. She then got a fright and threw herself on top of him and then noticed that the child was deceased. She subsequently went to her friends and asked them not to mention what she had communicated to them regarding the death of her child. See \textit{S v Bengu} para 398.

\textsuperscript{61} The Criminal Procedure Act 56 of 1955, s 258(2) states that: “Any court or jury may convict an accused of any offence alleged against him in the charge by reason of any confession of that offence proved to have been made by him, although the confession is not confirmed by any other evidence, provided the offence has, by competent evidence, other than such confession, been proved to have been actually committed.” See \textit{S v Bengu} para 399. Also see \textit{R v Blyth} 1940 AD 355.

\textsuperscript{62} \textit{S v Bengu} para 399. Also see \textit{R v Citha} 1920 TPD 115 para 117.

\textsuperscript{63} \textit{S v Bengu} para 399.

\textsuperscript{64} \textit{S v Bengu} paras 399–401.

\textsuperscript{65} \textit{S v Bengu} para 401.

\textsuperscript{66} \textit{S v Bengu} para 401.

\textsuperscript{67} \textit{R v Nhleko} 721–722; \textit{S v Bengu} para 398.

\textsuperscript{68} \textit{R v Nhleko} 721; \textit{S v Bengu} para 398.

\textsuperscript{69} \textit{R v Nhleko} 721–722; \textit{S v Bengu} para 398.

\textsuperscript{70} \textit{S v Bengu} para 401.

\textsuperscript{71} \textit{S v Bengu} para 401.
3.4 Brief Comments Regarding Older Cases

The State in *Nhleko* and *Sikosana* placed great reliance on eyewitness accounts to build the respective circumstantial cases. In *Bengu*, reliance was placed on the (unconfirmed) confession of the accused. As will be seen below, this differs significantly from the more recent cases where there was an abundance of, especially, biological and evidence from cell phones. Since the courts in the above three cases did not have the benefit of the aforementioned types of evidence, eyewitness accounts could not be confirmed to a substantial degree.

4. RECENT CASES

No reported cases between 1965 and 2011 which dealt with murder without a body could be found. Of course, largescale advances in evidence occurred during this period. Whereas the former cases depended almost exclusively on eyewitness accounts, the more recent cases had the significant benefit of a multitude of types of evidence available to the State. Further, whereas only two of the three former cases resulted in a finding of guilt, both recent cases resulted in a finding of guilt.

4.1 *S v Nkuna*

4.1.1 Facts and Evidence

In *S v Nkuna* the accused was charged with the murder of Frances by “means unknown to the State”. Frances was last seen on 27 August 2004. That morning she visited a hairdresser to prepare for the funeral of her boyfriend’s family member. Upon returning home that evening, Frances’s boyfriend determined that she was not home and the appliances that Frances had ordered the previous day, which had been received by their neighbour, were still at the latter’s residence. Frances’s phone was also switched off. She was furthermore also not at her familial residence. This all gave rise to the initial suspicion that something had happened to Frances.

The State laboriously established a factual, yet circumstantial case of murder especially through evidence of Frances’s personal and work life against Frances’s former boyfriend. Several people, including the deceased’s father, mother, sisters, brother, boyfriend, and colleague testified to the fact that Frances was a generally jovial person with a happy family life, job, and a healthy relationship and had no reason to disappear. The accused, who was a former boyfriend of Frances, informed Frances’s sister that he had given her a lift the day she disappeared. Importantly, blood was found in the vehicle of the accused that was a deoxyribonucleic acid (DNA) match to that of Frances. The accused asserted that the blood “could be of menstruation” as they had sexual intercourse in the car on the day in question and

72 2012 1 SACR 167 (B).
73 *S v Nkuna* 2012 1 SACR 167 (B) para 1.
74 *S v Nkuna* paras 6, 10.
75 *S v Nkuna* paras 6, 10.
76 *S v Nkuna* paras 11, 16–17.
77 *S v Nkuna* paras 6, 14, 28, 36, 38.
78 *S v Nkuna* para 22.
79 *S v Nkuna* paras 23, 26 and 52.
80 *S v Nkuna* para 28.
81 *S v Nkuna* para 27
Frances left traces of menstrual blood in the car after sexual intercourse in the past.\textsuperscript{82} A fraud investigator, Captain Mano, further testified that eight withdrawals from three different ATMs were made from Frances’s account after she disappeared.\textsuperscript{83} The person making the withdrawals could only be identified once from surveillance material.\textsuperscript{84} Captain Mano testified that the man identified from the images (still images from closed-circuit television (CCTV) footage) depicted the accused. Captain Mano particularly noticed that the man from the surveillance footage wore a black and white t-shirt. A search warrant was executed at the residence of the accused where said t-shirt was found.\textsuperscript{85} Captain Mano affirmed his identification during cross-examination and relied on the physique of the accused as depicted in the photos as well as his various personal “dealings” with the accused during the investigation.\textsuperscript{86} The accused denied having any knowledge of the money withdrawals and also denied that it was him in the photographs. He further denied that the police officers found a t-shirt at his home or even that a search warrant was shown to him.\textsuperscript{87}

Frances’s mother testified about an incident where she requested the accused to leave Frances alone. The accused responded that he was going to kill Frances and himself thereafter\textsuperscript{88} but later denied that this incident occurred.\textsuperscript{89}

The court was generally impressed by the evidence led by the State,\textsuperscript{90} and the fact that Frances was happy in terms of family life, that she was not known to disappear without informing her family and that she was generally a jovial person.\textsuperscript{91}

The accused asserted that his relationship with Frances ended in May 2004 and confirmed that he saw Frances on the day that she was last seen. He further asserted that there was no friction between them save for the rape charges which had been withdrawn and for which she allegedly had apologised. He also asserted that he was still in love with Frances.\textsuperscript{92} He further confirmed that she had asked him to take her to the hair salon but the last he had seen her was at the taxi rank where he dropped her off which was located 5 to 6 kilometres from the salon. The accused had Frances’s cell phone which she had allegedly lent him because his battery was flat. The accused asserted that this cell phone had been stolen while in his possession — but he recovered it — a fact that he did not communicate to the police.\textsuperscript{93} This explanation also did not make sense to the court and Hendricks J consequently rejected it as the accused made 88 phone calls on the day he borrowed the phone and only started using Frances’s phone that evening when he returned home.\textsuperscript{94}

Reference was also made to an alleged murder plot by Frances and a colleague of hers to kill the accused. The accused laid charges against Frances and one Lesheka after the accused became aware of Frances’s disappearance and after he became aware that he was a suspect
in the murder investigation.\textsuperscript{95} The court postulated that this was an attempt to pre-emptively establish a foundation for a defence of self-defence against Frances’s murder charge, but his plot failed as Frances’s body was never found.\textsuperscript{96}

### 4.1.2 The Law Applied in Nkuna

Hendricks J confirmed that “production or discovery” of the deceased’s body is not a requirement in all murder cases and held that such a requirement “would be unreasonable and unrealistic” and could cause absurdities which could result in gross injustices, especially considering the high incidence of crime in South Africa.\textsuperscript{97} This is especially true in instances where the accused themselves rendered production or discovery of the body impossible\textsuperscript{98} such as where they have destroyed the corpse.

The court held that a conviction in such cases, based on its own merits could only be secured where the circumstantial evidence “has the necessary probative force to warrant conviction” and that such an inference can be drawn from the circumstances and “leave no ground for a reasonable doubt”.\textsuperscript{99}

Hendricks J referred to Zeffertt, Paizes and Skeen and their requirement of a “satisfactory explanation” as to why the body is missing and that the standard of such an explanation will be contingent on the evidence tendered. This means that the explanation must not only satisfy the court but “be reasonable and reconcilable” with the evidence presented,\textsuperscript{100} which in turn, aligns with the rules of logic as described in Blom. The court then distinguished this case from Nhleko where the evidence indicated that there was a high likelihood that the body was devoured by crocodiles.\textsuperscript{101} The court nevertheless admitted that there may be instances where no evidence is presented that can offer a plausible explanation as to where the body may be — especially where the accused exercised their right to silence.\textsuperscript{102} This could also be where no confessions or admissions were made or where even the State failed to call witnesses who could provide an explanation of death.\textsuperscript{103}

Hendricks J respectfully disagreed with Zeffertt, Paizes and Skeen in respect of the “satisfactory explanation” requirement in explaining an alternative to murder.\textsuperscript{104} The court explained that the circumstances may vary from case to case and that each case must be decided on its own merits\textsuperscript{105} instead of requiring an explanation from the accused. Hendricks J holds that a conviction should follow where the “facts [were] so incriminating and so incapable of any reasonable or innocent explanation as to be incompatible with any hypothesis other than a finding that the accused has in fact killed the person who has disappeared”.\textsuperscript{106} Reasonableness must furthermore guide circumstantial evidence.\textsuperscript{107} Somewhat contradictory to its previous sentiments (and reference to Bengu), the court then held that the State is not expected to prove its case “with absolute

\textsuperscript{95} S v Nkuna para 98.
\textsuperscript{96} S v Nkuna paras 100–101.
\textsuperscript{97} S v Nkuna paras 111; 113; 116. Also see Greene 2003 Fordham Law Review 2870.
\textsuperscript{98} S v Nkuna para 111.
\textsuperscript{99} S v Nkuna paras 112–113.
\textsuperscript{100} S v Nkuna para 116.
\textsuperscript{101} S v Nkuna para 117. The court in Nhleko quite tangentially referred to this possibility and was only mentioned once. See S v Nhleko 716.
\textsuperscript{102} See 2 2 above.
\textsuperscript{103} S v Nkuna para 118.
\textsuperscript{104} See 2 1 and 2 2 above.
\textsuperscript{105} S v Nkuna para 119.
\textsuperscript{106} S v Nkuna para 120 [original emphasis].
\textsuperscript{107} S v Nkuna para 121.
certainty or beyond any shadow of a doubt”.

These remarks are however understandable, because, logically, one can rarely absolutely rule out the possibility that the alleged deceased could still be alive where the body is absent.

Hendricks J quoted the rules of circumstantial evidence in criminal cases as dictated in Blom and further referenced S v Cooper, where the court is cautioned against cases involving circumstantial evidence alone and further that courts should distinguish “between inference and conjecture”. Inferences can only be drawn from objective facts — other than those that are being sought to be established. The realm of conjecture and speculation is entered where there are no proven facts. Conversely, Hendricks J held that in cases such as the current one, where circumstantial evidence is abundant, such circumstantial evidence could “be equal or even superior to direct evidence”.

Frances’s case was similar to Sikosana where a woman with strong family ties disappeared. Her relationship with the accused, on the other hand, was found to be turbulent due to the protection order, rape charges and the threat to kill Frances uttered to her mother. Frances’s case was, however, “distinctly” different from Bengu which involved the disappearance of an infant.

The court once again compared this case where an abundance of evidence is present with that of Nhleko where no evidence of even a disappearance taking place — much less a murder — was present. In the latter case, there was however evidence by two witnesses of how the body was disposed of, as opposed to the former case which was founded solely on circumstantial evidence. Hendricks J asserted that the appellant in Nhleko was credible while the accused in this case was “a blatant pathetic liar”.

Regarding Hendricks J’s factual findings, it was held that Frances had a happy romantic and family life where various people were concerned about her disappearance. The media even covered her disappearance and despite a reward being offered, no leads were garnered from this reward. Frances had plans to join her boyfriend on a trip the day after she disappeared. It was further highlighted that Frances’s conduct prior to her disappearance was not congruent with that of a person who willingly disappeared. She purchased gifts for her boyfriend which were almost equivalent to her monthly salary. The court was also unimpressed with the accused’s tenuous explanation as to the presence of Frances’s blood in his car and the fact that he never said with certainty that he had sexual intercourse with her. Evidence was further accepted identifying him as the person withdrawing the money from the account and that the t-shirt (which was matched to the person in the surveillance material) belonged to the accused. The accused’s explanation as to why he was in possession of the phone and how he lost possession

108 S v Nkuna para 121.
109 S v Cooper 1976 2 SA 875 (A) (Cooper).
110 S v Cooper paras 888–889; S v Nkuna para 123.
111 S v Nkuna para 124.
112 S v Nkuna para 125.
113 S v Nkuna para 131. See R v Sikosana 724.
114 S v Nkuna paras 6; 127; 130.
115 S v Nkuna para 131.
117 S v Nkuna para 129.
118 S v Nkuna para 133.
119 S v Nkuna para 134–135.
120 S v Nkuna paras 136–137.
of it was also rejected. The court held that he disposed of it himself instead of it being stolen.\textsuperscript{121} Considering the body of circumstantial evidence as described, with specific reference to the ATM withdrawals and the use of the deceased’s cell phone,\textsuperscript{122} the court held that “the only reasonable inference [is that] she is dead” and that the accused murdered her.\textsuperscript{123}

Despite making this finding in the previous paragraph, Hendricks J still referred to “the question as to whether Frances is in fact dead” but held that the court is satisfied, based on the evidence tendered, that “the only reasonable inference” is that Frances is dead.\textsuperscript{124} The court highlighted the following aspects to underscore this finding namely, the fact that Frances has been missing for over a year without anyone in her family or her boyfriend hearing from her; the diligent police investigation, the reward offered and the media attention that produced no results as to Frances’s whereabouts; Frances’s blood in the car of the accused, and the turbulent relationship between Frances and the accused, including the threat to kill her.\textsuperscript{125}

No evidence was tendered that Frances was in fact still alive and no reasonable inference of such a fact could be drawn from the proven facts.\textsuperscript{126} This is acutely distinguishable from Bengu where a third party could have abducted the infant which means that there was at least one other possible inference that could be drawn from the proven facts.\textsuperscript{127} The court also excluded the possibility that others were responsible for her disappearance and presumed death.\textsuperscript{128} Hendricks J held that the motive to kill Frances was probably based on the alleged plot to kill the accused. The accused then orchestrated to take Frances to the hairdresser and subsequently murder her and dispose of the body.\textsuperscript{129}

Once again, Hendricks J concluded that the accused had killed Frances and that the State had proven this, based on circumstantial evidence “consisting of so many probative factors” pointing to the guilt of the accused.\textsuperscript{130}

\section*{4.2 \textit{S v Zungu}}

\subsection*{4.2.1 Facts and Evidence}

The facts of \textit{S v Zungu}\textsuperscript{131} are quite similar to that of \textit{Nkuna}. Here, too, the deceased was found to have been murdered by their former partner. On 4 March 2012, the accused found his former girlfriend, N, (the deceased) and her new boyfriend, Oliver, in bed together and proceeded to assault them both. The accused then ordered Oliver to leave the premises. The accused was thereafter alone with the deceased — who was never seen again.\textsuperscript{132} The court had to decide whether N was indeed missing based on the available evidence and whether the accused had

\begin{itemize}
\item \textsuperscript{121} \textit{S v Nkuna} para 138.
\item \textsuperscript{122} It must be noted that it is somewhat odd that the court in particular highlights these two aspects of the evidence. It may, however, be because it is directly linked to Francis and an unnatural absence.
\item \textsuperscript{123} \textit{S v Nkuna} para 139.
\item \textsuperscript{124} \textit{S v Nkuna} para 140.
\item \textsuperscript{125} \textit{S v Nkuna} para 140.
\item \textsuperscript{126} \textit{S v Nkuna} para 141.
\item \textsuperscript{127} \textit{S v Nkuna} para 141.
\item \textsuperscript{128} \textit{S v Nkuna} paras 142–143.
\item \textsuperscript{129} \textit{S v Nkuna} para 145.
\item \textsuperscript{130} \textit{S v Nkuna} paras 147–148.
\item \textsuperscript{131} \textit{S v Zungu} case no CC135/2013.
\item \textsuperscript{132} \textit{S v Zungu} paras 6–8. Also see paras 41–42.
\end{itemize}
in fact killed her.\textsuperscript{133}

Baqwa J referred to \textit{Nkuna} and Hendrick J’s comments regarding unreasonableness and the injustices that would arise requiring the production of the body — and the fact that the State can rely on circumstantial evidence to prove their case.\textsuperscript{134} The court, through inferential reasoning, must then evaluate this circumstantial evidence.\textsuperscript{135}

In this case, the State followed largely the same pattern as in \textit{Nkuna} in establishing that the deceased had no reason to disappear. Evidence was once again presented that the deceased had maintained good relationships with family members, friends, and colleagues and that she was a jovial person who enjoyed her work and was also studying part-time. Her disappearance, which, at the time of the trial, had been more than three and a half years, was completely “out of character with her personality”.\textsuperscript{136} Her bank account became dormant after 4 March 2012 and her townhouse was subsequently repossessed.\textsuperscript{137} Publicity and search attempts for the deceased were also fruitless as they did not find any trace of her at hospitals, mortuaries, or police stations. No one has heard from N since 4 March 2012.\textsuperscript{138} Police had also conducted, with no success, at least eleven field searches in the areas surrounding the deceased’s residence and other areas.\textsuperscript{139}

Police further searched the house which was found to be in a state of chaos.\textsuperscript{140} DNA matching that of N was found on a bed frill as well as on a glove at her townhouse.\textsuperscript{141} DNA found in the boot of the accused’s car could not be matched to the deceased, but it was confirmed to be from a female source. The accused denied that it was the blood of the deceased and claimed that it was either \textit{his} or that of the previous owner of the vehicle — who was a woman.\textsuperscript{142} The accused had his car washed at his friend, Tsoari’s business on the day before, who testified that the boot contained no bloodstains on that day.\textsuperscript{143} However, employees of the car wash testified that they saw blood in the accused’s boot on 4 March 2012.\textsuperscript{144} The accused asserted that the red stain witnessed by the employees of the car wash on 4 March was engine cleaner and that Tsoari had spilled it on 3 March but Tsoari denied this.\textsuperscript{145} Tsoari further testified that the accused had caught the deceased with Oliver twice that week and on the second occasion, he assaulted Oliver.\textsuperscript{146} This story was also largely confirmed by a cousin of the accused, save for the added detail that the accused left both the boyfriend as well as the deceased at the deceased’s house.\textsuperscript{147} The accused’s “touch DNA”\textsuperscript{148} was also found on the inside of the glove yet he denied that this

\textsuperscript{133} \textit{S v Zungu} para 9. This article will not focus on a discussion of the theft, malicious injury to property and assault charges (see paras 2–3).

\textsuperscript{134} \textit{S v Zungu} para 11; \textit{S v Nkuna} paras 111–112.


\textsuperscript{136} \textit{S v Zungu} paras 17, 48–53.

\textsuperscript{137} \textit{S v Zungu} paras 48, 57.

\textsuperscript{138} \textit{S v Zungu} paras 17–18, 52, 58.

\textsuperscript{139} \textit{S v Zungu} para 55.

\textsuperscript{140} \textit{S v Zungu} para 22.

\textsuperscript{141} \textit{S v Zungu} para 56.

\textsuperscript{142} \textit{S v Zungu} paras 56, 93.

\textsuperscript{143} \textit{S v Zungu} para 60.

\textsuperscript{144} \textit{S v Zungu} para 64.

\textsuperscript{145} \textit{S v Zungu} para 60.

\textsuperscript{146} \textit{S v Zungu} para 61.

\textsuperscript{147} \textit{S v Zungu} para 64.

\textsuperscript{148} Touch DNA usually refers to skin cells left behind by someone after they have come into contact with an object or surface. Touch DNA can often be obtained from common items such as drinking vessels, cigarette butts and postal flaps. See Zinn and Dintwe (eds) \textit{Forensic Investigation: Legislative Principles and Investigative Practice} (2015) 111.
could be possible as he alleged that he never wears gloves.  

The court largely rejected the evidence of the accused as he was found to be an unreliable witness who was evasive, contradicted himself, gave answers that were not in line with the objectively proven facts and “deliberately took the risk of giving false evidence in the hope of being acquitted”. This included his testimony of when last he was at the residence of the deceased (which was refuted by CCTV footage) as well as his whereabouts on 4 March (refuted by Global Positioning System (GPS) data captured from his and Oliver’s cell phone that he took). The accused indicated that he moved from the area of the deceased’s residence to his own.

Evidence was presented that the accused still had access to the deceased’s house even though the deceased had told her friend that she was uncomfortable being left in the presence of the accused.

Baqwa J cautioned against reliance on Oliver’s testimony as a single witness but ultimately found, even in applying the cautionary rule, that Oliver’s version of events on the day of N’s disappearance could be affirmed by objectively proven facts. The court describes this as “almost absolute corroboration”. The defence pointed out inconsistencies in the testimony of State witnesses but the court found these inconsistencies to be immaterial and satisfied the general evidential duty placed on the State.

Baqwa J found that the only inference that can be drawn from the proven facts, is that N is dead and that she died on 4 March 2012.

4.2.2 The Law applied in Zungu

Baqwa J affirmed the importance of the presumption of innocence in favour of the accused. In this regard, the court referred to R v Difford (Difford) where it was held that, without some explanation or response as to the State’s case, the court is entitled to convict the accused. The court in Difford emphasised that this does not constitute a reverse onus but rather a “conclusion which the court could draw if no explanation were given”. There is however an onus on the accused to convince the court of their version of events and “[i]f there is any reasonable possibility of
his explanation being true, then he is entitled to his acquittal…”.160 Courts must then also have regard to the “complete picture that emerges from the tapestry of all the evidence”161. The court in this regard later referred to Moshephi v R as follows:

The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.162

Baqwa found that the tapestry of evidence, in particular Oliver’s testimony, the CCTV footage, the DNA evidence, and the GPS data sketched “a complete picture” and the only conclusion that could follow was that the State has proven its case beyond a reasonable doubt. The judge further found that the accused’s version was “not only not reasonably true but … patently false”163 but also “riddled with improbabilities … [amounting] to nothing but a tissue of lies”.164

5 THEMES ARISING FROM THE CASES

It is clear from the discussion of the facts and judgments in both Nkuna and Zungu that courts are circumspect in cases involving an absence of the deceased’s body and pay meticulous attention to evaluating the evidence in order to promote and ensure the fair trial rights of the accused. Certain themes present in some or all of these cases must, however, briefly be discussed.

The courts in Nkuna and Zungu were greatly assisted by (real) circumstantial evidence. For example, the DNA of the deceased was found both in Nkuna and in Zungu. Although the blood found in either case, if evaluated alone, cannot be said to be indicative of a nefarious situation, it adds to the “mosaic” of other evidence presented, as highlighted in Zungu.

Present in all these cases was a discussion of the personal circumstances of the deceased and a theory as to why they might have disappeared (voluntarily) instead of making a conclusion of murder. It was submitted on behalf of the accused in Sikosana that the deceased had fled the country to escape her husband’s abuse, but this was considered unlikely as she had a supportive family network. No such evidence could be led in Nhleko as the identity of the supposed deceased was unknown. Further, the supposed deceased in Bengu was an infant, so naturally, no evidence could be led as to the personal reason for their disappearance. However, alternative theories as to the whereabouts of the child were postulated. It was speculated that even if the accused had abandoned her child, a Good Samaritan might have collected the child. The police were further unable to ascertain from the Kraal Head of the accused whether the child was somewhere in his jurisdiction.

In several of the cases, the State relied on eyewitness accounts relating mostly to events prior to the disappearance of the deceased. Older cases were, to a certain extent, doomed to rely on

160 R v Difford 373; S v Zungu para 66.
163 S v Zungu para 105.
164 S v Zungu para 106.
eyewitness accounts in the absence of modern types of evidence such as DNA, CCTV footage, banking, and cell phone evidence (including GPS data). In Sikosana, a house guest led evidence of the accused’s bloody hands after the latter allegedly violently removed the deceased from the residence and dropped her off at the bus station. Whereas in Nhleko there was fantastical evidence presented by accessories after the fact as to the alleged events that led to the death of an unknown person. In both these cases, however, there was no physical evidence of blood. In addition, a confession was made by the accused in Bengu but this confession lacked satisfactory confirmatory evidence. The confirmatory evidence, namely clothes that matched those of the infant close to the scene of the crime was rejected by the court as it could not be proven that the clothes were that of the infant in question. In Zungu, there was an eyewitness to an assault on the deceased prior to her disappearance. This, of course, strengthens the conclusion that the person in question has met a violent end. This assault was, at the very least, in part confirmed by the presence of blood matching the deceased on a bed frill and gloves at the crime scene. The accounts of the car wash witnesses are furthermore comparable to that of the witness in Sikosana in that it was at most eyewitness accounts regarding the presence of blood. This evidence, especially in Zungu, assisted with confirming a timeline and other pieces of circumstantial evidence.

It is reassuring to see that the courts in Zungu and Nkuna did not overemphasise the presence of blood and/or DNA evidence. The Supreme Court of Appeal in S v SB (SB)\textsuperscript{165} emphasised that DNA evidence does not constitute conclusive proof of the crime in question and that such evidence must “be viewed in proper perspective in each case”.\textsuperscript{166} DNA evidence matching that of the accused still constitutes circumstantial evidence and the weight of the evidence depends on a number of factors,\textsuperscript{167} including other supporting evidence. As Van der Merwe AJA (as he then was) points out, he “cannot conceive of a criminal case where there is absolutely no other relevant evidence or evidentiary material”.\textsuperscript{168}

On the back of that remark, it must be highlighted how other pieces of circumstantial evidence strengthened the State’s case in Nkuna and Zungu. In Nkuna, the accused was identified from stills from CCTV footage. The accused was further found to have made withdrawals from the deceased’s bank account. The t-shirt the accused wore in these stills was found at the accused’s residence. The State in Zungu also relied on CCTV footage which was useful in proving the timeline of events as presented by the State and disproving the version of events presented by the accused. The GPS data also facilitated this.

A prominent feature that originated in Nhleko was establishing a motive for the murder. In Nhleko, none could be established as the identity of the supposed deceased was unknown to the State. It appears that the motives, save maybe for Zungu, were to a large degree speculative. The most speculative motive was that in Bengu. Over and above the fact that the State could not even establish that the child was at least missing, the court, mero motu, considered the possible motive considering the comments in Nhleko. Harcourt J postulated that the motive was possibly

\textsuperscript{165} S v SB 2014 1 SACR 66 (SCA).
\textsuperscript{166} S v SB para 17.
\textsuperscript{167} The SCA listed the following factors:
(i) The establishment of the chain evidence, ie that the respective samples were properly taken and safeguarded until they were tested in the laboratory.
(ii) The proper functioning of the machines and equipment used to produce the electropherograms.
(iii) The acceptability of the interpretation of the electropherograms.
(iv) The probability of such a match or inclusion in the particular circumstances.
(v) The other evidence in the case.
See S v SB para 18 and also paras 19–23. These factors were derived from Meintjes-Van der Walt \textit{DNA in the Courtroom: Principles and Practice} (2010) — see S v SB fn 2.
\textsuperscript{168} S v SB para 23.
that the teenage mother wanted to rid herself of the burden of a child. The rest of the cases all had an underlying current of gender-based or intimate partner violence. The accused had previously received a fine for assaulting his pregnant wife. The deceased in Nhleko, although neither the court nor the State pertinently described this as a motive, previously had a protection order against the accused and had also previously accused the accused of rape (but subsequently withdrew the charges). Hendricks J, however, found that the motive was rather in response to the alleged murder plot by the deceased. The motive was clear and simple in Zungu: jealousy of the new relationship between the deceased and Oliver. This jealousy resulted in a fit of rage against both Oliver and the deceased. As the importance of motive was only pointed out in Nhleko, which was decided after Sikosana, no formal reference to motive as such was made in Sikosana. It is however clear that the postulated reason for murdering the deceased was in order for the accused to marry his mistress.

6 CONCLUSION

Several themes arise from Sikosana, Nhleko, Bengu, Nkuna and Zungu. The particular circumspection regarding cases of this nature, in general, receives significant attention. This is especially true in earlier cases. The earlier cases, although referencing and relying on circumstantial evidence in making their findings, do not pay particular attention to the theoretical underpinning of this type of evidence. At the time that Sikosana, Nhleko, and Bengu were decided, the principles in Blom (which was decided in 1939) had long been established. No court could therefore be faulted in their inferential reasoning process. It is further believed that courts have and could become more receptive to making a finding of murder without the body of the deceased due to advances in forensic evidence. The core of the inquiry remains, considering circumstantial evidence and the rules of logic, whether “facts [were] so incriminating and so incapable of any reasonable or innocent explanation as to be incompatible with any hypothesis other than a finding that the accused has in fact killed the person who has disappeared”.169

169 S v Nkuna para 120 [original emphasis].