IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

26/10/12

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

26.10.2012 .....

DATE SIGNATURE

CASE NO: A577/2011

PARIKSHA GOVENDER APPELLANT

AND

THE STATE RESPONDENT

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The Appellant, in the Pretoria magistrate court (Court M), had been charged with culpable homicide. She, in the alternative, had been

charged with reckless or negligent driving. She pleaded not guilty to the main count and the alternative. Advocate J H de La Rey, on her behalf, advised the court that the Appellant had not driven the motor vehicle recklessly, negligently or inconsiderately on the day in question.

[2] The Appellant was duly represented by Mr de La Rey in the court *a quo*. She was again represented by him when the matter was argued.

[3] The State, in the court *a quo,* alleged that the Appellant (then the accused) had, on 31 July 2007 at or near Pretoria Road, Silverton, a public road in the district of Pretoria, wrongfully and negligently killed Rian Pieter Lotter, in his lifetime an adult male, by entering the oncoming lane of traffic and causing an accident while trying to cross the same.

In the alternative, the State alleged that she had contravened the provisions of **section 63(1) read with sections 1, 63(2), 63(3), 69, 73, 89(1) and 89(5) of the National Road Traffic Act 93 of 1996** which relates to reckless or negligent driving.

[4] She was found guilty on the main count of culpable homicide and sentenced to a fine of R6 000.00 or 12 months imprisonment. Half of the sentence was suspended for five years on condition that the Appellant was not again convicted of culpable homicide arising from the driving a motor vehicle which would be committed during the period of suspension. No order was made in respect of her driver's license.

[5] The Appellant, on 7 June 2010, noted an appeal against the conviction only. The application for leave to appeal was refused by the court *a quo*. The Appellant then proceeded on petition. On 14 March 2011, Phatudi and Louw JJ granted the Appellant leave to appeal against conviction and sentence.

[6] It will be remembered that the notice of appeal and the application for leave to appeal specifically relate to conviction only. It appears that Mr de La Rey asked for the setting aside of the conviction and the sentence simply because if the Appellant succeeds on conviction the sentence ought to be set aside too.

[7] The parties, before the appeal was argued, agreed that although the court's record is replete with "inaudibles", the court could still follow the proceedings in the court *a quo* and then arrive at a finding based on the evidence that the court record reflects. It is, indeed, so.

[8] Mr Jacob Petrus Duvenhage, an attorney acting on behalf of the Appellant, brought an application which was to be heard at the hearing of the appeal, for the condonation of the late filing of the Appellant's Heads of Argument. The application which was not opposed was granted.

[9] Reverting to the trial, at the outset thereof, admissions in terms of **section 220 of Act 51 of 1977 ("the "CPA")** were made by the Appellant (then the accused). These are that:

1. She drove a Toyota Yaris with registration number WDB 767 GP on the day in question.
2. the deceased, Riaan Pieter Lotter rode a motorbike with registration number WVC 122 GP on the day of the incident.

3. The motorbike and the motor vehicle were involved in an accident.
4. The identity of the deceased was admitted.
5. Pretoria road in Silverton is a public road.
6. The deceased died on the scene as a result of the injuries that he sustained during the accident.
7. The photographs, which became exhibits during the trial, were admitted. It was also accepted that they were a true reflection of the accident scene on the day in question.

[10] The State bore the onus to prove the guilt of the Appellant as the law required and requires. To achieve that, the State called one witness, Mr Samuel Henry Onrust. The defence called three witnesses namely, The accused, Ms Janette Ford-Miller ("Janette"), a colleague of the Appellant at their work at the Forensic Science Laboratory in Silverton, and an expert, Mr Johannes Petrus Strydom ("Strydom").

[11] **EVIDENCE: STATE**

Onrust testified that he witnessed the accident which occurred on 31 July 2007 when people were coming back from their lunch. He was

travelling from West to East in Pretoria road. He approached a set of robots which changed to red. He then stopped at the corner of Creswell and Pretoria streets. Turning left according to him, one found oneself in Creswell street. The lane, used to turn left, became a channelling lane which compelled one to turn right. While stationary at the robots, he noticed a motorbike in his rear-view mirror also moving from West to East behind him. The robots turned green before the motorbike reached them. He moved to the left "allowing the motorbike to come through". He was travelling at 45 to 55 kilometre per hour. The motorbike passed and he then saw a Toyota Yaris motor vehicle coming from the opposite direction. The motor vehicle which was driven by the Appellant crossed the main road in front of them. This intersection, which the Appellant was crossing, according to Onrust, had no robots. He was about 50 metres from the Yaris motor vehicle when it turned and crossed to the right in front of the witness. The motorbike, using the right lane, moved in front of him. The Toyota Yaris, according to the witness, was crossing the main road moving **very slowly** in front of them. The witness testified that the motorbike then moved in front of him and he added *"again this is my perception now to avoid things that is (sic) going to happen in front. At that point in time everything freezed*

(sic) in front of us." He explained that *"the motorbike tried to avoid again, he came to the right, to the left, then he went to the right and that moment when he went to the right, that whole picture of the car freeze (sic) in front of us".*

Asked by the public prosecutor as to what he meant by that, he then testified that the motorbike passed him, swerved to the left and then to the right and then into the motor vehicle. He testified that the Toyota Yaris, at the time, had no right of way. The Toyota Yaris spun around and the driver of the motorbike flew over the Yaris. He immediately applied brakes, pulled out of the road and stopped his motor vehicle. He saw the driver of the motorbike lying on the ground and rushed to the Yaris to assist the lady driver out of the motor vehicle. He asked the driver of the Yaris if she was alright and she asked for his cell phone, spoke to an elderly person on the phone and within half an hour she was gone. He testified that the Toyota Yaris was moving from East to West. He was right behind the motorbike. He estimated the distance from the robots to where the collision took place at 400-450m. He testified that one could turn safely where the Yaris was turning if the road is clear.

Testifying under cross examination, he told the court that the motorbike was four cars' length away from him when he first saw it. He testified that the motorbike never came to a standstill. He was referred to two statements which he had made. In the one statement he was told he had said that the motorbike had been next to him. In respect of the second statement he was told that he had said that when the robot turned green, he moved away and there was no motorbike next to him. He was told that his statement showed that "the motorbike also stopped for the robot to turn green". He then said that the motorbike did not stop. Confronted with the problem, he testified that he either made a mistake or the one who took the statement made a mistake. Asked where the motorbike was when the robot turned green, he answered and said the motorbike was about 2 cars away from him. Asked if the vehicles behind him had been moving, he answered that they could have been standing still. He pulled away normally. The Yaris was at the distance of 50-55 metres away when he saw the Yaris for the first time and the Yaris, at the time, was moving. He, at the time, was travelling at 45-50 kilometre per hour. He was at a distance of 20-25m when the motorbike and the Yaris collided. The motorbike passed him when he was at a distance of 50-55m from the point of impact. Asked by the

court, he testified that he pulled away faster. He testified that the motorbike did not pass him for a distance of 400 metres from the robots.

It was then suggested to Onrust that, that then meant that the motorbike was travelling at the same speed as his i.e *"as slow as you were"*. His answer was *"he must travel at 65 to catch up with me"*. Another scenario that was given to the witness was that the motorbike had travelled with him for 400m and then decided to overtake him. He answered that he could not give Mr de La Rey alternatives as answers in the court. He, however, agreed that for a distance of 400 metres the motorbike did not pass him. The motorbike passed him when he was 55 metres from the point of collision and he was, at the time, driving at 50-55 kilometres per hour. Shown the possibility that the motorbike could have travelled with him and at the 55 metre mark decided to travel at a high speed in order to overtake him and did in fact overtake him, he, at this stage, avoided answering the simple question. He then said that the motorbike could have accelerated up to 65 kilometres per hour and then passed him. The court, realising it, then came in and explained to the witness that all Mr de La Rey was saying was that the

the brake 'lights' of the motorbike coming on as he knew that the motorbike was going to hit the Yaris. In trying to explain why he did not see the light coming on he said that he, at the time, could have taken his eyes off the motorbike. Mr de La Rey put it to the witness that he could not clearly remember exactly what had happened on the day in question at the point of impact. The answers he gave were in no way answering the question. Onrust ended up saying that he could not *"comment on something that you are accusing me that I cannot remember"*. The version of the Appellant was put to Onrust. He said that the distance between the robot at Creswell and where the accident took place was approximately 500 metres. He did not agree that the distance between the lampposts was 40 metres. He denied that the Appellant had brought the Yaris to a complete standstill at the intersection. He could not comment when told that the manner in which she brought the Yaris to a standstill had posed no danger to any motor vehicle which approached from the opposite direction. He testified that he was travelling in the far left lane. He could not comment on what the Appellant thought was the position as she saw it. He could not comment when told that the Appellant turned and suddenly saw something coming from her left hand side and then felt a massive knock on her motor vehicle. He did not

agree with what the Appellant heard people saying namely, that the motorbike had overtaken the witness at a very high speed swerving left and right performing what they called a wheelie. He disagreed that the Appellant had been taken to hospital after sustaining injuries and being in a state of shock.

The State closed its case whereupon Mr de La Rey brought an application for the discharge of the Appellant in terms of **Section 174 of the CPA**. The Court dismissed the application.

[12] The Appellant then testified and told the court that she was 24 years of age and that she, at the time of the accident, had been employed by the Forensic Science Laboratory in Silverton which is a wing of the South African Police Service. She was employed there since March 2007. On 31 July 2007 between 13h00 and 13h15 she drove to Engen Garage which is about 300-400 meters from her workplace to buy chips and chocolate for her lunch. She was driving from east to west up Pretoria Road. She was shown photograph B of Exhibit "J" and she testified that she came to a standstill in the channelling lane which obliged her to turn to the right. While so stationary, she saw a motor vehicle and a motorbike behind the motor vehicle coming from the opposite direction. The motor

vehicle and the motorbike used the right lane which was closest to the middle island. The poles that are seen on photograph B which are on the island are 40 metres apart. She measured them using a measuring equipment which they have at their office. The motorbike and the motor vehicle were approximately 200 metres from her when she saw them. Realising that it was safe for her to cross she started crossing the road at a consistent speed to the right i.e turning to the right. Just as she had almost crossed the white line seen on the right hand side of photograph *"D"* of Exhibit *"J"* with approximately 30 centimetres of the motor vehicle still to cross the line, she saw a blur to her vision on her left hand that was followed by a loud bang that she called a *"massive blow"* to the back of her car which then spun 360 degrees and came to a standstill over the white lines seen on photograph D. She testified that she used the road quite often to go and buy food from the garage. The motorbike and the motor vehicle appeared to be moving normally when she saw them. That convinced her that there was time enough to turn to the right and to get to her workplace. She did not see the motorbike coming closer to her after she had turned. After Onrust testified she realised that he was the man that had helped her out of the motor vehicle. She told him that she had not seen the bike. She asked him to get her

tropika from her motor vehicle as she, at the time, was thirsty. She also asked to use his cellphone. He obliged. The court at this stage decided *"to take the bold stand and allow the evidence"* which was hearsay. The evidence was that the Appellant had been informed by her colleagues at the scene that the motorbike had been quite fast moving at a speed of 140 to 160 kilometres per hour and even performing a wheelie. The court indicated that not much weight would be attached to the evidence unless the requirements of the exception to the hearsay rule were met.

Cross examined she testified that her driver's license was about a year old at the time of the accident. She testified that turning at 30 to 40 kilometres per hour, as she went into second gear at that speed, would have enabled her to safely make a turn. She denied that it took her long to turn to the right. After seeing the motor vehicle and the motorbike she again looked before she turned and she then turned when she realised that it was safe to do so. The vehicles, according to her, were still far away. In reply to a question from the public prosecutor she testified that she could have safely completed the turn unless the motorbike and the motor vehicle travelled at a very high speed. Told that a reasonable man would have made a quick turn, she answered that

she had executed a quick turn. She denied that she had turned very slowly and that she had been negligent in not allowing the motor vehicle and the motorbike to cross over. The speed limit at that particular area of the road was 70 kilometres per an hour. She assumed that the motorbike was still behind the motor vehicle after she turned to the right. She denied that she had not been keeping a proper look out. She specifically denied that she had been aware of the motorbike overtaking the motor vehicle especially as Onrust testified that the motorbike overtook him at the last 45 to 50 metre mark. Indeed,this has been his evidence. She testified that if that was how the deceased overtook Onrust then there was no way in which she could have seen the deceased overtaking as she, at the time, had been half-way crossing the road. She testified that she did not see the deceased performing a stunt. She was indeed honest as she could easily have said yes. She finally denied that she had not kept a proper outlook and that she had been negligent.

[13] The court then indicated that it had needed to clear up one or two aspects but ended up asking a number of questions. Asked by the court why she did not see the deceased performing the wheelie she answered

that she could not see it after she had turned and when she was left with a short distance to complete the turn. She testified that she had seen the motorbike behind the motor vehicle and assumed that the motorbike would keep on moving normally. She looked twice at the direction of the motor vehicle and the motorbike, once when she was standing still and once when she crossed. She confirmed that she had told Onrust that she had not seen the motorbike. The answer, in my view, must be understood in its proper context. She did not have personal knowledge of the speed of the motor vehicle and the motorbike. The chevron had never been an obstacle to her as she saw the motor vehicle and the motorbike. She thought that Onrust must have been travelling at 70 kilometres per hour. Asked how the accident could occur if she had to travel 5 metres while the motor vehicle and the motorbike had to travel approximately 160 metres she answered that for that accident to occur somebody must have travelled faster. If regard is had to the evidence of Onrust of how the motorbike, overtook him at the last 45 – 50 metre mark then it is indeed understandable how the accident could have happened.

Re-examined she testified that she focused on the two lanes of the oncoming traffic and she turned. She looked, started turning and looked

again and then continued driving crossing the road. She had driven past the chevron when she looked for the second time.

[14] The defence then called **Janette** who worked with the Appellant in the same building. She witnessed the accident. They were approximately 300 in the building and she did not personally know the Appellant. On 31 July 2007 she was driving following the Appellant who was in front of her. She was a few metres behind her but already in the right lane where one could only turn right. She was approximately near the intersection where the Appellant's motor vehicle was stationary waiting to turn. Looking at the oncoming traffic i.e. motor vehicles from the opposite direction she could see that the motor vehicles were still relatively far. She drove closer to the intersection believing that the Appellant was going to turn and she in turn would follow her. There was, according to her, nothing strange about the turn that the Appellant executed. Suddenly, and out of the blue there was an accident. She never expected the accident as she, too, had believed she was going to turn after the Appellant.

Cross examined, she testified that she never saw the motorbike. She saw the motor vehicles. She heard people saying that the motorbike had been travelling extremely fast and wheeling but did not see that.

She attributed that to the distance between her and the oncoming traffic as she was still approaching the intersection. She could not comment on whether the deceased had the right of way because of the distance. She testified that the Appellant on the day in question had waited until it was safe for her to turn and she then turned. She believed that the Appellant had kept a proper look out on the day in *question. In reply to the question she answered "definitely no doubt in my mind".* Asked by the court she answered *"The oncoming cars, no doubt in my mind that she did, she made a safe turn".* She testified that although the motorbike could not have come from the sky she only saw the motorbike after the accident. Asked if she could dispute that the Appellant had been negligent in her conduct she answered. *"I have got no reason to believe she was negligent in her conduct".* She was prevented from crossing by the accident. She was 7 to 8 metres from the accident. The accident occurred before she could turn.

[15] Mr Johannes Petrus Strydom was called by the defence to testify as an expert. His expertise was never in dispute. He traced his expertise starting from the time when he started his career as a traffic officer in the Benoni Traffic department during 1966 right up to 1976 when he

went abroad to further his studies. He studied at the North Western University in the United States in the city of Evanston where he completed his first courses. In 1984 he went back to the United States of America but this time to the University of Florida where he did advanced traffic accident investigation. There he did traffic accident reconstruction, special problems in reconstruction and DW1 instructor course. He went back to that University in 1988 and completed more courses. He visited various accident scenes and did 967 cases relating to property damage; 407 relating to personal injury accidents; 131 relating to fatal injuries and 259 relating to pedestrian accidents. He did in total 1.755 cases.

[16] He was instructed to investigate this collision. A sedan motor vehicle and a motorbike had collided. He testified that the first question that always comes to mind is whether the collision was preventable. He started by calculating the speed of the motorbike. He explained how he arrived at the speed. He was provided with copies of the police photographs and the inquest documents. He attended the scene of the accident with the Appellant. He determined the most probable minimum speed of the Kawasaki motorbike at impact to be 107 kilometres per hour. He

explained how he arrived at that showing the formula that he used. He testified that if the motorbike had been travelling at *"the legal speed of 70 kilometres per hour there would not have been an accident at all there"*. He explained what normal acceleration and rapid acceleration meant. He testified that under 30 kilometres per hour normal acceleration will be 1.47. if the motorbike travelled at 70 kilometres per hour he then was travelling at 19.46 metres per second. He testified that the motorbike and the motor vehicle would have missed each other if the motorbike had been travelling at 70 kilometres per hour.

[17] The court *a quo* asked a number of questions saying that it had wanted clarity on certain aspects. He conceded that the collision would have taken place if the speed of the Yaris motor vehicle was substantially reduced. He, however, said that for the collision to occur the Yaris would have travelled very very slowly if the motorbike was travelling at 70 kilometres per hour.

Re examined he testified that if the rider's legs were trapped and the motorbike was moving at 107 kilometres per hour then the legs would have been ripped off and, in that event, the motorbike would have fallen very close to the Yaris and that was not the case in the current matter.

[18] The defence closed its case and the matter, after the parties had addressed the court, was postponed for judgment. Upon resumption, the court, instead of giving judgment, called Captain LOUIS CORNELIUS VAN DER GRAGT as a witness. He testified that he was stationed at the Local Criminal Record Centre in Pretoria central. He took photographs of Exh G and he is the author of the key thereto. He was at the accident scene. The distance between the Yaris and the motorbike was 16.8 metres. The distance between the deceased and the Yaris was 26.7 metres.

Cross examined he testified that he did not have a sketch plan because all points were visible on the photograph. The answer was not helpful at all. He called that the golden rule. He decided on the day in question that it was not necessary to have the sketch plan. The witness, most importantly, conceded that he had made mistakes with the distances. He conceded that the distance between E and F which he said was 16.87 could be 22 metres. He then testified that he concurred hundred percent with Strydom's measurements which were different from his. He attributed the differences in the measurements to a faulty measuring tape that they used. He then said he concurred with the measurements that were depicted on Exh M4. He conceded there was doubt regarding

the length of "C", "D" and "E" and E to G. His evidence in no way helped the court. It did not come as a surprise when the court a quo did not even deal therewith.

[19] The state always bore the onus to prove the guilt of the Appellant beyond reasonable doubt. The court did not even have to believe the version of the Appellant who did not have to prove her innocence. The court had to acquit the appellant if her version was reasonably possibly true. The court could only reject the version if same was improbable and beyond doubt false. **(See R v Difford 1937 AD 370 at 373 and 383; S v V 2000 (1) SACR 453 (SCA) at 455 a – c and S v Shackell 2001 (4) SA 1 (SCA) at 3J-4A)**

[20] **APPROACH OF THE APPEAL COURT**

Appeal courts do not just interfere with the findings of fact by the trial courts. The findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. This, because trial courts are in the atmosphere of the trial. They observe the demeanour, appearances and personalities of the witnesses

while they give evidence. **(See S v Hadebe and Others 1997(2) SACR 641 (SCA) at 645 e-f; R v Dhlumayo 1948 (2) SA 766 (A) at 706 and S v Francis 1991 (1) SACR 198 (A) at 198j-199a)**

[21] **FACTS OF THE CASE**

These have been dealt with above. The state relied on evidence of a single witness who must be honest, credible, trustworthy and reliable.

Section 208 of the CPA provides:

"An accused may be convicted of any offence on the single evidence of any competent witness".

To avoid wrong convictions, evidence of a single witness needs to be treated with extreme caution. The evidence has to be satisfactory in all material respects. The honesty of a witness alone is not enough. **(See S v Artman and Another 1968 (3) SA 339 (SCA))** .

The court a quo was faced with two opposing versions. At the end of the case the question that was to be asked was whether the guilt of the Appellant was proved beyond reasonable doubt.

[22] **THE ISSUES**

The issue that the court had to determine was whether the state had proved the charge of culpable homicide i.e. – whether the state had proved negligence on the part of the Appellant and whether the negligence had resulted in the death of the deceased.

[23] **COMMON CAUSE FACTS**

These are that:

1. On the 31 July 2007 the Appellant drove a Toyota Yaris with registration number WBD767GP in Pretoria Road within the jurisdiction of the court *a quo*.
2. an accident occurred between the Toyota Yaris and a motorbike with registration number WBC122GP.
3. Riaan Peter Lotter was riding the motorbike when the accident occurred.
4. Riaan Peter Lotter died on the accident scene as a result of the injuries that he sustained during the accident.

5. Exhibits A to G were handed in and their contents were admitted by the defence.

[24] The question that arises when one applies the principles I referred to above is whether, indeed, the state has discharged the onus. The next question to be answered is whether the court a quo cannot be faulted for arriving at the decision that it did.

[25] Onrust, the single state witness, concluded that the accident was caused by the Appellant's fault. He, however, testified that the incident had occurred a long time ago and he could not remember everything. This, in my view, is a clear indication that his evidence had to be treated with the caution it deserved because his recollection abilities were limited. For instances, he testified that there were no skid or brake marks as he had checked that. That was proved to be incorrect during the cross examination. He also testified that the motorbike did not overtake him for approximately 400 to 450 metres yet his testimony was that the motorbike had been closing in on him. He could hardly explain why he moved to the left to give the motorbike way to pass. He ended up saying they normally did that when motorbikes approached them from behind. He testified that the Appellant crossed the road or turned to the right

very slowly. This is unthinkable and improbable. It is hard to believe that the Appellant could have moved like that in the face of oncoming traffic. Onrust could not explain why the deceased could not avoid the accident if he had not been driving extremely fast. He, however, under cross examination, ended up increasing, albeit slightly, the speed that the motorbike had been travelling at before the accident. Onrust wanted to paint a picture of himself and the deceased as people who were not travelling fast. He avoided the accident and the deceased could not. This, indeed, paints a different picture. One can hardly say that Onrust was honest, credible, trustworthy and reliable. He does not pass the test.

[26] The court *a quo,* in the light of Onrust's evidence, was well aware of the fact that the motorbike could have travelled at a speed higher than 75 kilometres per hour. The court *a quo* seemed to have misunderstood the Appellant when she testified and said that initially when she saw the motor vehicle and the motorbike for the first time they seemed to have been travelling at a normal speed. This was confirmed by Onrust. The normal speed did not relate to the speed that the motorbike later on travelled at. The court a quo incorrectly kept on repeating the word

"normal speed" in the wrong context. The court *a quo* did not seem happy with the speed that Strydom said the motorbike was travelling at at the time of the impact namely, 107 kilometres per hour. Even if that might not have been the correct speed the fact of the matter is that the motorbike was travelling fast at the time of the impact. This, the court *a quo*, said too, in its judgment. The court *a quo* said that it had no reason to doubt Onrust impartiality and objectivity. This cannot be correct in light of what I said above about the witness. Strydom clearly testified that if the motorbike had been travelling at 70 kilometres per hour no accident would have occurred. The deceased must, indeed, have been travelling very fast. This then explains what the Appellant and Janette

meant when they said that they did not see the motorbike. The Appellant had already seen the motorbike and what she then meant was that she had not seen the motorbike just before the impact. Janette did not see the motorbike because she was still at a distance and, according to the Appellant, the motorbike was behind the motor vehicle when she saw it. Janette, at the time, could not have seen the motorbike. She also could not have seen it just before the impact for various reasons. She honestly said that she did not see it. The Appellant cannot be blamed for not seeing the motorbike after she had looked for the second time and

established that it, at the time, was still safe for her to proceed forward. After all, she at the time, had to face and look where she was proceeding to. The court a quo also believed Onrust when he said that the Yaris turned and proceeded slowly. I have already demonstrated the improbability of the evidence. The court a quo again was wrong in accepting this piece of evidence. The court *a quo* was correct when it found that the motorbike had exceeded the speed limit. The motorbike had the right of way but evidence has demonstrated that the deceased far exceeded the speed limit and created the position in which he ultimately found himself. The Yaris, indeed, turned in front of the motorbike but while it was safe for the Appellant to do so. The motorbike, according to the Appellant, had been far when she started turning. She in no way could have done that when the motorbike was just next to her. That would have been suicide. It is indeed highly improbable that she turned "very slowly". The court a quo was correct in finding that *"had the motorcycle not exceeded the speed limit, the accident would not have occurred"*. Where the court *a quo* erred was where it started introducing contributory negligence in the circumstances of the current matter. This, in my view, does not even come into the equation. If the Appellant's assumption was correct in

that it was safe before she turned, she remained correct to the last. Indeed she did not see the motorbike after she had seen it for the first time. The motorbike was again not there when she looked for the second time. Onrust testified that the acceleration of the motorbike took place at the last 45 metre mark. By then the Appellant had started turning. This is borne out by the fact that her motor vehicle was hit at the rear part when she had almost crossed the road. She, in my view, did not cause the accident which was solely caused by the deceased. The Appellant was not negligent.

The court *a quo* made a few distinctions in the facts of the current case and those of the case of **S v Vause 1997 (2) SACR 395 (NPD)** to which Mr de La Rey referred the court when arguing his case. The distinctions in the light of what I have said above and the nature of the evidence in this case do not in anyway change my view that the state did not prove the guilt of the Appellant beyond reasonable doubt.

I, indeed, find nothing wrong with the evidence of the Appellant and her witnesses. Onrust cannot be trusted as a witness. He does not pass the test of a single witness for the State to get a conviction. The Appellant's version is, indeed, reasonably possibly true and she deserved to have

been acquitted. The court *a quo*'s contrary finding in this regard was wrong. The appeal against conviction should succeed.

[27] The following order is, in the result, made

1. **The appeal against conviction succeeds.**

2. **The conviction and the sentence of the court *a quo* are set aside.**

3. **The court *a quo*'s verdict is replaced by the following:**

   "The accused is acquitted".

M. W MSIMEKI

JUDGE OF THE HIGH COURT

NORTH GAUTENG, PRETORIA

I, agree

R.G TOLMAY

JUDGE OF THE HIGH COURT

NORTH GAUTENG, PRETORIA

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Counsel for respondent:	Advocate Z Mabodi
Attorneys for appellant:	Messrs Duvenhage, Du Toit & Coetzee Attorneys
Attorneys for respondent:	National Director of Public Prosecutions
Date heard:	20/ 02/ 2012
Date of judgment:	