

SOUTH AFRICA / JUDGMENT

Muller v S (A172/16) [2017] ZAFSHC 19 (9 February 2017) [2017] ZAFSHC 19

COURT

Free State High Court, Bloemfontein

BEFORE

M C Mokgobo, J P Daffue

CASE / FILE NUMBER

A172/16

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A 172/16

In

the matter between:

CHRISTIAAN
JOHANNES MULLER
Appellant
and
THE
STATE
Respondent
HEARD

ON:

5
DECEMBER 2016

JUDGMENT

BY: MOKGOBO, AJ et DAFFUE J

DELIVERED ON: 9 FEBRUARY 2017

A

INTRODUCTION

[1] This is an appeal granted on petition by this court against both the conviction and sentence. The Appellant was convicted and sentenced in the magistrate's court sitting at Frankfort on one count of culpable homicide arising from a motor vehicle collision. He was consequently sentenced to a period of eighteen (18) months imprisonment suspended for a period of four (4) years on appropriate conditions. In addition thereto his driver's licence was suspended for a period twelve(12) months. The Appellant was further sentenced to correctional supervision for a period of eighteen (18) months in terms of Section 276 (1) (h) of Act 51 of 1977. The Appellant felt aggrieved by the conviction and sentence, hence this appeal.

B EVIDENCE PRESENTED

[2] The following evidence appear from the record of proceedings.

[3] Ms Bierman on behalf of the State testified that she was a driver of a Ford Ranger bakkie ("Ranger") on the R34 to Frankfort. This is a tarred road. She was driving at a speed of approximately 100 km/h. Both her children, who were passengers in her motor vehicle were not restrained. When she approached the intersection, a motor vehicle driven by the accused entered the R34 without stopping. She applied brakes but not hard and swerved to the left to avoid a collision with the vehicle driven by the accused. Her motor vehicle left the road and struck the first small tree, moved forward and struck the second bigger tree. She further testified that the gravel road on which the accused was driving is not in a good condition and the accused was driving fast under the circumstances. She had the right of way. The accused told her that he was late for his appointment and repeatedly said that he is sorry.

[4] She denies that her attention was distracted by an incoming call on her phone. She further testified on a question by the prosecutor that she did not know whether she hit a big stone on the gravel shoulder of the road depicted on a photograph shown to her. Appellant's legal team did not cross-examine her at all in this regard. She is adamant that the whole incident was triggered by the accused who entered the R34 road without stopping. Whilst her motor vehicle was stationary she received a call that went on voicemail. On their way to the hospital she called her Doctor. The time lapse between the calls was one minute fifty-six seconds. On the way to the hospital she also called her husband. Her child died later as a result of the injuries sustained in the incident.

- [5] Adv Engelbrecht on behalf of appellant cross-examined at length. However, her testimony did not change in any material

respect save of course that she could not explain the short lapse of time between the incoming call that went on voicemail and the first outgoing call with the events immediately after the incident up until the transportation of the child to the hospital. She was emphatic that the reason she swerved was to avoid a collision with the motor vehicle driven by the accused.

- [6] Dr Humphries conducted a post mortem, testified that the deceased sustained a ruptured spleen and the extent of the injuries are consistent with high speed accidents. It is his opinion that Ms Bierman was driving at a speed of about 100 km/h. It was further his testimony that even if the child was restrained, she could have easily sustained neck injuries and might not have survived the accident.
- [7] Ms Linette Van Zyl testified that she is a cellphone expert at Vodacom. She further testified that the incoming call was disconnected by the caller and went to voicemail. The disconnected call and the outgoing calls were made from different locations. Although she is not in a position to locate the exact spot from which the calls were made, she is sure that the calls were received and made at different spots. Her conclusion was informed by the fact that the missed call was captured by the Schaaprand tower and second call was captured by the Frankfort tower. It was the testimony of the cellphone expert that the signals of the two towers does not overlap, however, where they overlap the stronger tower will capture the signal.
- [9] Mr Prinsloo testified that the call made at 07h14 and the following call were received and made at different spots. One minute fifty six seconds may lead to another coverage depending on the road. He further testified that the Schaaprand and Frankfort towers are not direct neighbours of one another and that the Schaaprand tower does not provide coverage on the R34, the tarred road travelled by Ms Bierman, in the vicinity of the scene of the accident.
- [10] Judith Swanepoel is a Captain in the SAPS. She testified that Ms Bierman informed that the accused did not stop at the intersection.

The accused was in a shocked state. She has no experience of accidents involving speed. She took photos of the scene and observed

that the spot where the Ranger driven by Ms Bierman left the road was almost even with the intersection with the gravel road. She also observed rolling marks from where the Ranger left the road. There were no brake marks on the tarred road. The left tyre of the Ranger was flat and there was a dent in the rim and part of the rim was missing. On the same day of the incident they used the Police vehicle, a Toyota Hilux 4X4 to determine the distance in which one can bring the vehicle travelling at a speed of 100 km/h to a standstill. Warrant Officer Meyer drove the 4x4 at a speed of 100km/h and applied brakes. The vehicle came to a standstill within five meters. However the distance was never measured. She cannot recall whether their vehicle left brake

marks on the road.

- [11] Benjamin Kotze is a Warrant Officer in the SAPS. He testified that he does accident investigations in the Eastern Free State. His duties entails amongst others to give a detailed report of the scene, positions of the respective vehicles and to determine the cause of the crash. On 8/11/2013 the scene was pointed out to him by Captain Swanepoel. A crash occurred on the intersection of the R34 provincial road and the S758 secondary route. There are no obstructions visible on the R34 and S758 for a distance of 200 meters. A posted stop sign was clearly visible on the left hand side of the S758. When he visited the scene, marks and debris were still visible. All the tyres of the Ranger were fairly new and inflated except the left front tyre. The rim of the left wheel was bent as a result of the impact. The dent on the rim could have been caused by a stone or any hard object which could have been removed since he only visited the scene two days after the incident. According to his observation the cause of the crash can be attributed to driver negligence as no environmental or vehicle factors could be found that might have contributed to the crash. He was not in a position to express any opinion on speed as speed calculations are normally done on skid marks as a reliable factor.
- [12] Mr Muller, the appellant, testified that when he approached the intersection, he made the necessary observations and when he realised that there was no car in sight, he entered the R34 driving at a speed of 5 km/h. Whilst on the tarmac he heard a noise from the back and noticed that a Ford Ranger bakkie had veered off the road whereafter it struck the trees.
- [13] He further testified that he paid an amount of R100 000 for hospitalisation of the injured child as a gesture of goodwill and not as a sign of any guilt on his part. However, that money was paid back to him when the child succumbed to her injuries.
- [14] He further testified that on the same day and on advice of his attorney they visited the scene of the incident. The reasons he advanced for the visit is that the attorney wanted him, firstly to explain the situation and secondly to show him certain points.
- [15] Appellant further denied that he had ever said that he was late for his appointment. He had an appointment with his attorney, but there was no specific time set for the appointment. He admitted to have said "sorry", but contended that the words were not uttered as a sign of guilt but were said as sign of sympathy to the situation in which Ms Bierman found herself.
- [16] Mr A Claassen testified that according to his opinion, Ms Bierman was driving at a high speed of about 142 km/h. Her motor vehicle struck the stone on the gravel shoulder of the road and to the left of the tarmac, the left front tyre deflated causing the vehicle to immediately veer off to the left and striking the trees. Ms Bierman's vehicle was already off the tarmac at that stage. His opinion is based on information given to him and his visit of the scene prior the commencement of the trial and during the inspection in loco.

[17] Mr D Claassen is the attorney of record. He testified that there was no specific time set for the appointment with the accused. However, on a question by the court he admitted that there was an arrangement to meet before 09h00.

[18] It was on the basis of this evidence that the appellant was convicted and sentenced. He feels aggrieved by the conviction and sentence and now approaches this court with leave granted on petition.

C GROUNDS OF APPEAL

[19] Ad conviction

(i) The magistrate committed a grave irregularity and has misdirected himself when he evaluated the evidence of the witnesses and erred in taking judicial notice of his own feelings and experiences.

(ii) The magistrate erred in rejecting the fact that the first cellphone call was made to Bierman's cellphone prior to the incident of Bierman's vehicle striking the trees.

(iii) The magistrate erred in rejecting the fact that the left front wheel of Ms Bierman's vehicle struck the stone.

(iv) The magistrate erred in accepting the evidence of Dr Humphries that the deceased would have died even if she was restrained.

(v) The magistrate erred in rejecting the contention of the defence that Bierman's negligence constituted a novus actus interveniens .

(vi) The magistrate erred in finding that Bierman drove at a reasonable speed and thus rejecting the expert opinion of Claassen that Bierman was travelling at an excessive speed.

(vii) The magistrate erred in accepting the evidence of Bierman.

(viii) The magistrate erred in rejecting the evidence of the Appellant and should have accepted the evidence of the Appellant as truthful.

(ix) The magistrate erred in finding that the failure of the Appellant to bring his motor vehicle to a standstill at the stop sign constituted

negligence on the part of the Appellant.

(x) The magistrate erred in not accepting the evidence of Claassen as truthful; especially that Claassen's opinion as regards to speed was corroborated by Dr Humphries.

[20] Ad sentence

- (i) The magistrate erred in finding that the merits of the case required a suspension of the driver's licence of the Appellant as well as the fact that the Appellant must produce a certificate of competency to the Commissioner of Correctional Services before he is allowed to drive a motor vehicle on a public road.
- (ii) The magistrate erred in accepting the evidence of the traffic inspector as proof that the Appellant was not a fit and proper person to drive a motor vehicle on a public road.

D

SUBMISSIONS

BY THE DEFENCE

- [21] Adv Engelbrecht argued before us that the incoming call that went on voicemail was received prior to the incident and it was that call that distracted Ms Bierman's attention, causing her not to observe appellant's vehicle earlier and consequently veering off the road to the left hand side and in the process her vehicle struck the stone on the gravel shoulder of the tarred road causing the left front tyre of her vehicle to deflate whereupon the vehicle ultimately struck the trees. He further argued that Ms Bierman could not apply the brakes severely because she knew that her children were not restrained. He further argued that Ms Bierman was an accomplice; hence she had reason to put the blame of the incident on appellant. He further submitted that the continuing acts of negligence on the part of Ms Bierman constituted a novus actus interveniens.

E

SUBMISSIONS

BY THE STATE

- [22] Adv. Chalale on behalf of the State submitted that the incoming call that went on voicemail was received after the incident

whilst the motor vehicle was stationery. The first outgoing call was made to the doctor on their way to the hospital, hence the short lapse of time between the two calls. It was further his submission that the short lapse of time between the calls is inconsistent with the events as they unfolded prior to and after the incident. Ms Bierman was confronted with a sudden emergency and has done everything humanely possible to avoid a collision with the motor vehicle of appellant.

F APPLICABLE LEGAL PRINCIPLES WITH REGARD TO THE CONVICTION

- [23] In *R v Dhlumayo and Others* 1948 (2) SA 677 (AD) at page 705-706 Davis AJA said:

"I summarise the conclusions to which I have come with regard to the principles which should guide an appellate court in an appeal purely upon fact as follows:

1. An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.
2. Those principles are in the main matters of common sense, flexible and such as not to hamper the appellate court in doing justice in the particular case before it.
3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.
7. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.
8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.
9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.
10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.
11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.
12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.
13. Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a civil or criminal case.

14. Subject to the difference as to onus, the same general principles will guide an appellate court both in civil and criminal cases.
 15. In order to succeed, the appellant has not to satisfy an appellate court that there has been 'some miscarriage of justice or violation of some principle of law or procedure'.
 16. The English practice in regard to 'concurrent findings of fact by two courts' has no application in South Africa”.
- [24] In *S v Monyane and others* 2008 (1) SACR 543 (SCA) the SCA at para 15 stated that it is only in exceptional cases that it will be entitled to interfere with the trial court’s evaluation of oral evidence and concluded as follows:
- “This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997*
- (2) SACR 641 (SCA) at 645e - f).”
- [25] Section 208 of the Criminal Procedure Act, 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. When it comes to the consideration of the credibility of a single witness a trial court should weigh the evidence of the single witness and consider its merits and demerits and, having done so, should decide whether it is trustworthy and whether, despite the fact that there are shortcomings, contradictions or defects in the testimony that it is satisfied that the truth has been told. See *S v Sauls and Others* 1981 (3) SA 172 (AD) at 180E-G.
- [26] In *S v Khoza* 1982 (3) SA 1019 (A) at 1031 B-F, the proper terminology in the participation doctrine was discussed. A participant may take the form of a perpetrator, co-perpetrator or an accomplice. This distinction between the forms of participations in an offence was recently restated in *S v Kimberley and Another* 2004 (2) SACR 38 (ECD) at para [10] where the following was held:-
- "Perpetrators and accomplices are all participants in a crime. A perpetrator is one who performs the act that constitutes the particular crime with the intention required by law for that crime. Where two or more persons together perpetrate a crime, they are termed perpetrators. An accomplice is neither a perpetrator nor a co-perpetrator, in that the acts performed by him do not constitute a component of the actus reus of the particular crime. He is one that consciously associates himself with the commission of the crime by aiding or assisting the perpetrator, which generally involves affording him or her opportunity, means or information in respect of the commission of the crime.. The criminal liability of an accomplice is therefore accessory in nature”.
- [27] In *National Employees’ General Insurance Co Ltd v Sullivan* 1988

(1) SA 27 (AD) at 36D-E Hefer JA said:

“The driver in a through street, while being required to keep a general look out, is entitled to assume, in the absence of indications to the contrary, that a driver approaching from a stop street will heed the stop sign operating against him and bring his vehicle to a stop. It is only when it would become apparent to a reasonable man in the position of the driver in the through street that the driver in the stop street that the driver in the stop street does not intend to stop, or will be unable to stop in time, that the duty rests on the through street driver to take appropriate avoiding action. Until that stage is reached it is not incumbent upon him, under normal conditions, to regulate his driving on the assumption that the driver in the stop street may not stop”.

G APPLICABLE LEGAL PRINCIPLES WITH REGARD TO SENTENCE

[28] In *S v Fhetani* 2007

(2) SACR 590 (SCA) at para 5 the court said:

“It is a well-established principle of our law that the sentence imposed must fit the nature of the offence of which the accused was found guilty. Put differently, the severity of the sentence must not be grossly disproportionate to the offence itself. An exemplary sentence such as the one we are concerned with here, is not a fair and just punishment because it is disproportionate to the true deserts of the offender”.

H

ANALYSIS

OF THE EVIDENCE AND APPLICATION OF THE LAW

[29] In the present matter, Adv Engebrecht argued that the magistrate has misdirected himself in his evaluation of the

evidence by making inferences and conclusions based on his knowledge and personal experiences. The record is speaking volumes of such inferences and his conclusions.

[30] In order to determine whether the magistrate has misdirected himself and has erred in analysing the evidence it is important to have regard to the record of proceedings and judgment of the magistrate.

[31] Ms Bierman is a single witness and her evidence with regard to her speed of 100 km/h is corroborated by Dr Humphries to the extent of the injuries sustained by the deceased are consistent with a speed of 100 km/h.

[32] Her evidence that she did not apply her brakes severely and had swerved to the left is supported by the rolling marks as opposed to brake and/or skid marks and the movement of her motor vehicle as depicted on the photos. The rolling marks as depicted on the photos are consistent with her version.

[33] She was emphatic that the first call that went on voicemail was received after the incident when her vehicle was stationary. Her version with regard to the exact location of where the call was received could not seriously be controverted by the cellphone

experts. In the absence of evidence to the contrary, there was no basis not to accept her version that the call was received after the incident. In view of the above, the submission on behalf of appellant based on the time lapse between the initial call and the subsequent call made by Ms Bierman on their way to the hospital cannot be accepted as proof that the call was received before the incident. Informed by the uncontroverted evidence of Ms Bierman, the magistrate, save of course his opinion and experience relied upon which was not required, was correct by having found that the call was received not before, but after the incident.

[34] Ms Bierman's testimony with regard to her conversation with appellant who told her that he had an appointment and he was "sorry" was eventually not disputed by appellant. She was quite open and frank with the court by admitting that her children were not restrained.

[35] Despite the lengthy cross-examination, her testimony did not change in any material respect. The only criticism that can be levelled against her is the fact that she could not explain the short lapse of time between the incoming call that went on voicemail and the first outgoing call, bearing in mind the events immediately after the incident until transportation of the child to the hospital. Notwithstanding a measure of doubt in this regard, Ms Bierman was in my view a remarkably honest and trustworthy witness.

[36] Warrant Officer Kotze constructed the scene on the basis of the contents of the docket and his observation of the scene and vehicle concerned. He conceded during cross-examination that the damage to the rim could have been caused by the stone depicted on the photograph or any other hard object. He could not give an estimate of speed and explained that he only visited the scene two days after the incident. At that stage the tyre marks were already in the process of degeneration. Skid marks are usually a reliable factor to determine speed. W/O Kotze accepted not as a fact, but as a possibility, that the dent in the rim could have been caused by the stone or any hard object. The magistrate was in my view correct not to have accepted as a fact that Ms Bierman's Ranger hit the stone, that this affected her driving ability and caused the vehicle to veer further off to the left in the direction of the trees.

[37] With regard to the version of the accused, the following appear from the record:

Examination by Adv Engelbrecht:

"In u verklaring wat ingehandig is meld u dat u en u prokureur die toneel besoek het ek dink daardie selfde middag.....Dis korrek

Hoekom het julle na die toneel toe gegaan?..... My prokureur het my gevra ons moet soontoe gaan sodat ek vir hom die situasie kan verduidelik en die punte kon uitwys.

Het u enige besering, ek weet ek gaan nou in detail in 'n mens kyk so, maar kan u onthou of enige beserings by haar opgemerk het?....Ek het geen beserings opgemerk nie behalwe dat sy bloederig was veral in die mond omgewing waar ek die bloed verwyder het en mond tot mond asemhaling op haar toegepas het.....

Is u gekwalifiseerd in hierdie tipe van menseredding?... Ek het 'n kursus gedoen op Potchefstroom Universiteit waar hulle ons van praktiese toepassing van so iets geleer het.

Kan u vir ons 'n idee gee van min of meer hoe lank het u wat se u KPR toegepas?..... 30 na 40 sekondes

Cross examination by Prosecutor:

Why did you say ek is jammer.....? ... Ja ek het dit vir die hof gese...

Were you worried that the child might die?Nee

She was badly injured sir..... Ek is nie 'n mediese dokter nie...."

He is not responsible for the incident but he goes to the scene with his attorney to explain the situation and to point out certain points. When asked about the extent of the injuries, his response was that he is not medically trained. He is not medically trained but strange enough he applied mouth to mouth resuscitation on the injured child. He is not medically trained but he remained on the hospital premises and on his own say so to render assistance. He is not medically trained but in the same vein he has completed a practical "menseredding" course at the University of the North-West, formerly known as the University of Potchefstroom. On the question of the Prosecutor as to why did he say that he is sorry, his answer was that he told the court.

His version that there was no time set for the appointment is directly contradicted by his attorney that they have agreed to meet before 09h00. The accused was evasive, his evidence is riddled with inconsistencies and is improbable and cannot be accepted as truthful.

[38] Mr Claassen, the expert called by the accused only visited the scene, three weeks before the commencement of the trial. His opinion and conclusions with regard to speed, distance and how the incident occurred is largely based on photos, hearsay, assumptions and projections and inconclusive estimations. His version was that a driver cannot enter the R34 from the gravel road at a high speed. He did not explain what he meant by a high speed, however, in his calculations he accepted it as a fact that the accused entered the road driving at a speed of 5 km/h, a version vehemently disputed by Ms Bierman. The accuracy of his estimation is further complicated by the fact that his initial report had to be amended. The magistrate, in my view, cannot be faulted for having accepted the evidence of Ms Bierman about her speed and how the incident occurred.

[39] There is no dispute that the gravel road joining the R34 is bad, the stop sign is a few metres away from the intersection, visibility from both roads to the intersection is unrestricted for two hundred metres and extreme caution is required when entering the R34. Ms Bierman's

evidence that the missed call that went to voicemail was received after the incident and her lack of knowledge that the Ranger hit a stone (as alleged on behalf of appellant but of which there is no proof) are facts that could not be disputed by acceptable countervailing evidence. In view of the above, I am satisfied that the inferences and conclusions arrived at by the magistrate were informed by undisputed facts and I cannot find any misdirection on his part with his factual finding. If it is found, which I doubt, that he has misdirected himself, it would be my conclusion that the misdirection was not so material to vitiate the entire proceedings.

- [40] Adv Engelbrecht argued that Ms Bierman was negligent and her negligence constituted a novus actus interveniens. He argued that her negligence is premised on the fact that the incoming call distracted her attention and in the process she failed to observe appellant's vehicle earlier, to swerve to the left causing her motor vehicle to leave the tarred road as a result of which the left front tyre hit the stone on the gravel shoulder which deflated at once and whereafter the vehicle hit the trees. He further argued that these sequence of events constituted a novus actus interveniens.
- [41] In the present case, Ms Bierman was driving in a through road. The presence or otherwise of the stone did not bother her. She is emphatic that the call that went on voicemail was received after the incident. Her version that the first call went on voicemail is corroborated by Ms Van Zyl. Secondly her version that the said call was received while her vehicle was stationary could not be controverted by any of the two cellphone experts. Further her version that the calls were received and made from different spots is corroborated by the two experts who were emphatic that the calls were received and made from different spots. The version of the accused as to the location where the first call was received is speculative. The time lapse on the cellphone record of Ms Bierman can with respect never be a conclusive proof of the exact location where the call was received. The evidence of Ms Bierman as to the exact location where the call was received is in my view instructive. Secondly the version with regard to the stone allegedly struck by the motor vehicle that ultimately caused the blowout is crucial to substantiate appellant's defence, but that version, significant as it appears to be, was never put to Ms Bierman, notwithstanding the fact that the defence was in possession of its expert's initial report prior to the start of the trial. Having failed to put that version to the witness and only raising it after she had testified, is in my view, nothing else but an afterthought and a desperate attempt by appellant to shift the blame to Ms Bierman. On that score, I am satisfied that Ms Bierman left the road because she was faced with a sudden emergency caused by appellant entering the R34 in front of her when it was not safe under the circumstances. I am satisfied that there is no independent event that caused or contributed to the incident other than the conduct of appellant. See in this regard Neethling, Law of delict, 6th ed p 206. The magistrate was in my view correct, albeit on different reasons, to have found that there was no novus actus interveniens.

- [42] In conclusion Adv Engelbrecht argued that Ms Bierman was an accomplice and it is for that reason that she shifted the blame to appellant. An accomplice is a person who consciously associates herself or himself with the perpetrator or co-perpetrator in the commission of the crime by aiding or providing the means for the commission of the crime. See *S v Kimberley and Another* supra.
- [43] In the present case, there is no evidence whatsoever, that Ms Bierman consciously associated herself with appellant by aiding him to commit any crime. Instead what is clear from the evidence is that Ms Bierman disassociated herself from the conduct of appellant by taking some evasive steps to avoid an imminent collision with his motor vehicle. This argument of Adv Engelbrecht is with respect misplaced. If for whatever reason it is accepted that Ms Bierman is indeed an accomplice, then it would follow that appellant was the perpetrator and by virtue of his role as perpetrator, he complied with the definition of the crime and on his own version he is guilty of the crime.

I

ANALYSIS

OF EVIDENCE REGARDING THE SENTENCE

- [44] The sentence is only assailed on the basis of the order suspending the licence of the accused and the competency certificate the accused must produce before driving a motor vehicle on a public road. Both counsel agree that the orders are disproportionate to the offence.
- [45] I am inclined to agree with them. The magistrate relied heavily on the evidence of Captain Swanepoel and the traffic officer and had ignored or laid less emphasis on the following factors:
- that the accused has been convicted of culpable homicide of which the constituent element is negligence.
 - the fact that he is a first offender and a holder of a valid drivers licence for a number of years.
 - the fact that immediately after the incident he stopped his motor vehicle, ran to the scene and rendered assistance and
 - the fact that the accused is a farmer and his licence and motor vehicle are essential tools for his business.
- [46] In view of the foregoing, the orders given by the magistrate are under the circumstances shockingly disproportionate to the offence. The magistrate in my view, ought to have exercised his discretion against the granting of such orders.
- [47] In the result the following orders are made:

- (a) The appeal against conviction is dismissed.
- (b) The appeal against sentence partially succeeds and the following orders are made:
 - (i) The order in terms of Section 34(1)(a) Act 93 of 1996 with regard to the suspension of the accused's driving licence and the order to produce a certificate of driving competency to the Commissioner of Correctional Services are set aside.
 - (ii) Save for the above, the sentences are confirmed .

M. C. MOKGOBO, AJ

I agree

J. P. DAFFUE, J

- [48] I indicated supra that I concur in the judgment of Mokgobo AJ, but believe it is apposit to refer to the following critical aspects in more detail pertaining to the appeal against conviction. Mr Engelbrecht submitted that two mutually destructive versions were placed before the court a quo, that a double cautionary rule should have been applied in that Ms Bierman was a single witness and an accomplice. Furthermore her credibility was totally destroyed insofar as the police expert, W/O Kotze concealed that the Ranger struck a stone, but notwithstanding that he was seated next to the prosecutor during the testimony of the defence expert, Mr Claassen, and clearly not agreeing therewith. Ms Bierman could not say whether she struck a stone. I do not agree that this has any bearing on the credibility of Ms Bierman. The stone was clearly not hit, bearing in mind the persuasive evidence led by the State and the photographs indicating that the wheels of the Ranger were rolling past the stone and continued to roll thereafter. If there was such severe impact as speculated about by Mr Claassen, the consequences would have been visible on the photographs. Ms Bierman would have felt such impact. She had no reason to lie about this. At that time she was already on the gravel shoulder, trying to avoid the appellant's Toyota that entered the tarred road right in front of her. In any event the defence case during the trial was to show that Ms Bierman did not keep a proper lookout as her attention was affected due to an incoming cell phone call.
- [49] Ms Bierman's testimony was seriously attacked in respect of two further aspects, i.e. her speed before the incident and her evidence about cell phone calls made and received. Before I deal with these issues it is apposit to refer to relevant authorities. I shall firstly consider estimates made by witnesses in order to evaluate the evidence of Mr Claassen

- [50] In motor vehicle collision cases the respective drivers and eyewitness are without exception requested to estimate aspects such as speed, duration and distance. It is obviously necessary to obtain clarification from witnesses, but there can be no doubt that it is notoriously difficult for anyone to make accurate estimates in the proverbial split second and/or in the agony of the moment. See *Olivier v Rondalia Versekeringsmaatskappy Van SA Bpk* 1979
- (3) SA 20 (AD) at 26-27 and *Rodrigues v SA Mutual and General Insurance* 1981 (2) SA 274 (AD) at 279 and 280. A strictly mathematical approach, although undoubtedly very useful as a check, can rarely be applied as an absolute test in collision cases since any mathematical calculation depends on exact positions and speeds whereas in truth

these are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy. See *Van der Westhuizen v SA Liberal Insurance Co* 1949 (3) SA 160 (C) at 168 quoted with approval in *Diale v Commercial Union Assurance Co of SA Ltd* 1975 (4) SA 572 (AD) at 577A.

- [51] I wish to quote the following from Cooper, *Delictual Liability in Motor Law*, 1996 ed, vol 2 at 471, relying inter alia on *President Insurance v Tshabalala* 1981 (1) SA 1016 (A), *Kapp v Protea Ass* 1981 (3) SA 168 (A) and *Marine & Trade Ins v Van der Schyff* 1972 (1) SA 26 (A):

"In a civil case a court is obliged to determine all issues on a balance of probabilities. If on the totality of the facts, and after making due allowance for the risk of error, the court is satisfied on a balance of probabilities of the reliability of the estimates, there is no reason why it should not adopt a 'mathematical' approach, not merely as a 'useful check' but to determine the negligence issue. The many reported judgments in collision cases reflect the important role this line of reasoning plays in the determination of the negligence issue."

- [52] Reaction time, that is the time that a driver takes to respond to any adversity, differs from person to person and experts make provision for different reaction times when reconstructing collision scenes. Reaction time of the normal person ranges between 1 and 1.5 second. See *Rodrigues supra* at 279G where the reaction time was accepted as 1.5 second and *Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA) where the expert allowed for reaction time of about 1 second. See footnote 1 on page 233 of the judgment.
- [53] The authorities quoted dealt with civil litigation, but in my view the principles are well-established and are equally applicable in adjudicating criminal matters. Ms Bierman testified that she travelled at approximate 100 kph before the incident. She was hesitant to make estimates in respect of distances as the record clearly shows. She was even invited to exit the court room and point out distances which she declined. Eventually an inspection in loco was arranged whereupon she pointed out where she was when she noticed appellant's Toyota as well as the position of the Toyota at that stage. This was about a year after the incident. Based on her estimates Mr Claassen made calculations and submitted that Ms Bierman would have been past the intersection before appellant's arrival. He testified, based on appellant's version that he did not see Ms Bierman's Ranger before he entered the tarred road and the speculation that her vehicle must have been at the other side of the

blind rise at the time, some 200 metres away, as well as his version pertaining to the events immediately before the impact with the trees, that she must have been driving at a speed of 142 kph.

- [55] A major topic argued was the receipt of the incoming call (which was not answered but went on voice mail) as well as the further calls made. The call data received from Vodacom show that Ms Bierman's phone received a call at 07h14:41 which went on voice mail and that she made two calls at 07h16:35 and 07h19:17. The first call was according to the records apparently received in the Schaaprand tower coverage area and the other two were made in the Frankfort Central tower coverage area. Ms Bierman testified that the incoming call was received just after the incident and whilst she was still in her vehicle. On her way to Frankfort, being transported by appellant, she firstly call her doctor and then her husband. Mr Engelbrecht extensively cross-examined Ms Bierman and submitted that she was lying. According to him the incoming call and the call to the doctor would have been in the coverage area of the same tower if her version was correct, but the different towers are indicative of and serve as proof that the incoming call was received prior to the incident and that the call distracted Ms Bierman to such an extent that she did not keep a proper lookout and noticed appellant's Toyota at a very late stage. On the defence version the incoming call would be received whilst Ms Bierman was travelling on the tarred road – the R34 – less than metres away from the point where appellant entered that road. It must be emphasised that it was never the defence suggestion during

cross-examination that Ms Bierman left the road as a result of the distraction; rather that she failed to notice the Toyota timeously.

- [55] An engineer of Vodacom, Mr Prinsloo, was called to testify. He relied on charts setting out coverage areas of all relevant cell phone towers in the area. The irony of the evidence presented by him is that the Schaaprand tower of Vodacom apparently does not provide coverage on the R34 at all. This cannot be correct, or if correct, then Vodacom's statements relied upon by the parties as correct pertaining to the time when calls were made and received are wrong. Mr Prinsloo conceded that the map was based on predictions and could not be accepted as 100% accurate. There is no reason to doubt that the three calls referred to supra have been received and made. Thus, the submissions of Mr Engelbrecht, based on speculation, cannot be correct.
- [56] It is true that the time lapse between the call received and the first outgoing call is less than 2 minutes, and bearing in mind all the action taking place immediately after impact with the trees, it might be said that this appears to be improbable. However exactly the same argument can be advanced to counter Mr Engelbrecht's argument. If the incoming call was received whilst Ms Bierman was still driving, it would be highly improbable that she would be making a call to her doctor in such a short space of time, bearing in mind the commotion that followed. Her version that the call to the doctor was made on route to Frankfort and that she phoned her husband thereafter must be accepted as the most plausible version. Appellant testified about one call, but he was uncertain in this regard.

[57] Experts are frequently called in to assist our courts, but courts are not bound by the opinion of an expert. An expert must be called as a witness on matters calling for specialised knowledge. It is the duty of the expert to furnish the court with the necessary scientific criteria for testing the accuracy of the expert's conclusions so as to enable it to form an independent judgment by the application of these criteria to the facts proved in evidence. See *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 370H – 372A. In the evaluation of the evidence of experts it is required to determine whether and to what extent their opinions advanced are founded on logical reasoning. See *Michael and another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at para [36].

[58] In *Mapota v Santam Versekerings Maatskappy Bpk* 1977 (4) SA 515 (AD) at 527H Potgieter JA commented as follows:

“Dit is egter welbekend ... dat direkte geloofbare getuienis dikwels aanvaar kan word al sou daardie getuienis indruis teen

waarskynlikhede wat voortspruit uit menslike ervaring of wetenskaplike menings. In die onderhawige geval sou, na my oordeel, die wetenskaplike mediese getuienis slegs die sterk en andersins aanvaarbare en gestaafde getuienis van appellant kan ontsenu indien

daardie getuienis onteenseglik getoon het dat die redelike moontlikheid dat die ongeluk kon plaasgevind het soos deur appellant

beskryf is, nie bestaan nie.”

In *Stacey v Kent* 1995 (3) SA 344 (ECD), the full bench of the Eastern Cape Division considered several dicta from a number of judgments dealing with the manner in which expert evidence should be considered and concluded as follows at 350G-I:

“I would point out that the present is not a case where the evidence was of so technical a nature that this Court is obliged to defer to the opinions of the experts who testified. I am further constrained to make the comment that, as will be shown below, the expert testimony adduced in the present matter to an extent verged on the highly theoretical and hypothetical. As pointed out in the authorities cited above, it is the duty of experts to furnish the Court with the necessary criteria for testing the accuracy of their conclusions, so as to enable the Court to form its own independent judgment by the application of those criteria to the facts proved in evidence. The mere pitting of one hypothesis against another does not constitute the discharge of the functions of an expert. The Court should also be on its guard against any tendency on the part of expert witnesses to be biased in favour of the side which calls them and an unwarranted readiness to elevate harmless or neutral facts to confirmation of preconceived theories or to dismiss facts supporting an opposing conclusion.”

[59] Bearing in mind the quoted dicta, direct and credible evidence of what happened in a motor vehicle collision often carry greater weight than the opinion of an expert

who had to reconstruct the event from his experience and scientific training. It is only where the direct evidence is so improbable that its reliability is impugned that an expert's opinion of what may have occurred should prevail. Having said this, in the finale result a decision must be reached on the evidence as a whole.

[60] Captain Swanepoel testified that she and a colleague, W/O Meyer, established that their vehicle, a Toyota Hilux 4X4, dissimilar to the Ranger driven by Ms Bierman, could be stopped within a distance of five metres at a speed of 100kph. Mr Engelbrecht tried to make much of this. The two police officers did not even try to get out of the vehicle to measure the distance, but more importantly, no evidence was led in respect of a fixed point used to start the test and no provision was made for reaction time. At 100 kph a vehicle travels at 27,8 metres a second and normal reaction time differs between 1 and 1.5 second as indicated *supra*.

[61] I am satisfied that Ms Bierman was a credible witness and that appellant's version was rightly rejected as not reasonably

possibly true. He tried all possible available avenues to set up a defence, but failed to achieve that. On his own version there was a stage where the grass next to the gravel road was so tall that he could not see traffic on the R34. It is improbable that he would never see the oncoming Ranger of Ms Bierman, even immediately when he entered the R34, if he was alert of his environment. On his version he entered the R34 at an extremely slow pace of 5 kph which on its own should raise eye brows. Based on all the accepted evidence he did not keep a proper look out and entered the R34 when it was unsafe to do, causing Ms Bierman to take evasive action by veering off to the left of the tarred road. He must have informed Ms Bierman that he was late for an appointment, otherwise she would not even be aware of the appointment. Appellant's evidence is this regard cannot be accepted. He was not cross-examined on the issue, but in my view a totally innocent person would not go back to the scene of the incident, accompanied by his attorney, and take all kinds of measurements.

[62] r Engelbrecht submitted that appellant should have been acquitted for another reason, i.e. that a *novus actus interveniens* occurred. According to him Ms Bierman did not focus on the road (whilst driving at an excessive speed) because of the incoming call (which we know was not answered) and when she observed the Toyota in front of her, she knew that she could not dare to brake as her children were not fastened by seat belts and therefore she veered off to the left whilst he could have either braked effectively or move to the right and safely pass the Toyota. All these factors are indicative that her action/inaction was a new intervening event and that any negligence on the part of appellant is not causally connected to the death of the child. I do not agree. A later event can only be deemed to break the causal link if it is a completely independent act, having nothing to do and bearing no relationship to in this case the appellant's act. See *Snyman CR, Criminal Law*, 5th ed at 87 and *S v Grotjohn* 1970 (2) SA 355 (AD) at 364 and *S v Lungile* 1999 (2) SACR 597 (SCA) at 605 - 606. In the last case Olivier JA stated that the act must also be abnormal. If appellant did not enter the R34 when and as he did, Ms Bierman would in all probability proceed safely on her way to Frankfort.

[63] The appeal in respect of conviction must fail.

On behalf of the appellant: Adv.

Instructed by:

BLOEMFONTEIN

On behalf of the respondent: Adv.

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