THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A 439/2015

Reportable

In the matter between:

MORNÉ VAN DER MERWE **Appellant**

And

THE STATE **Respondent**

Coram: Bozalek et Boqwana JJ

Delivered: 22 June 2016

JUDGMENT

BOQWANA J

Introduction

[1] The facts of this case are quite tragic. A young man, André Lubbe, ('the deceased') met his death after being struck by a motor vehicle in the early hours of the morning of 14 July 2010, whilst pushing his VW Golf motor vehicle with his friend, Andries de Villiers ('De Villiers') to the garage after having run out of fuel. The motor vehicle that collided with them sped off without stopping. This incident took place in Giel Basson Avenue in Parow. Extraordinary events, which I deal with later, followed, which linked a silver BMW belonging to the appellant to this tragic incident.

[2] The appellant appeared before the Parow Regional Court on charges of defeating the ends of justice (count 1), fraud (count 2), culpable homicide (count 3) and contravening section 61 (1) (a) to (d) read with sections 69 and 89 of the National Road Traffic Act, No. 93 of 1996 ('the National Road Traffic Act') (count 4). He pleaded not guilty to all the charges. He was convicted in respect of all counts on 20 March 2015. On 13 August 2015, he was sentenced to a fine of R2 000 or twelve (12) months imprisonment in respect of count 1; to a fine of R3 000 or 3 years imprisonment and a further three years which was wholly suspended in respect of count 2; three years imprisonment in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 ('the Criminal Procedure Act') with certain specified conditions including house arrest and community service in respect of count 3, and to a fine of R2000 or twelve (12) months imprisonment, which was wholly suspended, for contravening section 61 (1) the National Road Traffic Act. With the leave of the magistrate, the appellant appeals against his conviction.

[3] Most of the facts are common cause as the appellant admitted numerous written statements of the state witnesses in terms of s 220 of the Criminal Procedure Act, which led to the state not calling most of those witnesses. I will only highlight those statements that become important in the analysis of the evidence.

[4] The appellant submitted a plea explanation together with his s 220 admissions. In his plea explanation he denied that he was involved in the motor

vehicle collision which was the subject of the trial. He, however, admitted that a motor vehicle collision occurred in Giel Basson Avenue, Parow which led to the death of the deceased.

[5] The principal issue in dispute is accordingly whether or not the BMW vehicle belonging to the appellant was involved in the collision that caused the death of the deceased on 14 July 2010 at Giel Basson and whether the appellant was the driver of that vehicle.

Evidence

[6] The state called Mr Deon Lubbe ('Lubbe'), the deceased's brother, Mr Jerome Pretorius ('Pretorius'), a manager of a panel beater where the appellant's vehicle had been taken for repairs and Lieutenant Colonel Getruida van Huyssteen ('van Huyssteen'), an expert who testified on paint samples, as witnesses. The appellant did not testify nor lead any evidence. Upon the closing of the state's and the defence cases, the magistrate called an expert witness in terms of s 186 of the Criminal Procedure Act. I return to that issue later in the judgment.

[7] Lubbe testified that on 14 July 2010 before 05h00 in the morning, he received a telephone call from his mother Mrs Nola Lubbe ('Mrs Lubbe'), informing him of his brother's, (the deceased) accident. He proceeded to the scene of the accident. On his way there, he received a further telephone call informing him that his brother had passed away. When he arrived at the scene he saw police vehicles, his mother, as well as his brother's friend, De Villiers. His brother's body was lying on the ground and everyone was in shock. There were lot of objects lying around. After the police had finished with their work he and his mother asked for permission, which was given by the police, to pick up some of the items that were lying around. These included pieces of grille and parts of the deceased's vehicle. They removed these items as well as articles that were in the deceased vehicle's boot and put all these items in his (Lubbe's) vehicle.

[8] The deceased's vehicle was then towed to the police station. Lubbe went home with his vehicle. On his way home, his mother phoned looking for the

deceased's identity document ('ID'). When he got home he opened the boot of his vehicle and started unpacking the items which they had collected at the scene of the accident. He found the deceased's ID and also noticed a silver mirror amongst the items. He thought this strange because the deceased's vehicle was a white Golf. He concluded that the mirror was from the other vehicle that was involved in the accident. The mirror had a sock cover in the colours of a South African flag, as was commonplace during the soccer world cup. There was also blood and tissue around the mirror which he thought were his brother's. He then asked De Villiers about the type of vehicle that was involved in the accident. De Villiers made it clear that it was a BMW. The prosecutor informed Lubbe that De Villiers never mentioned a BMW in his written statement but simply referred to a '*silver coloured biggish sedan*'. His response was that he did not know what made him think that the mirror he had in his possession was that of a BMW.

[9] Later that day, Lubbe gave the mirror to Constable Eugene Human ('Human'), the investigating officer. He also put a notice in many newspapers and contacted radio stations regarding a motor vehicle that he was looking for which was damaged on the left front side. He phoned all local police stations and asked them to be on the lookout for anyone reporting such a motor-vehicle. He also notified insurance companies. The reports were published in newspapers the following day and such reports continued for about three days.

[10] In cross examination, he testified that he handed the mirror and the holder as one unit to the police. He was shown three separate items in photos 3 and 4 and conceded that the items in those photos did not look like what he handed in. He further conceded that he did not see the mirror on the scene of the accident.

[11] The mirror was in fact picked up by Mrs Lubbe from the scene of accident as appears from her written statement. She placed it in the boot of the deceased's vehicle. When her son, Deon Lubbe, arrived at the scene of the accident, she cleared the deceased's Golf and put all the items in his vehicle.

[12] The next witness, Pretorius, testified that he worked as a manager of the workshop at a panelbeating firm in the Maitland area. On 14 July 2010, at approximately 07h30 in the morning, the appellant phoned him advising him that he had been involved in an accident and requested him to arrange a courtesy vehicle. The appellant later arrived at Pretorius' workshop at approximately 11h30 with a silver BMW. The appellant showed Pretorius the damage and asked for a quote. The damage was on the left hand side of the vehicle. Pretorius noticed that the left hand side mirror was missing and there were a few dents in the other panels. He wrote down all the details and emailed the quotation to the appellant the following day of 15 July 2010. On Friday, 16 July 2010, he read a report in the newspaper of an incident which had happened and that a request was made to workshops and panel beaters, amongst others, to be on the lookout for a vehicle with a missing mirror.

[13] In view of the fact that the description in the newspaper report corresponded exactly with the damage on the vehicle brought in by the appellant, he phoned and asked him if the vehicle described in the newspaper was his, to which the appellant said 'no'. At approximately 15h30, the appellant arrived at Pretorius's office and they looked at the newspaper report together. The appellant said it could not be him. A couple of minutes later, the appellant phoned him to ask which newspaper contained the article and Pretorius told him.

[14] On Monday 19 July 2010 an insurance assessor arrived and assessed the vehicle brought by the appellant. The panel beaters did not immediately work on the vehicle as they were waiting for an instruction from the assessor's office. On Saturday, the assessor phoned and told him not to continue with the work on the appellant's vehicle. The assessor gave no reason. The panel beaters did not work on the vehicle and Pretorius did not contact the appellant any further. The vehicle stood at their premises until two policemen came to fetch it. He did not phone the police and did not know why they removed the vehicle.

[15] In cross examination, Pretorius testified that the vehicle did not look as if it had collided with something solid or that it was involved in a head-on collision situation. It could have either hit a pole, a barrier or perhaps a pedestrian but he was not sure.

[16] The next witness, Lieutenant-Colonel van Huyssteen, testified that she was employed by the SAPS in the Forensic Science Laboratory. She worked there for 18 years and in their paint division for 10 years. She had received paint samples in respect of a BMW and a Golf vehicle in this case and was requested to examine the paint samples that came from the two motor vehicles to see whether the samples from one vehicle matched the paint samples from the other vehicle.

[17] She opened each of the samples and looked at them under a microscope for maximum enlargement. Stereo microscopy is used to compare morphological and topographical properties of substances such as form, size and colour. Both the process and the interpretation of the results required knowledge of microscopy.

[18] The paint layer sequences of exhibits relating to the Golf and the BMW that she examined were the same and therefore comparable. She testified that the paint layer sequence in the exhibits relating to the paint samples of the Golf and the BMW were comparable and could have come from the same vehicles. By comparable she meant the paint, the colour and the texture.

[19] In cross-examination, she conceded that the paint samples she analysed could have come from countless BMWs and that her report was not conclusive as to the identity of any vehicle involved, unlike a fingerprint. That concluded the list of witnesses called by the state. It is important to highlight some of the admitted statements as they are crucial to this appeal.

[20] The set of statements that follow deal with the issue of the mirror. The investigating officer, Human, confirmed in his written statements, that he consulted with Lubbe on 16 July 2010 and received from him items that were found on the scene of the accident which he handed in as an exhibit to an SAPS 13 clerk, Warrant Officer Jameson (‘Jameson’). A mirror frame that was removed from a

silver BMW with registration number CA230996, by Warrant Officer Marais ('Marais') was also handed in to Jameson as an exhibit. These items were photographed by Warrant Officer Janklaas ('Janklaas') as handed to him by Marais. Janklaas then handed in those exhibits. Human collected those exhibits from Jameson, re-sealed them in a forensic bag serial no: FSD-393340 and took them to Macassar for analysis. I deal with this evidence later in the judgment.

[21] What follows is a statement by Sergeant Phumela Langa ('Langa'). Langa stated in her affidavit that she was employed by the SAPS and attached to the ballistic section of the Forensic Science Laboratory, Western Cape. She is an examiner of forensic ballistic related cases. She has received training in forensic ballistics and holds a BSc in Biochemistry and Microbology and BSc Honours degrees from the University of the Western Cape. On 12 August 2010 she received a sealed evidence bag with number FSD-393340 (note that this is the same forensic bag with the number that Human sealed and sent to Macassar on 06 August 2010 for analysis) from Case Administration of the ballistic section containing one black and silver side mirror which she marked 133743/10A and one black mirror frame which she marked 137743/10B. The side mirror and mirror frame showed unique breakage patterns which indicated they were previously a unit. Her conclusions were arrived at by means of an examination and a process which require knowledge and skill in ballistics. On 23 August 2010, she sealed these exhibits in an evidence bag with number FSD-668349 and handed it over to case administration of the ballistic section. During the period of examination the exhibits were kept in her custody under lock and key from 12 August 2010 to 23 August 2010.

[22] As regards paint samples, Human stated that on Monday 29 November 2010, he booked out item 1 of SAP 13/1479/2010 to draft a letter to the forensic department in Delft to analyse paint samples and to make certain comparisons. A letter was filed as per B22 and exhibits were sealed in a forensic bag with serial no.

FSB-892687. The exhibits were delivered the same day and a receipt was received and filed.

[23] The next set of statements deal with reports made by the appellant to an insurance company and to the police regarding his involvement in an accident that took place on 14 July 2010 and action taken by Human pursuant thereto.

[24] On 14 July 2010 at 12h15 the appellant telephoned an insurance company called Indwe Risk Services ('Indwe') and spoke to Elizabeth Brand ('Brand'), an employee of that company. He reported an accident that he said had been involved in and in respect of which he wanted to lodge a claim. He told Brand that he drove into a barrier and that no one else was involved in the incident.

[25] Later that day, the appellant went to a police station in Pinelands to report an accident he was involved in. According to the statement of Dumisani Makuleni ('Makuleni') a constable with SAPS Flying squad, who was on duty at Pinelands police station on 14 July 2010, he was approached by a gentleman who became known to him as the appellant at approximately 17h30 to report an accident. He assisted the appellant to complete an accident form. The appellant informed him that the accident occurred on the bend of Jan Smuts Avenue in Pinelands. The appellant drew a plan, wrote the description of how the accident happened and signed it. On the accident report the date and time of the accident are recorded as 14 July 2010 at 11h20. The description of the accident given by the appellant is recorded on the form as: '*Turning around the bend went of* (sic) *the road and hit the barrier*.' Details of his vehicle are stated as CA230996, Silver BMW 2001. The vehicle is reported to be the only vehicle that was involved in the accident. The appellant is named as the driver of the vehicle in the accident report. The damage to the vehicle is noted as left mid front and left front.

[26] In his statement of 09 September 2010, Human stated that on 19 July 2010 he received a telephone call from a Mr Joe Weber who informed Human that he was an attorney representing a person whom he was looking for in connection with a culpable homicide case in which the suspect drove off without stopping. Mr

Weber told him that the person that Human was looking for was a Mr Morné van der Merwe (the appellant). He also informed him that his client was willing to give his full co-operation and that he would come in with his attorney. Mr Weber later phoned him to inform him about where the vehicle involved in the accident was located.

[27] On the same day, Human went to a panel beater in Ndabeni where he spoke to the manager Pretorius who pointed out a BMW with registration number CA230996 and submitted a statement as to how the BMW got there. Pretorius also submitted a quotation for the damage to be repaired. Pretorius informed him that the BMW only had body damages and could be driven. Warrant Officer CJ Smit then drove the vehicle to Parow SAPS where it was handed in as SAPS 13/1458/2010. Human then arranged for the vehicle to be photographed and have it checked for paint deposits.

[28] On 20 July 2010, the appellant went to see Human with his attorney. Human took a warning statement from the appellant wherein he mentioned that he would have a fully detailed statement drafted regarding the incident in question but that he needed to consult with his attorney first. All this evidence was admitted by the appellant.

[29] Before the state closed its case, Mr Liddell, who represented the appellant at the trial, submitted that there appeared to be confusion regarding what was fitted and matched by Langa. Langa referred to a mirror frame and a mirror while other witnesses referred to brackets that were removed from a vehicle. He stated that he wished to place on record that it was never intended to admit that any part removed from the BMW vehicle had matched any part found at the scene of the accident and that may have broken off the vehicle involved in the accident. What was admitted, according to him, was that a mirror fitted into a mirror frame. He further advised that the defence wished to have access to the exhibits and had asked the state to be in contact with his instructing attorney in regard to such arrangements. It appears that the matter was postponed in order for the defence to secure an expert.

Upon resumption of the proceedings, the defence closed its case without leading any evidence.

[30] After the closing addresses of both the state and the defence, it became clear in the court's view that the defence argument hinged on the question of whether there was proof that the mirror found at the scene matched the mirror bracket later removed from the BMW vehicle by the police. The defence contended that on proper interpretation of Langa's evidence and the defence admissions as clarified, there was no such proof. The magistrate then asked the defence to provide it with the name of the expert witness they had intended to call. The name offered by Mr Liddell was of a certain Mr Johan Joubert ('Joubert'). It appears that the court asked the state to subpoena the witness on its behalf. The magistrate further mentioned that both parties would thereafter be given an opportunity to re-open their cases. She stated that her reason for calling the expert witness was to understand the position relating to Langa's affidavit which was the very affidavit that the defence submitted created confusion. The court found it to be in the interests of justice that the witness be called. In the result, Joubert was not called as a witness. From the record it appears that when he was approached pursuant to a subpoena he indicated that he had no expertise in metal fractures and recommended that a Dr Roediger be approached. So it happened that Dr Arthur Roediger ('Roediger'), was called as an expert in terms of s 186 of the Criminal Procedure Act. The defence objected to the calling of this witness on the basis that his name was not mentioned by any of the parties during the trial and that allowing him to testify would amount to a gross irregularity. After some debate, the court called Roediger as its own witness in terms of s 186 of the Criminal Procedure Act.

[31] Roediger testified that he had a PhD in Chemistry and was self-employed. He owned an analytical laboratory which undertook any type of chemical or physical analysis. He was requested to compare two exhibits (two parts) being one silver mirror cover and one black and cream part, a mirror bracket (mounting arm). He dismantled the bracket slightly, and compared the two parts visually. He used a

microscope which magnified certain sections of each of the pieces. In his report and evidence, he indicated that the mirror bracket and mirror housing showed identical fracture patterns which indicated that the two sections were once a single unit. Further microscopic pictures of the fracture patterns were recorded to show identical fracture patterns on the two sections proving that they were once a unit and were in fact matching fracture patterns.

[32] His conclusion was thus that the two separate pieces matched and were at one stage a unit. The defence chose not to cross-examine this witness. The report drafted by the witness was handed in as an exhibit.

[33] Having regard to all the evidence presented before her, the magistrate convicted the appellant on all counts.

[34] The appeal is based on the following grounds:

a) The State relied on hearsay and circumstantial evidence in an attempt to prove that the appellant had been the driver of the vehicle and that he was involved in a fatal collision with the deceased.
b) There were discrepancies between Lubbe's statements to the police. In one statement he stated that he handed over three items (including a mirror) on 10 June whereas in another statement he mentioned that he handed the mirror to Human on 16 July 2010. Furthermore, Lubbe stated in cross examination that the mirror he handed in to Human was part of a holder and formed a unit, whereas the exhibit that was analysed by experts was stated to be a mirror and a frame handed in as two parts. Also, Lubbe only saw the mirror for the first time at his home hours after the accident;
c) From Pretorius' observations, it was not apparent from the damages on the BMW with what precisely it collided.
d) Van Huyssteen conceded under cross-examination that the paint layer sequence, which matched and appeared to connect the vehicles, could have come from a multitude of silver BMWs and could not be conclusive.

e) The appellant had placed in dispute during the trial Langa's findings that a black silver mirror and black frame showed unique breaking patterns indicating that they were once a unit. He had also placed on record that what was admitted in Langa's statement was that a mirror found by Mrs Lubbe fitted the frame. He had submitted that it was never intended to be admitted that the mirror fitted a mounting bracket removed from the appellant's vehicle. Despite the fact that this issue was placed in dispute, no evidence was led by the state on this aspect.

f) The magistrate committed a gross irregularity by calling her own expert witness which rendered the trial unfair. In any event, Roediger's evidence fell short in three aspects, namely that: (i) the state never proved that the mirror found at the scene by Mrs Lubbe belonged to a BMW. The state's evidence in this respect was hearsay, which was admitted on condition that an expert was called to confirm that it was in fact a BMW mirror. This was never done and evidence to this effect stood to be excluded as inadmissible; (ii) there was a contradiction in the state's evidence in that the mirror found on the scene and that which was analysed were not of the same colour; (iii) the state of the mirror analysed by Roediger was not preserved.

g) The state failed to prove the required chain evidence pertaining to the preservation of the mounting bracket from the appellant's vehicle. There was no evidence about what happened to the exhibit after it was removed, neither was there any trace of it in the SAPS Parow exhibits register.

h) The state failed to prove that the appellant was not involved in the accident at the place alleged by the appellant.

[35] Mr Avontuur, who represented the appellant on appeal, sought to advance a new ground of appeal during oral argument, namely, that Roediger did not place any evidence qualifying him as an expert to examine the exhibits and therefore his evidence should be disregarded.

Analysis

[36] As can be seen from the evidence outlined above, there were several pieces of evidence which had to be considered in answering the question of whether the appellant's BMW was involved in the collision that caused the death of the deceased on 14 July 2010 in Giel Basson Avenue and whether the appellant was the driver of that vehicle.

[37] Principles on how circumstantial evidence should be approached are trite and constitute, firstly, the two cardinal rules of logic for the drawing of inferences set out in *R v Blom* 1939 AD 188 at 202 and 203, which have been distilled and followed in many cases. The first rule is that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. Secondly, 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 doubt whether the inference sought to be drawn is correct. The second principle is that circumstantial evidence should not be approached on a piece-meal basis but should be considered in its totality (*S v Reddy* 1996 (2) SACR 1 (A) 8 C-D).

[38] Circumstantial evidence is no less cogent than direct evidence. It can in many instances be more compelling. As the authors of *The South African Law of Evidence*, Zeffert DT, Paizes AP, St. Q Skeen A, Lexis Nexis Butterworths, 2003 at page 94 put it:

> 'Circumstantial evidence is popularly supposed by laymen to be less cogent than direct evidence. This is, of course, not true as a general proposition. In some cases, as the courts have pointed out, circumstantial evidence may be the more convincing form of evidence. Circumstantial identification by a fingerprint will, for instance, tend to be more reliable than the direct evidence of a witness who identifies the accused as the person he or she saw. But obviously there are cases in which the inferences will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard. All one can do is to keep in mind the different sources of potential error that are presented by the two forms of evidence and

> attempt, as far as this is possible, to evaluate and guard against the dangers they raise.'

[39] Therefore, any suggestion from the appellant that reliance could not be placed on circumstantial evidence is misplaced. The submission that the state relied on hearsay evidence to prove its case is unsubstantiated.

[40] It is so that no witnesses identified the BMW with registration number CA 230 996 driven by the appellant at the scene of the accident and that De Villiers only remembered a silver sedan motor vehicle that was driving fast and never stopped. A witness who was one of the first people on the scene, Mr Grant Cornellissen ('Cornellissen') testified that after having gone to look for a damaged vehicle he returned to the scene again and noticed a part lying around belonging to a BMW. Cornellissen's statement was admitted by the defence.

[41] Mr Avontuur submitted that it was never proven by experts that the mirror belonged to the appellant's vehicle as was undertaken by the state during the trial. While no particular expert evidence was led to that effect, the body of evidence, which I return to later, when put together suggests that the mirror that was found was that from the vehicle driven by the appellant which happened to be a silver BMW. It is convenient to start with the preservation of the exhibits as well as the examination of the mirror by the experts as these are amongst the most contentious points in this appeal.

The issue of the mirror

[42] The issue raised on behalf of the appellant is whether the mirror picked up by Mrs Lubbe and later handed in by Deon Lubbe, was the same as that which was examined by the experts, i.e. Langa and later Roediger; secondly, whether Langa and Roediger tested the same components of the mirror. The challenge is based on the contention that there was no evidence that such exhibits were preserved and there was a possibility that the mirror picked up at the scene of crime was not the same as the one tested. Secondly, it was contended, doubt was also created by

Lubbe in his testimony when he stated that he handed in a mirror as a unit but the photos showed three separate exhibits.

[43] The chain evidence regarding the preservation of the mirror from when it was handed to Human by Lubbe is not neatly presented in the record. In order for the appellant's submission to succeed, however, there must be evidence that the mirror was tampered with. At first blush the evidence regarding the mirror seems to be filled with gaps. A closer look at the sequence of evidence, however, indicates preservation of the exhibits.

[44] Mrs Lubbe instinctively picked up a mirror covered with a South African flag covering thinking it belonged to the deceased's vehicle and put it inside the boot of the deceased's Golf. When Lubbe arrived this item was placed in his boot with other items. A little later Lubbe noticed the odd silver mirror which he then handed to Human as a unit. Human confirmed in his statement that he received items that were found on the scene of the accident from Lubbe on 16 July 2010 which he handed in at Parow SAPS 13/1419/2010. It is important to note the exhibit number SAPS 13/1419/2010 as it is the exhibit containing the mirror handed by Lubbe to Human. The other exhibit was SAPS 13/1479/2010 containing items which were removed from the BMW vehicle, [CA…..], by Marais, which included a mounting bracket that normally attaches the mirror to the left front door of the vehicle. Both of these exhibits were handed in by Human and Janklaas to the SAPS 13 clerk Jameson respectively. Jameson, confirmed that he received the respective exhibits on 16 July 2010 and on 22 July 2010. These exhibits were kept safe by Jameson until they were collected by Human on 06 August 2010. Of crucial importance is Human's statement that he collected exhibits which were marked SAPS 13/1419/2010 from the SAPS 13 clerk, Jameson, as well as what he termed as a 'mirror frame' that was removed from a silver BMW with registration number [CA……] by Marais. Jameson also referred to a metal frame that Human removed from SAPS 13/1479/2010 with forensic bag number FSE-56046.

[45] Human confirmed that he 'broke' the seal of the forensic bag with serial no: FSE-56046 and removed exhibit no. 2 from SAPS 13/1479/2010 and handed the broken sealed bag and remaining exhibit to Jameson. It appears then that Human took the mirror handed in by Lubbe (SAPS 13/1419/2010) and the mirror frame (bracket) which he removed from SAPS 13/1479/2010 and resealed them in a forensic bag serial no: FSD-393340. He then drafted a letter to have the exhibits analysed and took them to Macassar to be analysed where they were received and an acknowledgement was filed as per B22 on 06 August 2010.

[46] Langa received a sealed evidence bag with number FSD-393340 from Case Administration of the ballistic section containing one black and silver side mirror which she marked 133743/10A and one black mirror frame which she marked 137743/10B on 12 August 2010. The side mirror and mirror frame showed unique patterns that indicated they were previously a unit.

[47] Based on the sequence of evidence outlined above there appears to be no evidence of tampering with the mirror received by Human from the time it was handed in by Lubbe to its examination by the experts together with the mounting bracket that was removed from the BMW by Marais. It is also clear that the mirror frame referred to in Langa's affidavit was in fact the mounting bracket that was removed by Marais from the BMW. I say this because Human referred to a mirror frame removed from the BMW in his statement exhibit NN, which he collected from the SAP13 clerk together with the mirror he received from Lubbe prior to taking it for forensic analysis. Jameson also stated that Human removed a metal frame (which was on SAPS 13/1479/2010) and returned exhibit SAP 13/1479/2010. It seems as though that exhibit bag SAPS 13/1478/2010 contained other items that were removed from the BMW. Human collected this 'metal frame' with the exhibit SAP 13/1419/2010 he received from Lubbe and re-sealed those in a forensic bag with serial no. FSD-393340 which were both examined by Langa.

[48] This analysis clarifies that the mirror frame that Langa referred to in her statement was the mounting bracket that was removed from the BMW by Marais.

The confusion in terminology for the mirror exhibits which has bedevilled this matter might have originated from Human who sent these exhibits for examination.

[49] Furthermore, those were the same exhibits that were analysed by Roediger in my view. The only difference is that when they were sent to Roediger they were referred to as one silver mirror cover and one black and grey part of mirror bracket. Crucially, the forensic bag depicted on the photos in Roediger's report refers to reference type as: SAPS 13/1419/2010 and SAPS 13/1479/ respectively.

[50] Ultimately, whilst the chain of evidence was not elegantly presented, a careful analysis of the evidence shows that the mirror found on the scene of the crime by Mrs Lubbe was the same mirror which was analysed initially by Langa and later by Roediger, together with the mounting bracket removed from the BMW motor vehicle belonging to the appellant. These items were found to once have been a unit. I do agree, however, that calling Human and perhaps Langa might have clarified the confusion and made the evidence much easier to understand.

[51] However, even if one puts mirror evidence to one side, I am of the view that, the remaining evidence overwhelmingly links the appellant to the accident in Giel Basson Avenue. The mirror evidence simply completes the picture and puts the matter beyond any shadow of doubt.

[52] The magistrate was correct in exercising her discretion to call an expert witness to help her clarify an issue that was not clear in her mind regarding Langa's evidence. In the first place, the confusion over this aspect began when the defence sought at a late stage to withdraw an admission it appeared to have made regarding the scope of Langa's evidence. Furthermore, the defence indicated that it intended to call an expert witness to dispute Langa's evidence but ultimately did not do so. Such evidence ultimately clarified the issue. I disagree therefore with the proposition that the magistrate acted irregularly and shored up a weak state case.

[53] Section 186 of the Criminal Procedure Act permits a court to subpoena a witness, (a) at any stage of criminal proceedings and (b) to subpoena a witness if the evidence of such witness appears to the court essential to the just decision of

the case. A judicial officer is there to see that justice is done. As it was put by Curlewis JA in *R v Hepworth* 1928 AD at 277 'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules but to see that the justice is done.'

[54] A conviction may well be set aside if a court calls a witness in circumstances where the record does not disclose that an offence has been committed and convicts on the strength of the evidence of that witness (See Du Toit et al, *Commentary on the Criminal Procedure Act* at 23-12C). That is however not the case in the present matter. In this case, the record shows that at the close of the state's case various offences had been committed.

[55] Moreover, even if the magistrate did not call Roediger as a witness, as I have already outlined, Langa's evidence was reasonably clear when viewed together with other evidence, especially that which emerged out of the written statements made by Human and Jameson. Roediger's evidence echoed Langa's findings at the end of the day.

[56] As to Roediger not placing his proper qualifications on record, whilst he did not provide the kind of detail that is normally given, he did state that he owned an analytical laboratory which investigates any type of chemical and physical analyses. At no stage during the trial did the defence indicate that they did not consider him suitably qualified. The submission that his evidence should be disregarded on that basis is without merit.

Paint evidence

[57] The paint evidence is also compelling when considered together with other evidence. The paint samples from the Golf and the BMW found independently on both vehicles, were found to be comparable. Van Huyssteen was correct in conceding that her findings standing alone could not be conclusive. Her

conclusions added to the body of evidence that the appellant's BMW was the vehicle involved in the fatal collision. Not only that, the parts where the respective vehicles were damaged increased the likelihood that the collision took place between them.

Appellant's actions

[58] The appellant's actions on 14 July 2010 and the days following are telling. He informed the police that the accident he was involved in on Jan Smuts Drive took place at 11h20 on 14 July 2010. However, it was not disputed that the appellant contacted Pretorius at 07h30 that morning reporting his involvement in an accident. How could he have called Pretorius at 07h30 if the accident only happened at 11h20 that day? The inescapable conclusion to be drawn from this inconsistency is that the appellant was not telling the truth. He attempted to quell the chances of being caught by arranging for his vehicle to be fixed as soon as possible and by giving false information to the insurance company and to the police.

[59] The telephone call from Mr Weber to the investigating officer is critical and it was unchallenged. If the appellant disputed Mr Weber's telephone call and what was told to Human, he would not have admitted it. Mr Weber gave the name of the appellant to Human unsolicited and offered that his client would co-operate with the police. Up to this stage the police had no knowledge of any BMW vehicle standing in a panelbeating shop. A day after that the appellant and his attorney visited the investigating officer and gave a warning statement. The question is why the appellant would come forward and for what purpose would he surrender himself to the police if he was not involved in the accident that led to the deceased's death?

[60] The picture created by the appellant's actions, the information contained in the witness statements as well as the evidence of the witnesses who testified in court, cannot be dismissed as a simple co-incidence. The linkages and similarities between the accidents reported by the appellant to the insurance company and the

police and that which took place at Giel Basson Avenue are too numerous and too striking. The accident the appellant reported was on the same date as the one in Giel Basson Avenue, the colour of the vehicle that sped off in that accident was reportedly silver as was the appellant's vehicle; the damage to that vehicle must have been on the left hand and the left front side, which coincides with how the deceased must have been struck by a vehicle. When the BMW vehicle was taken for repairs to the panel beaters, according to Pretorius, the left hand wing mirror was missing. Marais confirmed that only the mounting bracket was in place when he removed it. Damningly, the silver left hand wing mirror of a motor vehicle found at the scene of the accident in Giel Basson Avenue had fracture patterns which indicated that the mirror and the mounting bracket removed from the silver BMW belonging to the appellant were once a unit.

[61] In the face of all this evidence, the appellant chose not to testify. Clearly, if the accident which he reported to the police actually occurred in the manner he claimed, nothing stopped him from placing that version before court and testifying. This version was not even put to the state witnesses. Instead there was an attempt to blame his legal representatives for failing to do so.

[62] In a case like this, the appellant could ill afford to leave the evidence of the state witnesses unanswered. His failure to testify was bound to strengthen the state's case. In this regard see DT Zeffert et al, *The South African Law of Evidence* (2003) p 127, Lexis Nexis, Butterworths,).

[63] It was held in *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 21:

> '…[t]here can be no acceptable explanation for him not rising to the challenge. If he was innocent appellant must have ascertained his own whereabouts and activities on 29 May and been able to vouch for his non-participation ….To have remained silent in the face of evidence was damning. He thereby left the prima facie case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt.'

See also the oft quoted decision of *S v Boesak* 2001 (1) SACR 1 (CC) at para 24.

[64] In the circumstances, the magistrate correctly found that in the absence of any other evidence, the only reasonable inference that could be drawn from the proven facts was that it was the appellant's BMW vehicle which collided with the deceased's Golf and it was driven by the appellant. There was no evidence that the appellant's vehicle was driven by anyone else on that day. The vehicle was travelling at a high speed and collided with a vehicle that was being pushed in the yellow lane by the deceased and De Villiers, killing the deceased. The Golf vehicle probably had its hazard lights on at the time of the collision. Sergeant CP Segolela found in her examination that the filament of the globe removed from the hazard light on the right hand side of the VW Golf indicated that it was functional at the time of the collision. Cornelissen confirmed that the vehicle stood in the yellow lane when he arrived. De Villiers stated that the hazard lights on the Golf were on at the time of the fatal collision. The police also found the vehicle stationary in the yellow lane as depicted by the photos. According to Constable Van Schalkwyk, at that time of the morning, Giel Basson Avenue was well lit, visibility on the road was clear, traffic flow was quiet and the road was dry although it was overcast. It only started to rain later when he arrived at the scene. The only inference that can be drawn is that the appellant drove recklessly and negligently in colliding with the deceased either in not keeping a proper look-out, driving too fast, or both, and that his negligence caused the deceased's death. The magistrate was therefore correct in finding him guilty of culpable homicide.

[65] Having been found to be the driver of the BMW motor vehicle, it follows that the appellant was correctly found guilty of the other counts.

[66] The appellant defeated the ends of justice by reporting to the police that he was involved in an accident in Jan Smuts Drive which was false. He also contravened the National Road Traffic Act by failing to stop at the scene of the

accident and act in accordance with the duty placed on him as a driver of a vehicle which was involved in an accident on a public road.

[67] An issue of whether an element of prejudice was satisfied on the charge of fraud was raised with the parties on appeal. For a crime of fraud to be proven, the following requirements must be present, namely: (1) unlawfulness; (2) misrepresentation; (3) prejudice or potential prejudice; and (4) intention. (*See Criminal Law*, CR Synman, Sixth Edition, Lexis Nexis, 2014 at 523).

[68] Misrepresentation entails a deception by means of falsehood. X must in other words represent to Y that a fact or set of facts exist(s) which in truth do(es) not exist (See *CR Snyman supra* at 524). It is not disputed that the appellant in this case misrepresented the facts to Brand by stating that he hit a barrier when he was involved in an accident, which was not the case.

[69] A charge of fraud must however be supported by prejudice but in the present matter the charge sheet did not indicate precisely what prejudice was suffered by any party and no evidence was placed before the court in this regard. It has been held that mere lying is not punishable as fraud; harm is punishable if it brings some sort of harm to another (See *Principles of Criminal Law*, Jonathan Burchell, Fourth Edition at p 728).

[70] In *S v Kruger and Another* 1961 (4) SA 816 (A) at 828 it was held that '[*t*]*he mere circumstance that the defrauded party might ultimately have sustained the same loss will not avail the representor, for the eventual position of the representee is not necessarily a relevant consideration.'* The court went further to state that it was not necessary to prove the actual prejudice, but it is sufficient to show that the act was done with the intent to deceive and in the ordinary course of things was calculated in the sense of likely to prejudice, some persons. 'Likely to prejudice', according to *CR Snyman supra* at 528, does not mean that there should be a probability of prejudice but only that there should be a possibility of prejudice.

[71] Wessels CJ observed in *R v Dyonta & another* 1935 AD 32l at 57, that '[t]he law looks at the matter from the point of view of the deceiver. If he intended

to deceive, it is immaterial whether the person to be deceived is actually deceived or whether his prejudice is only potential.'

[72] This approach was followed in the Supreme Court of Appeal decision of *S v Mngqibisa* 2008 (1) SACR 92 (SCA). The appellant in the *Mngqibisa* case made a false representation to the employee of an insurance company by stating that he was the driver of an insured vehicle that was involved in a collision and later corrected the facts to state that his wife was the driver. It was argued on behalf of the appellant that it made no difference whether the appellant or his wife was the driver in that they were both designated as drivers in terms of the insurance policy and that in the event of the vehicle being damaged whilst driven by any of them, the insurance would pay. The wife in this case was a holder of a learner driver's licence. The Court at para 11 dismissed that argument on the basis that it foundered '*on the simple fact that a higher excess was payable if the driver of the Uno at the time of the collision was in possession of a learner driver's only*.' It was held to be of no consequence that the appellant finally told the truth.

[73] Mlambo JA at para 9 quoted with approval the findings of the court in *R v Kruse* 1946 AD 524 at 533 where the court held that:

> "…if the false representation is of such a nature as, in the ordinary course of things, to be likely to prejudice the complainant, the accused cannot successfully contend that the crime of fraud is not established because the Crown has failed to prove that the false representation induced the complainant to part with his property."

[74] It is clear from the *Mngqibisa* case above that payment on behalf of an insured of a lower excess amounted to prejudice to the insurer. Therefore, the lie had prejudicial consequences.

[75] In the present case, the intention to deceive was proved. The appellant misrepresented the facts regarding how the accident occurred. The appellant's false representation was calculated to prejudice. What insurer, one might ask, would not want to know that another vehicle had been involved in the accident or that someone had been fatally injured? If nothing else such information would be

material to its risk assessment of the insured. Even though Brand's written statement and the transcript of the phone call she had with the appellant made no reference to the terms and conditions of the insurance policy and the appellant's BMW vehicle was unquestionably damaged, some risk of harm must have been caused by the appellant's deception and such harm was neither fanciful nor remote.

[76] Therefore, even though the terms and conditions of the insurance policy were not placed before the court in the present matter, it is reasonable to conclude that had the appellant told the truth about the incident either his claim might have been disallowed by his insurer or, at the very least, his risk profile would have been affected. The appellant lied to his insurer because he was alive to the possibility of these consequences. In these circumstances, prejudice has been proven.

[77] In the result, for these reasons, the appeal against conviction is dismissed and the convictions and sentences on all counts are confirmed.

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N P BOQWANA

Judge of the High Court

I agree

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L J BOZALEK

Judge of the High Court