THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 908/2019

In the matter between:

PIETER DOOREWAARD **FIRST APPELLANT**

PHILIP SCHUTTE **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Doorewaard and Another v The State* (Case no 908/2019) [2020] ZASCA 155 (27 November 2020)

Bench: PONNAN and MOLEMELA JJA and LEDWABA AJA

Heard: 17 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 27 November 2020.

Summary: Mutually destructive versions – evidence of a single witness – corroboration of evidence of a single witness – duty to call important witnesses.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Hendricks J, sitting as court of first instance):

(a) The appeal is upheld.

(b) The convictions and sentences are set aside and replaced with the following order:

‘Both accused are found not guilty and discharged.’

JUDGMENT

Ledwaba AJA

[1] This appeal concerns the conviction of the first and second appellants (referred to, collectively, as the appellants) on five counts, *viz.* murder, kidnapping, intimidation, theft, and the pointing of a firearm, by the North West Division of the High Court, Mahikeng (Hendricks J).[1] The appellants' application for leave to appeal was refused by the high court,[2] but granted by the Supreme Court of Appeal in respect of the convictions.

[2] The murder charge involves the death of Mathlomola Jonas Mosweu, a 15-year-old boy (referred to as 'the boy', or 'the deceased, interchangeably). There are two mutually destructive versions of the circumstances surrounding the boy's death, one from the State and the other from the defence. The main witness for the State, Mr Sibongile Pakisi (Mr Pakisi), whose evidence is amplified hereunder, testified that on 20 April 2017 the appellants assaulted, mishandled and threw the boy out of a moving bakkie. They further assaulted, kidnapped and intimidated Mr Pakisi, such intimidation also through the pointing of a firearm. The appellants denied all of the charges against them and specifically denied that they had been in the company of Mr Pakisi. They testified that they had seen Mr Pakisi for the first time on 26 March 2018, when an inspection *in loco* was held by the court. Their defence to the murder charge is that the boy must have jumped from the back of the

[1] Unreported: *S v Doorewaard and Another* NWM 22-02-2019 case no 33/17.
[2] See *Doorewaard and Another v S* [2019] ZANWHC 25.

moving bakkie whilst on their way to the local South African Police Service (SAPS) station in Coligny.

[3] Mr Pakisi testified that on 20 April 2017 at about 07h00 he was at Rietvlei Farm, carrying eight Castle Lite beers, en route to an informal settlement called Scotland to visit a certain Constable Molefe. While approaching the sunflower fields, he heard a gunshot. Immediately thereafter he saw the second appellant, Mr Schutte, holding a firearm and running towards a quad bike. He drove it towards the first appellant, Mr Doorewaard, who was in a bakkie with an unknown white man. He heard the boy crying and saying, 'Mother, please help – I am dying'. Mr Schutte dismounted the quad bike and climbed into the back of the bakkie. Mr Doorewaard drove the bakkie away. The unknown white man sat in the cab together with Mr Schutte and the boy was in the back of the bakkie. Mr Pakisi further testified that he had seen Mr Schutte throwing the boy out of the moving bakkie. Thereafter the bakkie stopped, Mr Schutte picked up the boy and put him back into the bakkie. They drove into the field for about three minutes and then returned to the place where the quad bike was parked.

[4] According to Mr Pakisi, at this point Mr Schutte alighted from the bakkie and drove the quad bike towards him (Mr Pakisi) to ask what he had seen. He said that he had not seen anything, because he was fearful that what he had observed happening to the boy could happen to himself. Mr Schutte pointed a firearm at him and forced him to ride with him on the quad bike to where the bakkie was parked. Upon arrival, Mr Pakisi noticed the boy lying on his stomach and bleeding through his mouth, ears and nose in the back of the bakkie. They left the sunflower field with

the bakkie and the quad bike and proceeded to a house alongside a graveyard, at which point the quad bike was parked and the group departed together in the bakkie.

[5] Mr Doorewaard and the other unknown white man were in the cab, while Mr Schutte, the boy and Mr Pakisi were in the back of the bakkie. They went to Noordwes Kooperasie. Here Mr Schutte asked Mr Pakisi once more what he had seen, to which he again responded with nothing. Mr Schutte and the unknown white man assaulted Mr Pakisi with open hands and clenched fists on his face. Thereafter, they went towards Putfontein and stopped at the T-junction of Lichtenburg and Putfontein.

[6] The appellants and the unknown white man accused Mr Pakisi of stealing from the farms. Mr Doorewaard took hold of a bottle of Captain Morgan, an alcoholic beverage, from behind the seat of the bakkie, which Mr Schutte then took from him and forced Mr Pakisi to drink from it. Whilst drinking and complaining that his lungs were ‘burning’, the appellants continued to assault him with open hands, their fists and by kicking him. He was also forced to drink one of the beers that he had with him. The appellants, while pointing a firearm, instructed Mr Pakisi to jump over a fence and wade into a dirty dam. He complied and, when the water reached knee height, he ran back, grabbed Mr Schutte and pleaded that they should not kill him. The unknown white man pleaded also with the appellants not to shoot him, Mr Pakisi, because they were farm workers in the vicinity.

[7] Thereafter the appellants took Mr Pakisi to the bakkie where, again, Mr Doorewaard forced him to drink from the bottle of Captain Morgan. They left, joined the road heading towards Lichtenburg and stopped at certain Eucalyptus trees. The

appellants ordered Mr Pakisi to alight from the bakkie and begin running. As he was running ‘he heard gunshots next to his feet’. He fell and vomited. The men instructed him to eat what he had vomited. He felt dizzy and the appellants told him to return to the back of the bakkie again. At that moment the boy was sleeping in the back of the bakkie. The appellants drove in the direction of Lichtenburg and in due course turned towards Coligny. The bakkie came to a stop once more, at which point Mr Pakisi was instructed to exit the vehicle and begin running. As he was running, he felt dizzy and vomited again. The appellants approached him and forced him to again consume what he had regurgitated. Mr Schutte loaded him into the back of the bakkie, which then sped off in haste. The men stopped the bakkie at a certain farm, where sheep are sold, and the appellants instructed Mr Pakisi to alight from the bakkie. Mr Schutte told him to pick up the boy, who was still lying in the back of the van, and to check whether he was still alive. Mr Pakisi could not tell if the boy was still alive or not. The appellants further instructed him to wipe the boy’s blood with his jersey.

[8] Thereafter the appellants requested Mr Pakisi’s residential address, the details of which he provided to them. They further asked him if he shot any pictures with his cellphone, which Mr Doorewaard then confiscated. They said they are taking the boy to the clinic and instructed him to keep his face down. Suddenly he was struck by something at the back of his head, as a result of which he lost consciousness. After regaining it later on the same day, he returned to his home to rest.

[9] Later on the same day Mr Pakisi went to Coligny police station to lay charges, but a female police officer chased him away and said that he was drunk. He left the police station and went to the house of Warrant Officer Seponkane, where he also

found members of the community. Seponkane told Mr Pakisi that he was crazy and that he will not take his statement. I pause to note that Mr Pakisi did not explain why he went to the house of Seponkane and why members of the community were gathered there. Furthermore, he did not explain why he did not go to the police officer, Mr Molefe, who he said he was going to visit. Seponkane only took his statement on Sunday.

[10] Mr Pakisi also said that on Saturday, at about 03h50 in the morning, he heard a knock on the door of his house. When he opened, he noticed the appellants who were carrying firearms. They asked him if he had reported the incident to anybody and he told them that he did not report it to anyone. On Saturday at 10h00 Mr Pakisi met Mr Schutte in town, who had earlier instructed him that they meet at First National Bank. Thereafter, he decided to report the matter at the police station again. He found the same female police officer who was on duty when he went to the police station two days prior. The female police officer did not record a statement from him; instead, she told him to go home and wait for the police who would come to him. Unfortunately, the identification of the alleged female police officer was not revealed and she was not called as a witness to corroborate the version of Mr Pakisi.

[11] On Sunday the police did not show up and Mr Pakisi went to Mr Nyakana, the principal of JR Sesetsi School, to report what had happened. Mr Nyakana arranged that the police should be involved. Seponkane took Mr Pakisi to the police station where he made a statement and was also instructed to sign blank pages. Again, it is unfortunate that the State did not call Mr Nyakana and/or Seponkane to testify and corroborate the evidence of Mr Pakisi.

[12] Crucially, Mr Pakisi testified that on Sunday he visited the sunflower fields with Seponkane and he showed him the place where the appellants had thrown the boy out of the moving van. The boy's blood was still visible at the scene. Seponkane told him, Mr Pakisi, that he will summon forensic investigators to examine the scene the next day.

[13] The trial court ruled that an inspection *in loco* should be held on 26 March 2018, about 11 months after the incident. Mr Pakisi was present when the inspection *in loco* was held and he also pointed out various scenes that he had visited with the appellants on 20 April 2017.

[14] The appellants' evidence is that, on the morning of 20 April 2017, they drove together to observe the peanut crops. At about 9h30 they noticed two boys stealing sunflower heads from the farm that was owned by their employer. When they approached the two boys they ran away, in different directions, into the field. The appellants picked up the sunflower heads left by the boys and loaded them into the bakkie. They managed to trace one boy (the deceased). When they summoned him he cooperated. They asked him about the whereabouts of the other boy and he pointed in the direction of the informal settlement, Scotland. Mr Doorewaard requested the boy to climb onto the back of the bakkie and he complied.

[15] The boy wanted to sit on the side of the loading bin and Mr Doorewaard told him to sit against the cab. They travelled in the direction of Lichtenburg to trace the other boy, but could not find him. They made a U-turn and drove to the Coligny SAPS station to lay a charge of theft against the boy. On the way Mr Doorewaard, the driver, checked his rear-view mirror and noticed that the boy was still seated on

the back of the bakkie. When he approached a curve, he focused on the road which was uneven. After executing the curve, Mr Schutte told him that he thinks the boy had jumped from the bakkie. Mr Doorewaard was shocked and made a U-turn to check what could have happened. As they were driving, they passed the boy who was lying down on the gravel road. They made another U-turn and stopped next to the boy. He had injuries and was bleeding from his mouth, but he was still alive. They did not give the boy any medical assistance and they also did not have the phone numbers of an ambulance.

[16] The appellants decided to proceed to Coligny SAPS station. While en route they met a man, Mr Israel Moeketsi, and a woman, walking towards Coligny. The appellants requested them to look after the boy, who was lying down on the gravel road.

[17] Mr Israel Moeketsi, a State witness, testified that he was with a woman and that, at that stage, they were walking from an informal settlement to the Coligny clinic. He noticed the white bakkie passing and thereafter saw a boy lying on the road, bleeding. Subsequently, a bakkie approached them and the appellants requested them to look after the boy.

[18] Brigadier Kgorane, provincial head of organised crime, testified that on Monday, 24 April 2017, he visited the Coligny SAPS station to make enquiries about the deceased because the community was protesting. He consulted with Seponkane and was informed that there is an eyewitness to the death of the boy. Seponkane explained to Brigadier Kgorane that he had taken a statement from the eyewitness, Mr Pakisi, and that he was crazy. Seponkane further informed him that Mr Pakisi

had pointed out certain places and stated that there were two suspects involved. Brigadier Kgorane further testified that he consulted with Mr Pakisi and that they went to the scene of the alleged crime, along with a professional photographer.

[19] At the close of State's case, the trial court found the appellants not guilty and discharged them in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA) on counts 5 and 6, unlawful possession of a firearm and ammunition, without giving reasons for its judgment.

[20] Paragraph 13 of the summary of the substantial facts, in terms of s 144 of the CPA, reads as follows: 'The next morning, the accused went to the witness house and threatened him further. An intimidation docket was opened'. Assuming that the phrase 'the next morning', as used here, refers to the 21st or the 22nd of April 2017, according to the evidence of Mr Pakisi he did not go to the police station on 21 April 2017. Furthermore, there is no evidence that a docket relating to the incident was opened on 22 April 2017. Importantly, there is no explanation why only a charge of intimidation is mentioned and other serious charges, for example attempted murder, or assault with intent to do grievous bodily harm on Mr Pakisi, are not mentioned. It is also not known which police officer opened the alleged docket on 21 or 22 April 2017.

[21] Mr Pakisi in his affidavit dated 22 May 2017 does not mention going to the police station or for medical treatment on either 21 or 22 April 2017.[3]

[3] At paras 53-54 the following appears: 'I then went home to sleep. I spend the whole Friday at home and at about +- 17:00 my cousin Pontsho arrived at home. She asked me to take him home at Coligny town. We then went on foot to Coligny. On the way I explained to her about the incident but she couldn't believe me saying I have started with my jokes. I left Pontsho at her home in Coligny town and went back to sleep.
On Saturday the 22nd of April 2017 at about +- 4:30 in the morning I heard a knock at the door. I went to open the

[22] Mr Pakisi is a single witness in respect of all the charges against the appellants. In terms of s 208 of the CPA, '[a]n accused may be convicted of any offence on the single evidence of any competent witness'. The onus is on the State to prove the guilt of the accused beyond reasonable doubt. Where there are two mutually destructive versions, as is the case in this matter, the approach is as follows: 'Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However, the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold – in this case proof beyond reasonable doubt.'[4]

[23] Some of the issues and questions to be considered in this matter are:

(a) Was Mr Pakisi in the company of the appellants on 20 April 2017 and did the appellants act as he testified?

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door and when I opened I was pushed inside the house. I saw the very same white big beard guy and the other white guy who was also present during the incident. It is the one who was driving the vehicle during the incident with tinted beard. I could realized that during the incident they demanded my residential address of which I gave them and they also took my cell phone during the incident. They told me that I shouldn't tell anyone about the incident if I want to be alive. They then leave, but I was alone at home by then.'

[4] *S v Janse van Rensburg and Another* [2008] ZAWCHC 40; 2009 (2) SACR 216 (C) para 8. See, further, *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199; *S v Saban en 'n Ander* 1992 (1) SACR 199 (A) at 203H-204C; *S v Van der Meyden* 1999 (2) SA 79 (W) at 81D *et seq*, especially at 82C-E ('The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored'); and *S v Trainor* 2003 (1) SACR 35 (SCA) para 9.

(b) Why did Mr Pakisi not go for medical treatment for the injuries that he alleged were caused by the appellants?

(c) How did Mr Pakisi know that the deceased was bleeding through his mouth, nose and ears? and

(d) How did Mr Pakisi know that Mr Doorewaard was the driver of the bakkie?

[24] The trial court found that the contradictions in the evidence of Mr Pakisi were not material. The judge was also of the view that there was no cogent reason why Mr Pakisi could have been innovative when thinking about the different scenes, and what transpired at each of them, if it did not happen.

[25] In *S v Mkohle*[5] the Appellate Division said the following:

'Contradictions *per se* do not lead to the rejection of a witness' evidence. … [T]hey may simply be indicative of an error. … [N]ot every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'[6]

[26] Mr Pakisi testified that on 23 April 2017 he visited the scene of the alleged crime with Seponkane and they noticed some blood. Yet none of the photos taken the following day show the alleged blood samples.

[27] In the affidavit of Warrant Officer Mabote, it is mentioned that on 24 April 2017 he photographed scenes shown by Mr Pakisi. Photos 14-19, and 23, show the sunflower field where the boy was thrown out of the bakkie. Photos 30-35 indicate

[5] *S v Mkohle* 1990 (1) SACR 95 (A).
[6] Ibid at 98F-H, with reference to *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C.

scenes where Mr Pakisi alleges the appellants attempted to kill him. On the key to the Sketch Plan and Photographs, Mabote noted points A, B and C which would have been indicated to him by Mr Pakisi and Mr Modisane. On the photographs, point C indicates the area where the boy was allegedly found after the incident. However, and importantly, according to the evidence of Mr Pakisi he last saw the boy in the bakkie when he was hit at the back of his head and lost consciousness, and he only regained his consciousness later that day, at which point he went home. It should be noted that Mr Pakisi did not see where the boy landed as he was not present at the scene where he was removed by the ambulance. It follows that Mr Pakisi did not provide the warrant officer with the correct information.

[28] Importantly, Mabote, who has been a police officer for 25 years, and a draughtsman and photographer for ten years, did not mentioned in his affidavit that blood samples were mentioned or showed to him by Mr Pakisi when he shot the photographs. Mabote states in his affidavit that Modisane was present when the photos were shot, but when Modisane testified he did not mention that he was present when the photographs were taken, nor that Mr Pakisi pointed to the scene where the police found the boy. He also did not mention anything about the blood.

[29] Another interesting factor regarding the shooting of the photographs is that Brigadier Kgorane testified that, on 24 April 2017, he arranged photographers and they, together with Mr Pakisi and the police officers, went to the scene of the alleged crime where Mr Pakisi pointed out all of the scenes mentioned in his statement. Mr Pakisi confirmed that photographs were taken, but these photographs were not handed in as exhibits. Brigadier Kgorane also stated that Mr Pakisi informed him about there being two suspects involved. This is a material contradiction of the

evidence of Mr Pakisi, who stated that three people were involved in the comission of the crimes.

[30] Brigadier Kgorane further testified that the decision to charge the two appellants was made on 24 April 2017. On 25 April 2017, the two appellants handed themselves over to the police and were charged. Brigadier Kgorane requested the appellants to hand over the bakkie that they had used on 20 April 2017.

[31] He appointed Lieutenant Colonel Nkosi as a new investigating officer because he was not satisfied with the manner in which Seponkane had handled the case. Importantly, the record of proceedings shows that, on 27 April 2017, Seponkane was still involved in the investigation of the case. Indeed, according to the affidavit of Constable Moremi, a draughtsman and photographer, he was requested by Seponkane on 27 April 2017 to photograph the vehicle with registration number FHZ 993 NW at 57 Nelson Mandela Drive, Lichtenburg. Seponkane indicated certain points to him. The vehicle was found in a fuming tent at Lichtenburg.

[32] The vehicle that was tested for the blood samples was not identified by Mr Pakisi, nor Mr Modisame, nor Mr Moeketsi, as the bakkie that was driven by the appellants on 20 April 2017 when the alleged crimes were committed.

[33] The results of Hexicon Orbit, which was used to test for human blood in the loading bin of the vehicle, were negative. That is, samples of blood could not be found in the vehicle. Assuming that the vehicle that was tested was in fact the bakkie that was used to ferry the boy who Mr Pakisi says was bleeding profusely, the results

of the Hexicon Orbit test cast serious doubt on the testimony and credibility of Mr Pakisi, who is a single witness.

[34] Mr Pakisi further testified about a quad bike, a third suspect, and firearms. There is no corroborative evidence about whether the appellants possessed firearms or if the quad bike was used at the sunflower field. If the State based its charges on the evidence of Mr Pakisi, it did not explain why they failed to charge the appellants with the attempted murder of Mr Pakisi.

[35] In my view, Seponkane was an important witness who could have corroborated the evidence of Mr Pakisi and clarified some material aspects of the case. It is not clear if there were any blood samples or whether there was any blood on the ground when he, together with Mr Pakisi, on 23 April 2017 visited the scene where the appellants allegedly threw the boy from the bakkie. There is no explanation why Seponkane was still involved in the investigation after a new investigating officer was appointed. Mr Pakisi further testified that the appellants told him to wipe up the blood of the deceased with his jersey. Yet Mr Pakisi's blood-stained clothes were not produced as exhibits and no forensic tests were performed in order to check if the blood on his clothes matched with the blood on the deceased, to confirm whether Mr Pakisi was in the company of the deceased and the appellants.

[36] The trial judge also expressed his worries about the manner in which this case was handled and investigated,[7] adding that the relevant police authority should take

[7] Hendricks J states as follows in the judgment of the high court:
'Allow me to express also my disquiet about the manner in which the police at Coligny handled the complaint of Mr Pakisi and also investigated this matter. Not only was the police officer unhelpful when Mr Pakisi reported his

action against the police officers who did not perform their duties adequately or at all.

[37] Regarding the firearms, the trial court discharged the appellants in terms of s 174 of the CPA on counts 5 and 6, *viz.* unlawful possession of a firearm and unlawful possession of ammunition, but convicted them of pointing of firearm. The only available evidence on the charge of pointing of a firearm is the version of Mr Pakisi. There is nothing corroborating that the appellants pointed the firearm at Mr Pakisi. Cartridges were not found at the scene mentioned by Mr Pakisi. Except from what was said by Mr Pakisi there is no evidence that corroborates the point that charges relating to firearms were investigated.

[38] Mr Pakisi, in his affidavit to the police dated 22 May 2017, stated that the deceased was thrown from the bakkie on three occasions. However, when he testified in court, he said that he saw the boy being thrown from the bakkie once, and that he was not sure about the other two incidents. Interestingly, the trial court found this unexplained discrepancy not to be material. In this regard the court stated

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complaint and told him to go away otherwise he would be locked up, but Mr Pakisi was also insulted, stating that he was drunk. The actions of Warrant-Officer Seponkane leave much to be desired. He totally neglected to perform his duties at all, never mind doing it diligently. He was not of any assistance to Mr Pakisi. The matter was reported on the same day of the incident, namely 20 April 2017. It took him four days to take down a statement and to even start his investigations. The manner in which he took down the first statement of Mr Pakisi, if one can call it taking down of a statement at all, is totally unsatisfactory. Brigadier Kgorane had to ask Warrant-Officer Seponkane for the statement so that he can read it. A lot of evidence either went missing or was not timeously investigated or gathered at all. The van was at the police station when the incident was reported. It was not at all inspected or impounded at that stage. Neither were the details of the van taken down for further investigations. The van was only taken five days after the incident, if it was at all the van that was used on the day in question. The evidence, if this was indeed the van, disappeared. The scene was visited by Warrant-Officer Seponkane and blood was still visible. No forensic evidence was obtained. It was simply left and on the following Tuesday Mr Pakisi was told by Warrant-Officer Seponkane that he forgot to contact the forensic personnel of the South African Police Services. No investigations were made as to whether the accused possessed firearms and ammunition lawfully. Mr Seponkane dismissed Mr Pakisi's complaint and even insulted him by saying that he is crazy. The behaviour of Warrant-Officer Seponkane was totally unacceptable and unprofessional. Action should be taken against the police officers who are implicated for the dereliction of their duties. This must be brought to the attention of the relevant police authorities to act.'

that ‘what is material is the fact that the deceased was thrown from the bakkie which is consistent with the evidence as testified by Dr Moorad’. I disagree, particularly because, save for the evidence of Mr Pakisi, there was no direct or satisfactory evidence that the boy was thrown from the bakkie. In my view, there are material discrepancies in the evidence of Mr Pakisi. He is a single witness and there is no corroboration to his evidence.

[39] The appellants’ version that they arrested the boy at approximately 9h30, and arrived at the police station at approximately 10h00, is more probable as compared to the time mentioned by Mr Pakisi, namely that he noticed the appellants for the first time at about 7h30. Modisane testified that the appellants arrived at the police station at approximately 10h00. The distance from the sunflower fields to the police station corresponds with the times provided by the appellants. On the contrary, the distance and the times on the version of Mr Pakisi do not tally with the evidence of Modisane. The duration of the relevant trip can be estimated to be about one hour, considering that the appellants allegedly stopped at certain places. On Mr Pakisi’s version the appellants should have arrived at the police station at about 9h00.

[40] There was evidence by Mr Lynette van Zyl and Mr Samuel Hallat, Mr Doorewaard’s witnesses from Vodacom, who testified as experts in respect of the times and calls made. Mr Bakkie Zyl confirmed that the police phoned Mr Doorewaard at 10:08:39. This confirms that the appellants arrived at the police station at about 10h00. Their evidence does not corroborate the version of Mr Pakisi in connection with the areas travelled, the distance and the estimated time it would take for the said trips.

[41] There is no evidence or facts justifying that the trial court should draw an inference that the appellants have thrown the deceased from the bakkie at a place where Mr Motleholwa saw him lying. Without any substantiating evidence, the trial court further held that this was done to create an impression that the deceased jumped from the bakkie. The expert evidence of Dr Moorad does not, in my view, support the inference drawn by the trial court. There are no facts to support such an inference.[8] Dr Moorad said the following:

'My opinion would be that from the injuries that were found on the post-mortem all of them being blunt force injuries I maintain that it is difficult to state with any certainty that the injuries occurred either as a fall off the bakkie or a jump off the bakkie. They are all blunt force trauma and consistent with a motor vehicle collision.'

[42] The appellants' version regarding how the deceased apparently vanished from the vehicle is not satisfactory. However, even assuming as correct Mr Pakisi's testimony, all that was mentioned was the boy's injuries and the fact that Mr Doorewaard was the driver and the onus remains on the State to prove its case beyond a reasonable doubt.

[43] In conclusion, after a careful analysis of the totality of the evidence, I take the view that the State did not prove its case beyond reasonable doubt and that the appellants should therefore be acquitted.

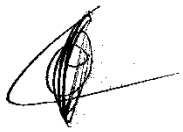
[8] See *R v Blom* 1939 AD 188, especially at 197-198.

[44] The following order issues:

(a) The appeal is upheld.

(b) The convictions and sentences are set aside and replaced with the following order:

'Both accused are found not guilty and discharged.'



A P Ledwaba
Acting Judge of Appeal

Molemela JA

[45] This is a case with many, inexplicable twists and turns. After a careful perusal of the record, the arguments on behalf of the State and the appellants and the judgment of the court a quo, I am inclined to agree with the court a quo's finding, which is supported by the first judgment, that the criminal investigation in this matter was bungled.

[46] A person who is injured through falling or jumping from a moving vehicle is involved in a motor vehicle accident for purposes of s 61(1) of the National Road Traffic Act 93 of 1996[9] (National Road Traffic Act). Although Warrant Officer Modisane, given his seniority, must have been aware that basic precepts applicable to motor vehicle accidents were flouted, he took no steps to enforce them. On his version, when the appellants refused to go back to the scene, he did absolutely nothing about that. Neither did the fact that the deceased soon succumbed to his injuries galvanise him into action. Contrary to basic police procedures, he failed to obtain a written statement from the driver of the vehicle (the first appellant) and failed to open a docket. It was only the violent reaction of community members that triggered the opening of a docket.

[47] These failures resulted in missed opportunities in the investigation of the matter. Had proper procedures been followed, the appellants' bakkie would have been stationary at the scene of the accident and the police would have had a chance

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[9] See S V Hoctor *Cooper's Motor Law: Criminal Liability, Administrative Adjudication & Medico-Legal Aspects* 2 ed (2008) at B10-2; *Taute v S* [2018] ZAECGHC 51; 2018 (2) SACR 263 (ECG) para 12 *et seq*; *S v Mcelu* [1975] 2 All SA 314 (TkH);1975 (2) SA 103 (Tk) at 105H-106A; *R v Dhlodlho* 1968 (1) SA 315 (R) at 316B-317H.

to inspect it and assess its roadworthiness. Thus, if there were any blood stains on the loading bin of the bakkie, they would have been visible during the general inspection of the vehicle at the scene, which would have led the inspecting officer to raise an alarm. The appellants' bakkie was only inspected days after the incident.

[48] A further astounding aspect is the reaction of Warrant Officer Seponkane, who was the investigating officer tasked with taking Mr Pakisi's statement. After taking down a statement implicating the appellants in murder and other serious charges, Seponkane did not inspect the scene of the crime and record his observations. Instead, the scene was visited days after the incident, and only after the intervention of senior officers.

[49] As regards Mr Pakisi's evidence that he had sustained visible injuries at the hands of the appellants, it is troubling that despite the fact that he had allegedly recounted his ordeal to his cousin and showed him his injuries on the same day on which the incident occurred, his cousin simply assumed that he was joking and did nothing about the matter. Furthermore, a statement was not taken from his cousin so that the presence of Mr Pakisi's injuries could be corroborated. Of course, there is also the aspect pertaining to the jersey with which Mr Pakisi allegedly wiped the blood of the deceased, which is canvassed in the first judgment. There is simply no explanation whatsoever as to why the jersey in question was not handed to the police for purposes of testing the blood stains for the presence of the deceased's DNA. For all the reasons mentioned above, I am inclined to agree with the court a quo that the criminal investigation was bungled. Where I differ with the court a quo is the extent or the impact of such bungling.

[50] In my view, the bungling of the criminal investigation impacted on the strength of the State's case, in particular on the reliability of Mr Pakisi's evidence. I agree with the court a quo's findings in relation to aspects which tend to attest to Mr Pakisi's honesty, such as the fact that he knew that the first appellant was the driver of the bakkie on the day in question, and also his description of the injuries sustained by the deceased (which were independently confirmed by the paramedics and the police officers who attended the scene as well as the post-mortem results). Furthermore, even though Mr Pakisi had not met the appellants before, his description of them was accurate. These aspects make it difficult to conclude that Mr Pakisi's entire version constituted a fabrication. It is nevertheless trite that the evidence of a single witness can only sustain a conviction if it meets certain requirements. Honesty alone is not sufficient. The witness must also be reliable.[10]

[51] I agree that Mr Pakisi's evidence did not pass muster for the reasons already mentioned in the first judgment. I must state that I found the discrepancy between the averments made in his second written statement, which were carefully taken down by a senior officer under circumstances that withstand scrutiny, and his oral evidence, to be troubling. Particularly disconcerting was that, in his written statement, Mr Pakisi details the three occasions on which the deceased was allegedly thrown out of the bakkie. Yet in his oral evidence, Mr Pakisi stated that he personally witnessed only one incident and merely assumed that the deceased was thrown out three times because the bakkie stopped twice after the first incident. This is a serious weakness in the State's case. In my view, Mr Pakisi's evidence does not meet the standard set for the evidence of a single witness.[11]

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[10] *R v Bellingham* 1955 (2) SA 566 (A) at 569D-H; *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-H.

[11] Section 208 of the Criminal Procedure Act 51 of 1977 (CPA) states that '[a]n accused may be convicted of any offence on the single evidence of any competent witness', whereas its predecessor – s 256 of the 1955 Criminal

[52] An aspect that warrants mention is that the crime scene was visited by the SAPS officials some days after the incident, by which time it could already have been contaminated by elements such as the weather, or even deliberately, as Mr Pakisi's account of events had quickly become public knowledge. The appellants' bakkie, too, was only tested for the presence of blood a few days after the incident. The lack of objective evidence at the scene of the alleged crime must be seen against this light. The evidence pertaining to the cell phone towers that allegedly reflected the whereabouts of the appellants was correctly assessed by the court a quo. In my view, that evidence was a neutral factor in the case, considering that the data is, apparently, captured only when a transaction such as a phone call (or SMS transmission) is made or received.

[53] Having said that, the fact remains that there was no objective evidence which could serve as a safeguard for accepting Mr Pakisi's version on how the events pertaining to the deceased's death unfolded on that day. The risk of convicting the appellants on the basis of Mr Pakisi's uncorroborated evidence cannot be ignored. Given the universal standard of proof in criminal cases, that the State must prove its case beyond reasonable doubt, I agree with the first judgment's finding that the appellants ought to be given the benefit of the doubt and were thus entitled to be acquitted on the charge of murder as well as the other charges preferred against them. I therefore agree that the appeal ought to be upheld and that the appellants' convictions ought to be set aside. To my mind, however, that is not the end of the matter; there are other circumstances that bear consideration. For this reason, I respectfully disagree with the criticism by my colleague, Ponnan JA (the third

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Procedure Code – spoke of 'the single evidence of any competent *and credible* witness' (italics my own). The witness is nevertheless still required to be credible. See *S v Sauls* 1981 (3) SA 172 at 180D-G. See also the remarks of De Villiers JP in *R v Mokoena* 1932 OPD 79.

judgment), in relation to the court a quo's refusal of the appellants' application for discharge at the close of the State case, as contemplated in s 174 of the CPA. A brief discussion of that section is necessary, as it serves as the backdrop against which the court's refusal to discharge the appellants is to be viewed.

[54] The starting point must be the wording of s 174 of the Criminal Procedure Act, which reads:

'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge *or any offence of which he may be convicted on the charge*, it may return a verdict of not guilty.' (Own emphasis.)

In *R v Shein*,[12] this court held that the reference to the words 'no evidence' in the text of that provision meant 'evidence on which a reasonable court, acting carefully, "might convict"'. The following dictum of this court in *S v Lubaxa*[13] is instructive:

'Section 174 of [the CPA] repeats in all material respects the terms of its predecessors in the 1917 and 1955 Criminal Codes. It permits a trial court to return a verdict of not guilty at the close of the case for the prosecution if the court is of the opinion that there is no evidence (meaning evidence upon which a reasonable person *might* convict: *S v Khanyapa* 1979 (1) SA 824 (A) at 838F-G) that the accused committed the offence with which he is charged, *or an offence which is a competent verdict on the charge*.'[14]

[55] Hiemstra[15] opines that the decision to allow or refuse a discharge is fact-specific and 'the entire spectrum of circumstances' plays a role. I agree. For reasons that will presently become evident, I am of the view that the court a quo's refusal to discharge the appellants was justified under the circumstances.

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[12] *R v Sein* 1925 AD 6.
[13] *S v Lubaxa* 2001 (4) SA 1251 (SCA).
[14] Ibid para 10. (Own emphasis.)
[15] A Kruger 'Conduct of proceedings' in *Hiemstra's Criminal Procedure* 7 ed (RS 13 2020) at 77.

[56] This court in *S v Lubaxa* pointed out that what is entailed by a fair trial 'must necessarily be determined by the particular circumstances' of a case.[16] Similarly, in *S v Steyn*,[17] the Constitutional Court explained that in determining what is fair, 'the context or prevailing circumstances are of primary importance', as there is no such thing as 'fairness in a vacuum'.[18] The following observation made by Kriegler J in *Key v Attorney-General Cape Provincial Division and Another*[19] is apposite:

'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. *Ultimately, as was held in Ferreira v Levin, fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision.'* (Emphasis added.)

[57] The circumstances of this case warranted a further consideration, *viz.* whether the appellants are guilty on the competent verdict of culpable homicide, an aspect to which I now turn.[20] During the cross-examination of the appellants, the State Advocate explored this aspect. It is evident from the judgment of the court a quo that the appellants had seemingly made submissions on this aspect, which the trial court, in light of its guilty verdict on the murder count, did not consider necessary to

[16] *S v Lubaxa* (above fn 5) para 21.
[17] *S v Steyn* 2001 (1) SACR 25 (CC).
[18] Ibid para 13.
[19] *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) para 13. (Citations omitted.)
[20] Culpable homicide is, in terms of s 258*(a)* of the CPA, a competent verdict on a charge of murder.

evaluate. During the hearing of the appeal, this aspect was debated with counsel. Counsel for the State argued that if this court was not persuaded that the charge of murder had been proven, it should set that conviction aside and replace it with a conviction of culpable homicide. Counsel for the appellants argued that the State had not proven the commission of culpable homicide beyond reasonable doubt.

[58] It is trite that although the onus of proof differs, in relation to liability, the test of negligence to be applied in criminal trials is the same as that applied in civil cases, namely the standard of care and skill which would be observed by a reasonable man.[21] The learned authors of *Cooper's Motor Law* explain:

'On a charge of culpable homicide, the critical question is thus: would a reasonable person in the accused's position have foreseen the possibility that his or her driving may cause death? Once foreseeability has been established, it is incumbent on the court to further inquire whether the reasonable person would have taken steps to guard against such a possibility, and whether the accused's conduct deviated from that of the reasonable person…

It is the "general" possibility, not the specific manner in which the deceased was killed, that must be reasonably foreseeable.

Foreseeability is not confined to an accused's own conduct.'[22]

[59] As regards the appropriate approach, it has also been held as follows:

'[T]he practical approach is to look at *all* the facts at the end of the case, including, if it be one of the facts, the absence of any evidence from the person to whom negligence is sought to be imputed… And the enquiry is whether, from the totality of the facts, one can draw an inference of negligence…'[23]

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[21] *R v Meiring* 1927 AD 41 at 46.
[22] *Cooper's Motor Law*, op cit fn 1, at C1-3.
[23] See *R v Sacco* 1958 (2) SA 349 (N) at 352F-H (which was subsequently endorsed by the Appellate Division). Also see W E Cooper *Delictual Liability in Motor Law* (1996) at 200.

For the reasons set out below, I am of the view that the totality of the facts of this case justify an inference of gross negligence.

[60] From what can be seen in the photographs depicting the contents of the appellants' bakkie, the incident that led to the deceased's death was sparked by the suspected theft of about five heads of the sunflower plant. In response to the questions posed by the court a quo, the appellants estimated the value of the sunflower heads to be between R60-R80. On the appellants' version, they were driving past their employer's sunflower fields on the gravel road linking Coligny and Lichtenburg when they observed the deceased and his unidentified companion stealing sunflower heads. On this aspect, Modisane's testimony was that the appellants informed him that they saw the deceased and his companion at the sunflower fields while they were in the process of patrolling the crop fields on their employer's farm. The appellants disputed that evidence. According to the appellants, upon noticing that the deceased and his companion were stealing sunflower heads, the first appellant immediately stopped the vehicle and asked them what they were doing. The duo immediately threw the sunflower heads on the ground and fled the scene in different directions. Before pursuing them, the first appellant picked up the sunflower heads from the ground and put them in the bakkie.

[61] The appellants stated that they decided not to pursue the unidentified companion that had fled in the direction of the sunflower fields, as they knew it would be difficult to spot him. Instead, they drove in the direction of the one who had fled in the direction of the maize fields. They saw the deceased climbing over the cattle fence, after which he suddenly stopped. Having apparently decided that the situation warranted the arrest of the deceased, the first appellant stopped the

bakkie and instructed the deceased to get onto the back of the bakkie. The deceased obliged.

[62] Notably, there was no attempt to summon the police to the scene.[24] It bears mentioning that, in the normal course, an arrestee is transported by the police in a bakkie with a canopy, which at least ensures that the arrestee does not fall out in the normal operation of the vehicle, and thus excludes the risk of the arrestee being ejected from it. It is axiomatic that a bakkie without a canopy cannot offer the same protection. In addition to offering protection to the arrestee, the canopy of the police van ensures that the arrestee does not escape.

[63] In my view, by deciding to arrest the deceased, both appellants assumed the duty of care to ensure his safe conveyance to the police station. I noted from the contents of the post-mortem report and the deceased's photographs, as depicted in the photo album that served as an exhibit in the proceedings, that although he was 15 years old, he was of small build. It is therefore not surprising that the appellants, throughout their evidence, referred to him as a boy ('seun'). According to the appellants, the deceased had opted to sit at the corner of the bakkie, close to the tailgate, but the first appellant instructed him to sit in the middle of the loading bin, against the cabin section. When asked why he did not sit at the back of the bakkie with the deceased, the second appellant stated that he did not consider it necessary to do so as he did not think that the deceased would attempt to flee.

[24] In *S v Martinus* 1990 (2) SACR 568 (A) at 578F-G, it was held that '[t]he power conferred upon a private citizen to arrest without a warrant should be exercised sparingly and with great circumspection'.

[64] On the appellants' own version, they were traveling on an uneven gravel road that had ridges and potholes. The photographs that were submitted as exhibits attest to the poor condition of that road. Although both appellants were aware that the deceased was petite, none of them, as mature adults, expressed misgivings about him sitting alone and unrestrained in the loading bin of the bakkie. Both appellants must have had a full appreciation of the risk of the deceased, as an unrestrained passenger sitting in the loading bin, being ejected from the moving bakkie that was travelling on a bumpy road, but they failed to take the necessary steps to ensure that that risk would not eventuate. In deciding to convey the diminutive deceased in a bakkie without a canopy and on a bumpy road, the appellants created a potentially dangerous situation for the deceased.

[65] In my view, a reasonable person in the position of the first appellant, as the driver, would have foreseen that conveying the deceased at the back of a bakkie without a canopy presented certain risks, including that he could lose his balance while the bakkie was going around the bend of an uneven, ridged road surface, as he was unrestrained. Appreciating that risk and conscious that the deceased, as an arrestee, had to be safely conveyed to the police station, a reasonable person in the position of the appellants would have directed the deceased to sit in the cabin section of the bakkie with the driver (first appellant). Alternatively, he/she would have ensured that the second appellant sat with the deceased in the loading bin as an escort to prevent, at the very least, the deceased being catapulted from the moving bakkie on account of the poor road conditions. Instructing the deceased to sit in the middle of the loading bin against the cabin could not have mitigated that risk.

[66] Furthermore, the second appellant's version is that the first appellant was driving at 60km/h when approaching the bend on the Lichtenburg-Coligny gravel road. A reasonable person in the position of the first appellant would not have approached a bend at that speed, given the poor conditions of that gravel road and the presence of the unrestrained deceased in the loading bin of the bakkie. It is clear from the evidence of the second appellant that the deceased was still seated at the back of the bakkie shortly before they started moving around the bend. The deceased's absence from the loading bin was noted while the first appellant was still rounding the bend. The appellants' version leaves me with the impression that no serious thought was directed at the safety of the deceased.

[67] It is true that Modisane testified that he personally 'did not have a problem' with the arrangement of the farmers bringing suspects to the police station; and, further, that the appellants had, on two prior occasions, brought 'underage boys' to the charge office for the theft of their products. In relation to the remarks that, 'on no previous occasion had any suspect jumped off the bakkie' and that 'there had never been a complaint of any sort by the suspects', in my view the fact that underage boys had previously been brought to the charge office without any demur from them or the police did not serve as a carte blanche for the appellants to continue doing so in whatever way they deemed appropriate. I am mindful of the fact that the context of a scarcity of resources in our country, especially in rural areas, must always be borne in mind. Indeed, the police service is often left with inadequate human and material resources. I am, at the same time, equally alive to the lawfulness of a citizen's arrest. But basic precepts still need to be observed in order to ensure the safety of the arrestee.

[68] As I see it, accepting that the deceased jumped off the bakkie should not exculpate the appellants. As stated before, both appellants took it upon themselves to apprehend the deceased, take him into their custody and transport him to the police station. In so doing, they assumed the duty of care to ensure his safety while he was in their custody. They both knew that he and his companion's initial reaction, when confronted, was to flee from the scene. They had also observed that the deceased's inclination, when instructed to get onto the back of the bakkie, was to sit in one of the corners closest to the tailgate. That he could attempt to escape from their custody by jumping from the moving bakkie, and harming himself in the process, must therefore have been foreseeable. And the eventuality of the deceased jumping from the moving bakkie could easily have been prevented by either transporting him in the cabin of the bakkie, or one of the appellants sitting with him in the loading bin. Instead, both appellants opted to sit in the cabin while the deceased sat alone and unrestrained in the loading bin of their bakkie.

[69] On the appellants' own version, upon realising that the deceased was no longer sitting in the loading bin of the bakkie, they concluded that he had jumped out and fled and decided to drive back in an effort to apprehend him once more. The second appellant's account on this aspect was narrated as follows:

'Nou wat doen julle nou, nou dat jy vir Mnr Doorewaard gesê het die oorledene het gespring, wat gebeur toe? -- Ons het weer omgedraai om te kyk of ons hom kan kry.

[Now what are you guys doing now, now that you have told Mr Doorewaard that the deceased has jumped, what happened then? -- We turned around again to see if we could get him.]

As u sê of julle hom kan kry wat bedoel u daarmee? -- Ek het vermoed hy het dalk probeer weghardloop so ek het gedink 'n mens moet hom seker maar weer vang.

[When you say if you could get him, what do you mean with that? -- I suspected that he perhaps attempted to run away, so I thought one should probably catch him again.]

En wat gebeur nou? -- Toe ons terug kom, na ons omgedraai het, het ons weer rigting Litchtenburg gery het. Toe ons om die draai kom het ons die seun gesien lê in die pad.
[And what happens now? -- When we came back, after we had turned around, we were driving in the direction of Lichtenburg again. When we came around the corner we saw the boy laying in the road.]
En wat doen u nou? -- Ons het weer die bakkie omgedraai en langs hom gestop.
[And what are you doing now? -- We turned the bakkie around again and stopped next to him.]
Kan u net 'n bietjie klaarheid daaroor gee die bakkie omgedraai en langs gestop het is u eersverby die oorledene of hoe, kan u net verduidelik asseblief? -- Ons het, die oorledene het op 'n draai gelê so ons het net verby hom om die draai gegaan want aan die regterkant die mielies het dit moeilik gemaak om te sien weerskante waar die voertuig van weerskante af kom.
[Can you just provide some clarity on turning the bakkie around and stopping next to him, did you first drive past the deceased or what, can you please just explain? -- The deceased was laying on a bend, so we just passed him around the corner because on the right-hand side the maize made it difficult to see on both sides where the vehicle was coming from on both sides].'[25]

[70] As regards the appellants turning the vehicle around after noticing that the deceased was no longer sitting in the loading bin, Mr Motleholwa's evidence was that as he and his companion were approaching the Lichtenburg-Coligny gravel road, he noticed the appellants' vehicle speeding in the direction of Lichtenburg, before re-emerging in the direction of Coligny and then stopping near to the spot where the deceased lay unconscious on the road. The appellants' denial of his evidence relating to the speed at which the bakkie was traveling was put to him under cross-examination, but he remained steadfast.

[71] I interpose to mention, *en passant*, that I find it quite disconcerting that the appellants decided to leave the scene of the accident merely to request the police to

[25] Translation my own.

summon an ambulance. On their version, they had previously phoned the police station on various occasions. They were both in possession of their cell phones and could simply have called the police, or anyone else for that matter, from where the deceased lay to request them to summon an ambulance. Instead, the appellants left the scene for the police station and delegated the task of looking after the seriously injured deceased to unknown persons under dangerous circumstances, as the deceased lay on the road in close proximity to the crop fields which made it difficult to see oncoming traffic. Furthermore, I find it quite shocking that from the police station, the two appellants went back to their workshop and continued about their daily farming activities as if nothing exceptional had happened. Despite their awareness about the serious nature of the deceased's injuries, none of them later bothered to find out what had ultimately transpired. I do appreciate that this morally reprehensible conduct has no bearing on the inferences that may be drawn in relation to the crime committed, hence the forewarning that this is mentioned in passing.

[72] I consider next the issue of causal negligence. It is trite that in addition to proving the negligence of an accused person, the State also bears the onus of proving that such negligence caused the death of the deceased.[26] This means that the accused person must have foreseen that death could eventuate from his conduct. As stated before, a person who is injured through falling or jumping from a moving vehicle is involved in a motor vehicle accident for purposes of the National Road Traffic Act. In this case, it cannot be gainsaid that the deceased's death resulted from the serious injuries he sustained from falling off the appellants' moving bakkie, regardless of how exactly that happened.

[26] *Bramwell v S* [2014] ZAECGHC 7.

[73] The post-mortem report of Dr Letabile, who conducted the first post-mortem, was unchallenged. The chief post-mortem findings are that the deceased sustained 'an atlanto-axial fracture dislocation which is consistent with falling head first to the ground at high velocity.' It was not disputed that the deceased sustained serious injuries, bled profusely and succumbed to his injuries soon thereafter. Dr Moorad, a specialist forensic pathologist, testified that the deceased's injuries were consistent with a motor vehicle collision. It is evident from his evidence that it is within the range of ordinary human experience that particular persons may suffer fatal injuries from falling out of a moving vehicle. In my view, causal negligence has also been proven beyond reasonable doubt.

[74] I have already demonstrated that the conduct of both appellants, in placing the helpless deceased in the position in which he found himself, and their omission to take adequate steps to prevent the eventuation of the risks alluded to, constituted gross negligence. Having said that, the death of the deceased is directly linked to the driving of the bakkie in which he was a passenger. Causal negligence is therefore ultimately attributable only to the first appellant, as the driver of the bakkie. Thus, only he can be held accountable for the negligence that caused the deceased's death. For all the reasons mentioned above, I would set aside the first appellant's conviction on the charge of murder and replace it with a conviction on culpable homicide.

M B Molemela

Judge of Appeal

Ponnan JA

[75] I have had the benefit of reading the judgments prepared by Ledwaba AJA and Molemela JA. I agree with the former that the appeal must succeed. Molemela JA inclines to the view that, on count 1, the charge of murder, the first appellant should be convicted of culpable homicide. I cannot agree with that conclusion.

[76] Like my colleagues, I also am of the view that there are several disquieting features about this case. To commence with the police investigation of the matter: Some three days after the deceased had met his death, Brigadier Kgorane received a call from his Provincial Commissioner, as he put it, 'to go and assist the investigators about the case of the young boy who … passed away on Friday because there was more violence in the area of Coligny'. When Kgorane got there, so he testified, there were schoolchildren as well as members of the community protesting at the police station. He was informed by community leaders 'that suspects who were involved in the murder of this young boy are known and they were not arrested'. In addition, he continued, 'they indicated that there was an eyewitness available in the matter… They were insisting that … the child was killed. The community members said they are not going to leave the police station … until they see justice being done'.

[77] Thus, even before Kgorane had become involved in the matter, the community had already labelled what had befallen the young man a 'murder'; were satisfied that there was a witness to the murder; had decried the inaction on the part of the police; were insisting that charges be preferred against the 'suspects'; and, had embarked upon violent protest action, including the burning of houses and crops, to force the hand of the police.

[78] According to Kgorane, when he interviewed the then investigating officer, Warrant Officer Seponkane, he established that an inquest docket had been opened. Seponkane had informed him that he had taken a statement from the eyewitness, but went on to state that 'the alleged witness is crazy'. Kgorane then arranged to interview the witness, Mr Pakisi, and for him to point out the crime scene. Thereafter he instructed 'them to change the charge to [a] charge of murder' and he 'appointed the new investigator, which is Lieutenant Colonel Nkosi, to investigate the matter'. What this reveals is that, even before Nkosi was appointed to investigate the matter, a decision that a charge of murder should be preferred had already been taken by Kgorane. This, solely on the strength of the interview with Mr Pakisi and his pointing out of the crime scene. Until then, no further investigation had been conducted.

[79] Nkosi did not testify. We accordingly do not know what further investigations he undertook in order to satisfy himself that there was sufficient evidence for an indictment against the appellants. There could hardly have been much by way of further investigation because, on that very day, the appellants learnt that they were to be charged. The next morning they handed themselves over to the police. According to Kgorane, members of the community were 'still protesting at the police station where they wanted to see the suspects being arrested'. The appellants were then arrested and charged.

[80] Prosecution of crime is a matter of some constitutional importance to the citizenry of this country. Given the adversarial nature of criminal trials, prosecutors play a critical role in our criminal justice system. The mere decision to prosecute can have a far-reaching impact on an accused person's life. It should not be lightly made,

because even if an accused is ultimately acquitted, the harm already suffered could prove to be irreparable.

[81] Prosecutors have at their disposal the full machinery of the State. It is for a prosecutor to establish, through the presentation of evidence, the guilt of the accused beyond reasonable doubt. The prosecutor must provide proof of the accusation made. To that end, the prosecutor must place before a court credible evidence in support of the alleged crime. It is for a prosecutor to evaluate the conduct of the police and the strength of the State's case that will be actively presented to a court. It is not the function of a prosecutor 'disinterestedly to place a hotchpotch of contradictory evidence before a court, and then [to] leave the court to make of it what it will'.[27]

[82] Broughton observes:

'Firstly, the prosecutor cannot become, as it were, an extension of the media. The prosecutor must act independently of the media. That is to say, he or she must not base his or her decision on media reports or opinions or sentiments expressed in the media, nor in exercising his or her discretion may he or she yield to or be influenced by pressure placed on the prosecuting authority by the media or the public as expressed through the media. Besides political and judicial interference, the prosecutorial discretion to institute and stop criminal proceedings must also be free from "*public*" interference. Surrounding publicity may result in a prosecutor being reluctant to withdraw a case notwithstanding that he or she has personal doubts concerning the guilt of the accused, because by doing so he or she runs the risk of being perceived in the public domain as soft, fearful and lacking the skills to win the difficult case. Where a case generates media attention, there may be "enhanced pressure" upon the prosecutor to obtain a conviction. A prosecutor may prefer a particular charge or a more serious charge against an accused which is not supported by the prima facie evidence as

[27] *S v Van Der Westhuizen* [2011] ZASCA 36; 2011 (2) SACR 26 (SCA) para 11.

per the case docket, where he or she is driven by a media frenzy attendant upon the case (because of its high-profile or notorious nature or because it involves shocking facts) or by an outcry from society (or community outrage) as expressed through the media in its various forms, including social media, especially as to what the outcome of the case ought to be. The prosecutor may thereby hope to obtain a conviction which is not supported by the evidence and to gain an increased or a more severe sentence than what the facts of the case warrant and thus to be seen in the media as a champion of "justice" who satisfied the public's baying for justice and the maximum or harshest possible punishment (ie who did what the public expected). The prosecutor may simply lose his or her objectivity on account of hostile or adverse pre-trial publicity when exercising his or her discretion, instead of devoting himself or herself to the facts of the case.'[28]

[83] Had there been a sufficiently careful assessment of the evidence in the docket, the public interest and the law, perhaps some doubt would have been entertained as to whether there was, on the basis of sufficient and admissible evidence, reasonable and probable cause to believe that the appellants are guilty of an offence and that conviction was a reasonable prospect. To once again borrow from Broughton:

'Prosecutors should bring professional standards of a non-partisan nature to their prosecutorial discretion. The decision to prosecute or not to prosecute must be shaped in substance by *an impartial and objective assessment of the prima facie evidence as contained in the case docket*, the law and the public interest, as well as prosecutorial guidelines, codes of conduct and policy directives. *Prosecutors must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution*. There must indeed be a reasonable prospect of a conviction, otherwise a prosecution should not be commenced or continued. *Before a prosecution is initiated, there should be reasonable and probable cause to believe that the accused is guilty of an offence*. When instituting or maintaining criminal proceedings, the prosecutor should proceed *only* when a case is well founded, *upon evidence reasonably believed to be reliable and admissible*. It is clear that prosecutors must pay meticulous attention to police dockets before deciding whether

[28] D W N Broughton 'The South African Prosecutor in the Face of Adverse Pre-Trial Publicity' (2020) 23 *PER/PELJ* 1 at 11-12. (Footnotes omitted.)

or not to prosecute, and in this respect they must act with objectivity. A "sensible discretion" and "circumspection" should be exercised by the prosecutor in deciding whether to institute a prosecution. After all, "it is excellent to have a giant's strength, but it is tyrannous to use it like a giant." *A prosecutor should be just a prosecutor, not a persecutor*.'[29] (Italics my own.)

[84] The prosecution in this matter came to rest almost entirely on the evidence of Mr Pakisi, a single State witness. Kgorane testified during the bail proceedings that, having visited the various scenes with Mr Pakisi, he 'could find no independent, verifiable evidence linking [the appellants] to those scenes'. That did not change by the time of the trial. There was no evidence: (i) of tyre tracks of either the quad bike or bakkie in the sunflower fields; (ii) that the sunflower crop had been damaged or flattened in any way by having being driven over; (iii) of spent cartridge cases at any of the various scenes described by Mr Pakisi at which, according to him, firearms had been discharged; (iv) of blood on the back of the bakkie; or (v) of visible injuries on Mr Pakisi after what, on his version, were fairly severe assaults.

[85] In short, the prosecution's case consisted of Mr Pakisi's say-so and nothing more. No effort appears to have been made by either Kgorane or Nkosi to satisfy themselves as to the truthfulness and reliability of Mr Pakisi's account of events. In my view, even the most perfunctory interrogation of his version ought to have satisfied them of his mendacity. Not only is there no objective corroboration for Mr Pakisi, but his version, such as it is, is riddled with inconsistencies and contradictions.

[29] Ibid at 12-13.

[86] During the course of his evidence, Mr Pakisi disavowed the first statement (the first statement) that he had made to Seponkane on Sunday, 23 April 2017. In his evidence in chief, he testified:

'He then went with me to his office. On arrival in his office he took out a paper. He then said to me that I should tell him my statement.

Yes. -- After I gave him my statement he then took those documents, or those papers that they use at the police station, and he said to me that I must sign. Those papers were blank there was nothing written on them.

Yes. -- And then after I had signed he said to me he is going, or he did not let me read my statement he just said that he is going to copy my statement into those police papers, or police documents.

Let me try to show that I understand you here Mr Pakisi. Do I understand you to be saying that Seponkane caused you to sign a document, a police document and that police document it was empty, but whilst he was taking your statement he had written on another document which he did not read to you? -- Yes.

All right this other paper which you say he was writing on, but which he did not read to you. Did he give that paper to you so that you should read it yourself? -- No.

When you were giving him your statement about what you knew did you give him detailed information? -- Yes I gave him my statement in detail, but when I was at NPA that statement was not mine.'

[87] Mr Pakisi made a second statement on 22 May 2017 (the second statement) and a third on 25 July 2017. Both were made to Nkosi. In that regard he testified:

'… Mr Pakisi yesterday during your evidence-in-chief you testified that you made a statement on 23 April which was reduced to writing by Warrant-Officer Seponkane and furthermore that you at some point at the offices of the National Prosecuting Authority came to see the contents of that statement and that you were not happy with … the contents and the correctness thereof is that correct? -- That is correct.

On that day at the National Prosecuting Authority's office will I be correct to say that is when you went to consult with the prosecutor? -- That is correct.

And did you then inform the prosecutor of the issues you took with the first statement? -- Yes.
Now after explaining to the prosecutor how the first statement was taken and that you were not happy with the procedure did the prosecutor inform you of the correct procedure for a statement to be obtained? -- He said to me I should concentrate on the statement that was taken by Colonel Nkosi I should not confuse myself about that statement that was taken by Warrant-Officer Seponkane.
Okay. So you were not happy with the first statement but the second statement that you made to Colonel Nkosi that statement was correct?
… -- Correct.
So the second statement you were granted an opportunity to read through the statement or it was read to you before you signed it? -- I have read it they even read it to me and I understood it then.
…
Mr Pakisi will I also be correct to say that you made an additional statement, a third statement which was also reduced to writing by Colonel Nkosi and this one is dated 25 July 2017 where you made additional statements or provided initial information pertaining to your second statement. -- Yes…'

[88] His explanation for having made as many as three statements ran thus:

'Sir with regard to your statements and your additional statements you have just indicated that you made additional statements because you kept on remembering or recalling what actually happened on 20 April am I understanding you correctly? -- Correct.
So it took a while for you to recall everything in detail? -- Yes it took me time because I was thinking and I had trauma and stress.
Now as you sit here and testify ever since Wednesday are you convinced that you now with precision recall what happened on 20 April last year? -- Yes I remember now even now some of the things are still coming.
Do you mean by saying that as you sit there some things come to you for the very first time still? -- That is correct because I have been disturbed, I have been disturbed on my health and my mind.

Did you tell the prosecutor about these problems you are experiencing before you started to testify here? -- Advocate Molefe and his group knows about my problems because they have been informed because I have been attending doctors and they were told, I was telling them as well.
Now sir it was pointed out to you that there are discrepancies and contradictions between what you say here at court and the statements you made? -- My statement is corresponding because I have said the things that accused have committed I did not change anything.
The problem is that when you now say that you testify and even now things are only coming to you for the first time and my predicament is that when I close the cross-examination you can remember tonight something else is that not true? -- Yes that is correct because I have flashbacks I can remember every time what occurred.'

[89] The summary of substantial facts, in terms of s 144(3) of the Criminal Procedure Act 51 of 1977 (the CPA), alleged that the 'accused drove with the deceased and threw him from the bakkie. He was put back into the bakkie. This happened more than once'. That could only have come from Mr Pakisi. That was consistent with what was stated by him in his second statement. He there said:

'11. The white man driving motorbike then climb at the back of the van and I saw him [grabbing] the boy at the back of the van and threw him on the ground.

12. He then alight from the van and grabbed the boy from the ground and put him back at the van. The white fat beard male then climb at the back of the van.

13. By then I was standing motionless, shocked and admiring to what had happened.

14. The white van then started moving and whilst in motion the very same white guy sitting at the back of the van, grabbed the boy and throw him out of the moving vehicle. After throwing him, the van stopped and the white guy climb out of the vehicle, picked up the boy and put him at the back of the van. The white guy again got back into the van at the back, and the van started moving.

15. The white fat guy with beard again grabbed the boy and threw him for the third time out of a moving vehicle. The van stopped again and the white fat guy climb out off the vehicle and grabbed the boy from the ground and put him back at the back of the vehicle.'

That was the tenor as well of his evidence in chief.

[90] Under cross-examination, though, Mr Pakisi altered his version. He testified:

'Now that statement of yours the second one dated the 22 May do you still have it there? -- Yes.

You were very, very specific in paras 11, 14 and 15 that the child was thrown three times. Yes thrown three times and with relation to the second and third time paras 14 and 15 you described this in detail. You saw when referring to the very same white guy being accused 2 grabbed the boy and throw him out of the moving vehicle you said here that you saw this happening? -- I saw him with my two eyes.

And that he for the second time threw the child from the vehicle? -- I said at that point I did not see what was occurring because the van was deeper and I could not see but the van was going and stopping and driving and stopping we would not make out why are they stopping did they throw the child or did they not.

Yes that is what you came here to testify so you will agree with me that you lied here. -- I am not lying. I was telling the truth. What I am telling is not a lie it is the truth because as the van was moving and stopping and moving it stopped two times and moved three times so I do not know what are they doing there at the front are they throwing him off or not.

Yes but if you confirm now … So you are lying when you say the white guy then started moving the, sorry the white van, this is paragraph 14:

"The white van then started moving and whilst in motion the very same white guy sitting at the back of the van grabbed the boy and threw him out of the moving vehicle."

Now you come and say you could not see that happening so you lied here. -- I saw him when he was throwing him off for the first time, on the first instance I observed that but as the van was moving the van moved and stopped three times so as it stopped, it stopped for the first time, they threw the child off and then it stopped for the first time then when it stopped for the first time I did not know what was going on there and it went on and stopped again upfront as it was moving to the front and I could not see what was going on whether they have thrown the child off or not.

Sir the police investigated this as a murder because of what you were telling them. You were telling them that the child was thrown three times. You also lied at paragraph 15 when you told them that the child was thrown for yet another time, a third time out of the moving vehicle. -- I assumed so that the child was thrown once again in another chance because of the van drove and stopped and

then it drove and stopped so I assume that as it stops as they picked the child up but I did not know if they are throwing the child.

Yes why did you not tell the police that you assumed this, why did you tell the police that you saw it happening? -- That is what I mentioned in my statement that I saw as if they are throwing him off three times that is why I assumed so.

Tell me where you see that in your statement at paragraph 14 and 15 that you thought or you assumed that they threw the child for a second and third time when the vehicle stopped the second and third time? -- Because the van was stopping and going and stopping and going, it stopped three times so there was nothing that I can do. Can you please explain to me according to your observation for me to be able to see what has occurred did you expect me to follow that van and see where it ends up?'

[91] The high court approached that aspect of Mr Pakisi's evidence thus:

'In his statement it is stated that [Mr Pakisi] said that the deceased was thrown from the van thrice. In his evidence in court he testified that it was once and then that he is not sure about the other two acts, but infer that it must have been a repetition. Once again this is not material. What is material is the fact that the deceased was thrown from the van which is consistent with the evidence as testified to by Dr Moorad.'

But, that is far too charitable to the witness.

[92] The truth of the matter is that this is a contradiction of some moment. It cannot simply be brushed aside, as the high court purports to do. Brushing it aside in that fashion also ignores the context in which the witness came to retract his earlier version. Mr Pakisi initially testified in some detail as to manner in which the deceased was manhandled, thrown off the moving bakkie and landed in the sunflower field. He stated that the deceased had fallen on his head and landed on the left side of his body. It was only when it was suggested to him that he could not have seen any of this because of the height of the sunflower crop that he started to retreat

from his earlier evidence. This culminated in him saying that he did not actually see the deceased being thrown on the second and third occasion, but that he assumed that that had occurred. However, in that he was plainly disingenuous.

[93] Mr Pakisi made no mention in his statements of having been assaulted by the appellants, except for the following:

'46. I bend my back and looked on the ground and suddenly I was struck with something on the neck and fell on the ground.'

This assault, which is mentioned in his second statement, came at the end of his ordeal that morning. It caused him to lose consciousness. When he came too, he did not know what had become of the appellants and deceased.

[94] And yet Mr Pakisi's testimony is replete with allegations that during the course of the morning, on many different occasions, he was subjected to sustained assaults. I need only touch on the following: According to Mr Pakisi, the appellants and the third person drove from the sunflower fields to NWK. Once there, so he testified:

'When I alighted they asked me several times what did I see. I also replied several times I did not see anything. I was begging them that I did not see anything, and then they started to assault me.

So I understand you correctly when you say they to be saying that all three of them assaulted you? -- Yes all three.

Yes you were assaulted continue.

COURT: How were you assaulted? -- Open hands, and fists, or clenched fists.

Where on your body? -- On the face.'

[95] They then proceeded to the Lichtenburg-Putfontein T-junction. When they got there, Mr Pakisi was forced to drink the Captain Morgan alcohol. He testified in chief:

'Yes. -- Whilst I was drinking it, it was burning me inside my lungs, so I then told them that it is burning, and they said that I should drink it, and they proceeded to assault me.'

…

'This time how were they assaulting you? -- They were assaulting me with open hands, clenched fists, and kicking.

All of them? -- Accused 1 and 2 and then that other man was standing next to the van and looking at the child, or looking after the child.'

[96] Neither of these assaults, however, merited a mention in his statement. When taxed in cross-examination he stated:

'So from my understanding all three of them attacked you? -- Yes.

You were taking blows from all sides? -- Yes they were all assaulting me.

Yesterday you testified that all these blows were directed towards your face? -- Yes they were assaulting me on my face.

In total how many blows struck your face? -- It was really dark to me because I was just standing for all the assault and pain.

Will you say that it is more than five? -- More than five.

Okay. And did you sustain any injuries? -- On my mouth and eye was also swollen.

Which eye was that? -- The left eye.

Sir if I, if any person or witness will come to this court and say that the third person at NWK Silos never climbed out of the vehicle will that person be telling a lie? -- That person would be telling a lie.

Let me take you to your second statement please the one for 22 May 2017. Paragraph 24. It reads as follows:

"On arrival at NWK behind the storage tank they stopped. The driver and the big fat bearded guy alighted from the van. All three of them started communicating whilst the third one was sitting inside the van."

Then it proceeds to paragraph 25:

"After some few minutes they got back into the van and drove to the direction of Botshabelo."

-- The third person did alight. He alighted, they assaulted me together with accused 1 and 2 and after assaulting me they then drove away.

Did you realise that those paragraphs I referred to where you on your own version referred to the incident at NWK Silos there is no mention of an assault whatsoever. -- They assaulted me right there it is my fault or my mistake that I did not mention it in the statement but then otherwise they did assault me there.

Apart from the negligence on your part to mention the assault in your statement on your own version you are telling a lie when you say that the third person never alighted from the vehicle.'

[97] On 27 April 2017, Mr Pakisi was interviewed by a journalist. The interview was broadcast on television the next day. His account of the assaults, in the course of the interview, differed from both his statement and his evidence in court. When asked about this, he stated:

'Yes I mean the interview with the news person when you went to the news people to the scene and everything, the interview that we are talking about can you remember was that before you made your second statement on 22 May last year? -- That had been a very long time after I had spoken to the television people.

Yes. Now you say in the television interview that they started beating me up but the context is that you are still there where they caught you at the sunflower field you are not yet at NWK? -- Yes they assaulted me there forcing me to tell them what I saw, that part also occurred there.

Yes. In your evidence-in-chief you said that the first assault occurred at NWK not there at the sunflower field. -- The incident started at the sunflower and proceeded to NWK and they kept on using their powers on me.

Why did you not tell the court in your evidence-in-chief that you were assaulted at the sunflower field already? -- I was assaulted, being assaulted at sunflower as well as at NWK is the same thing I just thought that the court will take it that as the same thing, it is one thing, it is the same thing to be assaulted as I was assaulted at the sunflower and NWK.'

[98] The appellants were indicted on a raft of charges. None of these assaults were included in the indictment. Mr Pakisi was simply unable to explain why he did not mention the assaults to Nkosi. In that regard he testified:

'Yes because you said, oh sorry. Because you have said or you have testified yesterday that accused 1 and accused 2 and the third person all three of them assaulted you there in front of NWK Silos. -- Yes they assaulted me there I will not deny that. Have you told Colonel Nkosi who took your statement that accused 1 and 2 and the third person assaulted you there at NWK Silos? -- No I did not tell him because I was still scared I explained about the occurrences what has occurred and I was still scared that maybe the same thing is going to repeat itself.

Sir you were already in witness protection at that time? -- Yes I was under witness protection but I was going to explain to the court what has occurred, I was going to tell the court everything that happened.

Sir at the time when you were providing your second statement to Colonel Nkosi on 22 May 2017 you were already in witness protection there was nothing threatening you. -- We knew that there was nothing that could happen to me because any time is tea time nobody knows.'

[99] What detracts quite significantly from Mr Pakisi's credibility is that, when Kgorame interviewed him, he only mentioned two suspects – 'the one who was driving and the one he saw throwing the deceased out of the motor vehicle'. That as well, so it emerges from his cross-examination, is what was contained in his first statement. Later, the following emerges from his evidence.

'Sir yes Brigadier Kgorane informed this court that you were in a position to describe but he said you particularly spoke about two suspects and accordingly he tasked Intelligence to trance two suspects. -- I described three people with their stature in front of him. And then after I described

those two they said the same people that I gave description of two of them are at the police station they handed themselves over where is the third one? I then said I do not know.
So if Brigadier Kgorane said that you only mentioned two suspects it is complete and absolute untruth? -- I informed him that there were three people, I explained to him about three people he said he will have to do his duty in the correct manner that third person must be apprehended.'

[100] Even accepting in his favour that there were three perpetrators, as the following excerpt from the record reveals, his evidence in that regard is still not without blemish:

'Sir can I ask you something, am I correct to say that you informed Colonel Nkosi that accused 1 before court you recognised him as a family member of Mr Fai who owns the garage, the petrol garage in Coligny am I correct? -- That I realised that or I started knowing that information when I went to the police station to lay a charge and when they said I should describe him I described him and they confirmed yes it was him.
Okay but you are certain that is accused 1 before court today? -- Yes.
…
You also confirmed that accused 1 is the person whom you identified as the relative of Mr Fai? -- Yes that is correct.
Can I please take you to paragraph 27 of that statement dated 22 May 2017. My Lord there is a copy that I have of the second and third statement for the court's convenience, it is exactly the same as the one before the witness if the court would like to follow.
…
This is where you in your statement describe what is happening there at the scene at the dam.
"The white fat bearded guy then instructed me to jump over a fence. I jumped the fence and the white bearded male and the passenger on the van followed me."
-- The third one came when we were already at the dam when I was already in the water when I was pleading with them not to shoot me and he came to warn them that they should not shoot.
No sir that is not what your statement is saying. Have a look at paragraph 30. At paragraph 30 you say:

"The other white guy who was left behind at the van then came and asked the two guys not to shoot me because there are people in the veldt who might notice the incident."
Then on paragraph 31 you say:
"I then realised that I know this white guy he is the relative of Mr Fai who owns Henex Garage having trucks, delivering petrol having lots of businesses in and around Coligny".'

[101] The trial court did not engage with this aspect of his evidence at all. It contented itself with the statement that: 'there was another man, a third man … This third man is not an accused before court'. Because Nkosi did not testify, there was no evidence whatsoever as to whether any investigation was undertaken to establish whether a third person was indeed involved, when during the course of the morning he parted ways with the two appellants, his identity or what had subsequently become of him. If Mr Pakisi had conjured up a third person that would detract significantly from his veracity as a witness.

[102] According to Mr Pakisi's second statement, he was driven to NWK, then to the T-junction of the Lichtenburg/Putfontein Road, then to the Lichtenburg/Koster T-junction. They then stopped at the Henwill Abattoir, from where he was instructed to run up to the Doornhoek road sign, which is about 12km away. They then travelled to the Coligny road sign and then to Aubrey's farm.

[103] Before the commencement of Kgorane's cross-examination, an inspection *in loco* was held at Coligny on Monday 26 March 2016. According to Kgorane, the route followed on this occasion differed from that travelled with Mr Pakisi on 24 April 2017. In that regard, Kgorane testified that 'the points that he pointed out to me is inconsistent with his explanations even before we left for the pointing out'. When asked to account for this discrepancy, the evidence of Mr Pakisi was:

'Sir I am putting it to you that you are not telling the truth, you are changing your version. Brigadier Kgorane came to court and under oath said that the route that you showed us to NWK Silos on that particular day of the *inspection-in-loco* is not the route that you took him to NWK Silos you took him on a different road. -- No it is not true we used the same route that we used when we were doing the *inspection-in-loco*.

So if Brigadier Kgorane says on the day when you pointed the scenes and the route out to him on 24 April and he says you used a different road to get to NWK Silo will he be lying? -- Yes because they used their own route, I used the route that I saw when we were doing the *inspection-in-loco* that is the route that is the one that we used, they used their own route.

So Brigadier Kgorane is not even from Coligny he was travelling where you directed him to drive? -- Which one is Kgorane again?

The Brigadier. -- To tell you the truth Kgorane we used the same route that I used the time when I was pointing out and even when we went for an *inspection-in-loco* I even used the same route again I have never used any other route.

Sir I put it to you that the version of lying down and being pointed with a firearm the whole route is a new story that you are coming up today with. -- That is your story that you bring to court I have told the court the truth about the route that you have used.'

[104] Moreover, Mr Pakisi's pointing out to Kgorane did not include Henwill Abattoir or the Koster/Lichtenburg road. Under cross-examination, Mr Pakisi testified:

'In your evidence-in-chief that is the spot or the place, the location where you said that they reversed park and then they were firing shots at you as you were ordered to run on that gravel road. -- Yes I remember that statement.

Now if I go through your statements this incident is nowhere mentioned. – That is there it appears and I did not even know the place at the time but by seeing it I could recognise it.

No sir let me tell you what you wrote in your statement …

You say:

"… At the T-junction of Lichtenburg and Koster we made a U-turn driving back."

Can you see it, is that correct? -- It is correct.

…

"We reached Hanwell Abattoir and stopped the van there."

Is that also correct? -- No

So that one is a lie? -- Yes

It is a lie from the statement that you signed after you have read it through? -- Yes.

…

…[W]here would Colonel Nkosi get this information of Hanwell Abattoir … ? -- I do not know where did they get the Hanwell part [from] … I disagree with the Hanwell issue.

…

And what about the Koster, Lichtenburg T-junction where the U-turn was made? -- On the road, on that same road you find those boards that are written Koster, Lichtenburg but the Hanwell issue I still disagree with that but maybe I mentioned those names Koster because there are boards that are indicating Koster.'

[105] The importance of this is that, ultimately, Mr Pakisi was driven to concede that the events that he described in his second statement at those places did not occur at all. Significantly, his evidence in regard to the places, to which he was taken, was also shown to be objectively impossible. According to the Vodacom employees, who were called to testify during the defence case, the two cell phones of the first appellant and the one cell phone of the second appellant were on the day only within the radius of the Coligny cell phone tower. Some of the places that Mr Pakasi was allegedly taken to were far outside of the reception area of the Coligny Tower. The distance travelled on Mr Pakisi's version was approximately 45 km. The time period spent at these places, including him having to run 12 km, outside the reception area of the Coligny Tower would not have been possible. This evidence conclusively refuted any possibility that Mr Pakisi could have been driven to places outside the tower reception area, such as the Putfontein T-junction, the Coligny road sign, the Lichtenburg/Koster Road and Doornhoek.

[106] Over time Mr Pakisi came to make repeated references in his evidence to the employment of firearms. As emerges from the following excerpt, his evidence on this score was far from consistent:

'Okay. On that note please go to paragraph 35 of that statement. It reads as follows:

"By then he was still sitting at the back of the van and he took out a rifle (a long firearm) and instructed me to run again in front of the van. I ran again and he started shooting randomly around me while I am running. -- It is true.

Now last week under oath you told us that there were only two firearms you saw the day in question that was used it was a handgun used by accused 1 and a handgun used by accused 2. -- Yes with the, in consideration with the firearms there were firearms I could not look back I was running looking or facing forward and I was running, as I was running even the time when I was seated and when they called me back when I reached the van I could see the firearm on top of the bonnet.

So the version you gave us last week that the only two firearms that were used were the two handguns that one is incorrect? -- That information or the testimony is correct but that firearm was also present it is only that I did not explain before court.

No sir I pertinently asked you are you sure it was only those two handguns and you said yes. -- Yes I did not mention it but I was running facing forward and I could hear the sounds and the sounds of the firearms were also confusing me as I was running, they were also confusing me about the shooting so that firearm was also present because I found it on the bonnet on that day though I did not mention, I only mentioned those two but otherwise that is why I heard the sound of it as well and at the time I was also dizzy.'

[107] The importance of Mr Pakisi's inconsistent evidence relating to the firearms cannot be understated. The appellants were indicted on charges of unlawful possession of a firearm (count 5), unlawful possession of ammunition (count 6) and pointing of a firearm (count 7). They were discharged at the end of the State's case on counts 5 and 6. According to the trial court, '[t]he basis for their discharge on these counts is that the State failed to prove that the accused were unlawfully in

possession of the firearms and ammunition they had'. They were, however, convicted on count 7. From the rather cryptic observation by the court it is difficult to comprehend how they could have been acquitted of the possession of a firearm charge but convicted on the pointing of a firearm. In that regard it appears that the judgment suffers an internal contradiction.

[108] These criticisms of Mr Pakisi's evidence represent but the tip of the iceberg. Almost every facet of his evidence does not survive scrutiny. Nevertheless, Hendricks J was 'satisfied that the evidence of Mr Pakisi is honest, truthful and reliable and must be accepted…'. Even a superficial perusal of Mr Pakisi's evidence demonstrates that this finding cannot be supported. I have quoted *in extenso* from the record to show that Mr Pakisi simply cannot be taken at his word. I have also dwelt in far greater detail than is absolutely necessary on his evidence to demonstrate that, on many of the aspects to which I have alluded, there is no room for honest mistake and that his evidence cannot be true. This must mean that on the aspects mentioned, which are by no means exhaustive, his evidence has been deliberately fabricated. The fact that Mr Pakisi was guilty of deliberate falsehood required the high court to consider whether he could be safely relied upon.[30] The high court did not embark upon that enquiry. Had it done so, it may well have concluded that it could not. Instead, the high court appears to have been far too receptive to the prosecution case. Consequently, it far too readily accepted the evidence of Mr Pakisi. It lost from sight that Mr Pakisi was a single witness. Had it approached his evidence with the appropriate measure of caution, it ought to have concluded that his evidence fell to be rejected.

[30] *S v Oosthuizen* 1982 (3) SA 571 (T).

[109] When the prosecution closed its case, both appellants applied to be discharged in terms of s 174 of the CPA. Save for counts 5 and 6, the applications were refused. Why precisely the applications for a discharge in respect of the remaining charges failed is not apparent. I have been at pains to show that Mr Pakisi could not safely be relied upon. Thus, at the close of the State case there was simply no reliable evidence upon which to found a conviction. As Nugent AJA observed in *S v Lubaxa*:[31]

'To place the accused on his defence in those circumstances has usually been said to conflict with the presumption of innocence (which is a concomitant of the burden of proof: per Kentridge J in *S v Zuma and Others* 1995 (2) SA 642 (CC) para 33), or to infringe the accused's right of silence and his freedom to refrain from testifying (eg *S v Mathebula* 1997 (1) SACR 10 (W) at 35C; Schwikkard *Presumption of Innocence* at 129; Schmidt *Bewysreg* 4 ed at 95).'

[110] Nugent AJA added:

'I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness-box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu,* is, in my view, a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence before a

[31] *S v Lubaxa* 2001 (4) SA 1251 (SCA); [2002] 2 All SA 107 (A) para 14.

prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.'[32]

[111] Having decided that a prosecution was warranted in this matter, it was not the function of the prosecutor to seek a conviction at any cost. As it was put by Rand J, of the Supreme Court of Canada, in *Boucher v The Queen* [1955] SCR 16 at 23-4:

'It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.'[33]

[112] These observations by Rand J are of particular importance to this matter, because by the time that the appellants came to testify in their defence, the prosecutor appeared no longer to be pressing a case that placed reliance on the evidence of Mr Pakisi. Instead, the prosecutor focused a substantial part of his cross-examination on trying to establish that the appellants had acted negligently in failing to take

[32] Ibid paras 18 and 19.
[33] A passage referred to also in *S v Shaik and Others* [2007] ZACC 19, 2008 (1) SA 1 (CC) para 67.

precautionary measures to prevent the deceased from jumping off the moving bakkie. But the case belatedly sought to be advanced by the prosecution, was itself fraught with difficulty.

[113] By that stage of the trial there were two broad theoretical hypotheses, the one advanced by the prosecution that the deceased had been thrown of the bakkie and the other advanced by the appellants that the deceased had jumped off the bakkie. The alternative case sought to be advanced in cross-examination of the appellants, lacked any proper factual foundation. It had never been the case for the prosecution that the appellants had somehow made themselves guilty of a crime by failing to take adequate steps to prevent the deceased from jumping off the bakkie. That was simply not the case that the appellants had been called upon to answer. Nor were the appellants called upon to answer a case that mutated somewhat to one of them having failed to secure the person of the deceased on the bakkie.

[114] What the crimes of murder and culpable homicide have in common is a fatal outcome for a human being. The difference in the two lies in the distinction between the two forms of *mens rea*, which are essential elements of the respective crimes of murder and culpable homicide. For murder, *dolus* in one or other of its manifestations (*directus, eventualis, indeterminatus*, etc) is the kind of *mens rea* which must have existed.

[115] As Marais JA explained in *S v Naidoo and Others* 2003 (1) SACR 347 (SCA) paras 28-29:

‘The crime of murder cannot be said to have been committed unless the act or omission which caused death was intentionally committed or omitted and death was the desired result, or, if not

the desired result, at least actually foreseen as a possible result, the risk of occurrence of which the accused recklessly undertook and acquiesced in…

The crime of culpable homicide, on the other hand (certainly as regards the consequence (death) of the impugned act or omission) postulates an absence of *dolus* and the presence of *culpa*. The fact that the crime of culpable homicide may be committed even where the act which causes death is an intentional act of assault should not be allowed to obscure that essential truth. In such a case the perpetrator is not convicted of culpable homicide simply because he or she deliberately assaulted a person as a consequence of which it so happened that the person died. If the perpetrator could not reasonably have foreseen that death might ensue, a conviction of culpable homicide cannot be justified. *Aliter* if death should have been foreseen as a possible consequence. What this shows is that it is the perpetrator's culpable failure to foresee the possibility of death in cases where an assault has resulted in death and, in cases not involving an assault, that failure coupled with a further culpable failure, namely a failure to do what could and should have been done to prevent the occurrence of death, that is the rationale for the conviction of culpable homicide. *Culpa* is therefore always present in the crime of culpable homicide. Sometimes it is also associated with *dolus* (as in intentional assaults resulting in reasonably foreseeable but actually unforeseen death). Sometimes it is not (as in negligent conduct resulting in reasonably foreseeable death). For a penetrating and instructive analysis of these matters see Professor Roger Whiting's article "Negligence, Fault and Criminal Liability" in (1991) 108 *SALJ* 431.'

[116] In this case, the trier of fact is confronted with two destructive versions. Logic dictates that both cannot be true.[34] If Mr Pakisi's evidence is rejected as false, as it has to be, then any conviction would, of necessity, have to rest solely on the defence case. In that event we would not be dealing, on appeal, with a case involving an assault. Therefore, as Marais JA made plain in *Naidoo*, to sustain a conviction of culpable homicide, the prosecution had to establish a culpable failure on the part of the appellants to foresee the possibility of death coupled with a further culpable

[34] *S v Janse van Rensburg and Another* [2008] ZAWCHC 40; 2009 (2) SACR 216 (C) para 8.

failure to do what could and should have been done to prevent the occurrence of death.

[117] The version of the appellants was summarised in their plea explanations. Those explanations were later confirmed by them in their evidence. According to the appellants, they saw the deceased and another person stealing sunflowers. The other person fled. The deceased was called to the bakkie, driven by the first appellant. On his way to the bakkie, the deceased's tracksuit became entangled in a fence. The first appellant assisted him to untangle it. The deceased was then told to get onto the back of the bakkie. The deceased first sat on the side frame at the back of the bakkie, but the first appellant told him to move to the middle and to sit with his back to the driver's compartment, which he did. The second appellant sat with the first appellant in the front cabin of the bakkie. The first appellant initially drove slowly looking for the other person, who they had also seen stealing sunflowers. When that person could not be found, they decided to take the deceased to the police station at Coligny. They did so with a view to opening a case of theft against the deceased.

[118] Whenever the first appellant had previously encountered persons stealing from his employer, he had on each occasion handed the suspects over to the police. He explained that it had always been the practice, since he was a child, to take people who had stolen to the police station and it was for the police to sort matters out The police had never taken issue with this, as they did not always have a vehicle at their disposal. It also helped establish cooperation between the farmers and the police. In fact, theft was so prevalent, that the first appellant's employer had secured the services of a security company to guard the crops, and every time a suspect was

caught stealing, that suspect was handed over to the first appellant, who then took that person to the police station with the stolen items. This was done, in the hope that the police would do something about the matter.

[119] Warrant Officer Modisane corroborated the first appellant's version in material respects. In his evidence in chief he testified:

'Let me put it this way, as Warrant Officer Modisane did you have any problem with the accused having found people stealing, bringing those people to the police station and opening this dockets? -- Personally I did not have a problem with this arrangement of the farmers when they found people who are now stealing their products taking them and bringing them to the police station.'

Modisane agreed that 'citizens also have to play the role in the fight against crime'.

[120] Modisane further testified:

'Now would you explain to this honourable court how you knew the accused before this honourable court. -- I remember that there were two cases pertaining to mealie crops. They came with some boys who were under age, that is coming to the charge office. We then went for the parents of this young boys. We then issued them with summons, the J534.

During this two instances you have just mentioned, did they open dockets against those small boys? -- They opened cases against the parents of the young boys.

When they opened this dockets, did they bring the proof of the mealies they were saying this boys had stolen? -- That is so, they brought such mealies.

And now when they so came to the police station on this two occasion, I assume that they had caught the boys red handed and the brought them to the police station? -- That is so, they caught them red handed.'

[121] The first appellant testified that in 2017 several cases were opened with the police pertaining to people stealing crops. It was put to Modisane that the appellants had opened cases for crop theft under references: CAS 57/03/17; CAS 11/03/17;

CAS 24/03/17 and CAS 57/02/17 and that the cases were registered at the Coligny Police Station by various police officials. Although Modisane did not have any knowledge of this, the prosecution armed with the specific CAS references, did not seek to gainsay the evidence of the appellants.

[122] On no previous occasion had any suspect jumped off the bakkie and there had never been a complaint of any sort by the suspects. On each occasion police dockets were opened. On this occasion, as they were travelling on the gravel road to the police station, the second appellant told the first that the deceased had jumped off the back of the bakkie. The first appellant turned the vehicle around and stopped next to the deceased, where he was lying on the gravel surface of the road. As the appellants did not have the necessary medical experience they decided to drive to the police station to inform the police so that arrangements could be made for an ambulance to be contacted. As they left they saw two people walking in the direction of the deceased. They requested them to remain with the deceased. One of them, Mr Motleholwa, testified. He confirmed the version of the appellants. On the way to the police station, the appellants called Esme Oelofse, who was an attorney and a friend. The first appellant made it clear that he did not contact her in her capacity as an attorney, but as a friend, who he believed could assist in getting hold of an ambulance before they got to the police station.

[123] When asked why he did not take the deceased to a nearby clinic, the first appellant explained that he did not believe that it was safe in the circumstances to transport him to the clinic, having regard to the deceased's condition. He explained that the clinic at Coligny did not have its own ambulance and the closest ambulance was in Lichtenburg. There is nothing to suggest that the version of the first appellant

that it was better not to transport the seriously injured deceased on the back of the bakkie, was not true or reasonable in the circumstances. They believed that the police would be able to expedite arrangements for an ambulance to attend on the deceased. There is no suggestion that they were dilatory in attempting to secure medical assistance for the deceased. On realising that the deceased was injured, they arranged for the deceased to be watched and immediately set off to the police station. The police station was 1.8 km away and the traveling time was estimated to be about two and a half minutes. Constable Kgabi agreed that it was quicker and shorter to go to the police station than the clinic, which was about fifteen minutes away from the place of the incident.

[124] At the police station the appellants met Modisane. They first asked him to send an ambulance to the deceased. Thereafter, they explained to him that they had arrested the deceased for stealing and on the way to the police station the deceased had jumped off the bakkie. According to Modisane, the appellants were 'bothered by the injuries suffered by the deceased' and appeared to be shocked. He believed them when they told him that the deceased jumped off the back of the bakkie.

[125] It is so that the second appellant stated that he assumed that the deceased had jumped off the bakkie. That statement must be viewed in its proper context. They were travelling in a moving vehicle. When last he looked, the deceased was seated against the cabin in the middle of the back of the bakkie. He next saw a puff of dust out of the corner of his eye in the side mirror of the bakkie. Looking over his shoulder he observed that the deceased was no longer at the back of the bakkie. Given where the deceased had previously been seated the assumption was a fair one in the circumstances.

[126] On the evidence of the appellants, there is no suggestion that: (i) the speed at which they travelled was excessive; (ii) their conduct was dangerous or reckless in the circumstances; (iii) the deceased was being thrown around the back of the bakkie; (iv) lost his balance while the bakkie was in motion or (iv) was flung out of or catapulted from the bakkie. None of those, it seems to me, are logical conclusions that can be drawn from any of the established facts. At best they constitute what may be described as rather speculative or conjectural hypotheses.

[127] In reasoning by inference there are two 'cardinal rules of logic' that cannot be ignored:

'(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'[35]

These fundamental rules must survive in order to sustain a criminal conviction in our law. In this case they do not. The only way to arrive at a conviction here would be to predicate one inference upon another inference.

[128] It is so that a prosecutor is not obliged to 'play chess against him- or herself'.[36] And, where an accused is represented, it is not the function of a prosecutor to call evidence which is destructive of the State's case or which advances the case of the accused.[37] However, a prosecutor may nonetheless have a duty to disclose, in certain circumstances, facts harmful to his or her own case. This may well have been such

[35] *R v Blom* 1939 AD 188 at 202-203.
[36] Per Cloete JA, *S v Van Der Westhuizen* [2011] ZASCA 36; 2011 (2) SACR 26 (SCA) para 12.
[37] Ibid.

a matter. I have already alluded to Mr Pakisi's purported disavowal of his statement made to Seponkane. His explanation was that the latter had caused him to sign blank pages, indicating that he would fill them in later. Mr Pakisi also testified that when he brought this to the attention of the prosecutor during consultation, he was told that he should focus on his second statement.

[129] Despite the fact that Seponkane was on the list of State witnesses, he was not called to testify by the prosecutor. According to Mr Pakisi, Seponkane had: (i) refused at first to take his statement; (ii) called him a drunk and a crazy person; (iii) caused him to sign blank pages, when he took his statement; and (iv) did not call a forensic expert to examine the blood, which he had pointed out at the scene where the deceased had allegedly been thrown into the sunflower fields. Seponkane was in a position to confirm or refute these allegations. If Seponkane refuted these allegations, Mr Pakisi would have been exposed as a liar.

[130] Further, although Kgorane alluded to Mr Pakisi's first statement in respect of the pointing out by the latter to him, counsel for the appellants was not permitted to make use of the statement, as Seponkane was not a witness. Had Seponkane been called as a witness, his evidence would have been relevant not just to Mr Pakisi's first statement, but also his pointing out to Kgorane. It seems perfectly obvious that Seponkane was not called as a witness by the prosecutor because his evidence would have detracted in a direct and substantial manner from the evidence of Mr Pakisi. His evidence would have called the lie to Mr Pakisi's evidence in many material respects. Plainly therefore, he was not called to protect Mr Pakisi from further adverse criticism.

[131] Counsel for the appellants did indeed consult with Seponkane, after he was made available to them by the prosecutor. It was then intimated that his evidence would be to the effect that he had correctly taken down Mr Pakisi's first statement, which he thereafter read back to him. However, it was subsequently placed on record that Seponkane refused to testify as he feared for his own safety and the safety of his family in the light of the violent protests that accompanied this case in Coligny. Relying on Mr Pakisi's evidence, the high court criticised Seponkane, finding that his behaviour was 'totally unacceptable and unprofessional'. It reached this conclusion without affording him an opportunity to be heard.

[132] One of the contentions advanced on behalf of the appellants is that the high court had the power under s 186 of the CPA to subpoena a witness 'if the evidence of such witness appears to the court essential to the just decision of the case'. Seponkane, the contention proceeded, was such a witness. It may well be that the failure by the high court to call Seponkane as a witness constituted a material irregularity amounting to a failure of justice, but it is not necessary to arrive at a firm finding in that regard because that aside, the appeal must still succeed.

[133] Importantly, any judgment must account for all of the evidence.[38] In *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426E-H, citing with approval from *Moshephi and Others v R* (1980-1984) LAC 57 at 59F-H, Marais JA stated:

'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

[38] *S v Trainor* 2003 (1) SACR 35 (SCA); [2003] 1 All SA 435 (SCA) para 9.

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.'

So approached, the appellants were entitled to their acquittal. Consequently, the appeal must succeed.

V M Ponnan

Judge of Appeal

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