Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

In the matter between:

CASE NO. A409/13; A185/14

JUAN NINABER **APPELLANT**

AND

THE STATE **RESPONDENT**

CASE NO. 9834/14

JUAN PEET NINABER **APPLICANT**

AND

MAGISTRATE JT CLAASEN N.O. **FIRST RESPONDENT**

THE DIRECTOR OF PUBLIC PROSECUTIONS WESTERN CAPE **SECOND RESPONDENT**

JUDGMENT: 1 DECEMBER 2015

LE GRANGE, J

[1] There are two matters before us emanating from the same incident. I will deal with both in one judgment.

[2] The appellant was convicted on a charge of culpable homicide on 31 May 2012 and on 12 June 2013 sentenced to a term of five (5) years imprisonment in accordance with the provisions of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977.

[3] On 13 June 2013 the magistrate granted the appellant leave to appeal against his conviction and sentence. The appellant's bail was extended pending the outcome of the appeal.

[4] Thereafter, and almost a year after his conviction and sentence, the appellant launched an application in this Court for the proceedings before the first respondent ("the magistrate") to be reviewed and set aside. The magistrate opposed the review application. The second respondent, the Director of Public Prosecutions Western Cape, has filed a notice abiding by the decision of this Court. For ease of reference, I will refer to the appellant as such in both the appeal and the review application.

[5] The delay in this matter is regrettable but is largely as a result of the appellant's own doing. On 2 October 2014 the State notified the appellant and his erstwhile attorney in writing, of the State's intention to apply to this Court on 5 December 2014 for the appeal to be struck from the roll as the appellant failed to comply with this Court's Rule to file its heads of argument timeously on 12 September 2014. On 5 December 2014 the appellant indicated his intention to proceed with the appeal. By

agreement between the parties, the appeal hearing was postponed to 6 March 2015 with an Order of Court as to the further conduct of the matter in relation to the filing of an application for condonation and heads of argument.

[6] The appeal hearing on 6 March 2015 was again postponed to 23 March 2015. This was to allow the review application and the appeal to be heard before us, as the review application had been set down for hearing before a different judge on a different date. The hearing of the two closely related matters concerning the trial proceedings by differently composed benches was inconvenient and undesirable.

[7] At the hearing on 23 March 2015, counsel for the appellant, Mr. van der Westhuizen, announced for the first time that the appeal record was incomplete. According to him, crucial evidence by some of the witnesses who had testified during sentence proceedings had not been transcribed.

[8] Counsel for the appellant indicated he had indeed given instructions to the appellant's attorneys at the time (Adéle Smit, from Krüger Smit Attorneys, who is also the appellant's sister and a witness in the trial) to file a complete record. According to him, it was only when he prepared for the matter over the weekend preceding the postponed hearing that he discovered that the record was incomplete. He explained that he had previously prepared his heads of argument from certain notes and portions of the record without noticing what had been missing. This unsatisfactory state of events required the appeal to be postponed again to 26 March 2015.

[9] The review application was argued, however, as the alleged irregularities on which it was founded occurred outside the record. This court also requested Ms Smit to file an affidavit explaining *inter alia* why the missing portions of the appeal record had not been detected earlier and why the missing portions of the record were considered to be material for the adjudication of the appeal.

[10] Ms Smit filed a comprehensive affidavit. She requested *inter alia* that the matter be postponed to attempt a reconstruction of the proceedings that had not been recorded. She also alluded to the appellant's right to a fair hearing that may be compromised without the complete record. The appeal hearing was again postponed to 21 August 2015 with clear directives from this Court as to the further conduct of the matter. Instructions were also given to ensure the reconstruction of the record and for the appellant to file such missing portions of the record timeously with the judges' registrars.

[11] According to Counsel (by this stage Mr Scholzel had replaced Mr van der Westhuizen due to the latter having become indisposed), and the appellant's new attorneys of record, Mathewson Gess Inc, the missing portions of the record were located by the clerk of the court and transcribed, although certain statements in terms of s 212 (7) of the Criminal Procedure Act, 51 of 1977, which were read into the record and accepted as exhibits, were still outstanding. It needs to be mentioned that these statements were related to the handling of the deceased's body for post mortem and identification purposes and had not been materially in dispute at the trial. In the event

we were satisfied that the appeal would be argued on a substantively complete record of proceedings in the court below.

[12] Turning to the review. After the review application was argued, the following order was made on 23 March 2015:

> *"The application for the review and setting aside of the proceedings before the first respondent under case no. C 1421/2009, held at Mossel Bay magistrate's court, in which the first respondent convicted the applicant of culpable homicide and sentenced him to a term of five (5) years imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, 51 of 1977, is dismissed."*

[13] The reasons for that order now follow. The appellant in his founding affidavit essentially relied on two grounds of purported misconduct on the part of the first respondent, which occurred off record and before the sentencing of the appellant. The first concerned an alleged conversation on 5 April 2013 between the appellant's erstwhile attorney Mr Dercksen of Dercksen Incorporated in Knysna who represented the appellant in the magistrate's court, during which the first respondent allegedly informed Dercksen that he was not considering imposing a sentence of direct imprisonment on appellant. The second was the allegation that the first respondent had made telephonic contact with Nicolizé Pienaar, the clinical psychologist who had assessed the appellant, to discuss her qualifications, her opinion about the accident and appellant's behaviour at the time, as well as an alleged vendetta by the prosecutor against the appellant.

[13] According to the appellant the alleged misconduct of the first respondent amounted to a gross irregularity, which resulted in the entire proceedings before the first respondent having not been in accordance with justice. Supporting affidavits were filed by the appellant's parents, his brother, his girlfriend, Dercksen and his aforementioned sister, Ms Smit. An affidavit filed by Ms Pienaar was attached to the supporting affidavit of the appellant's father.

[14] The appellant in paragraphs 9, 11 and 12 of his affidavit records the following:

> *"9. On the 5th April 2013, prior to my testifying in mitigation of sentence, I was informed by my attorney Mr. Derecksen, that the magistrate, the first respondent herein, has informed him that he is not inclined to consider imposing direct imprisonment.*
>
> *11. On the morning of 12 June 2013, at court, but before the sentence proceedings commenced, my attorney, Daan Derecksen, informed me that Nicolizé Pienaar had informed him that she received a telephone call from the presiding magistrate, magistrate JT Claasen, wherein he discussed certain aspects of the case with her.*
>
> *12. I was not present at any stage where Nicolizé Pienaar discussed the mentioned telephone conversation, and do I rely on the supporting affidavits deposed."*

[15] The first respondent denied in his answering affidavit that he phoned Ms Pienaar, as alleged. He also denied and rejected the claim that, in the absence of the prosecutor, he had met and discussed the issue of sentence with the appellant's attorney outside of the court. The prosecutor made an affidavit confirming that he had been present on the occasions that the appellant's attorney had visited the first respondent's office in connection with the trial. The first instance had been when he came to introduce himself and on the second had been when the probation officer's report had been discussed with the first respondent. According to the prosecutor, at no stage during these meetings did the first respondent express his intention regarding sentence.

[16] Ms Pienaar in her affidavit does not positively support the hearsay claims made by the appellant. She averred as follows:

1. *I presumed that it was the court that phoned me at Bayview Hospital, while I was consulting a paediatric patient. The person did not identify himself therefore I cannot confirm it was Magistrate Claasen. I was asked to give a definition for the concept "remorse". I responded that a specific definition could not be given for this concept. The individual thanked me. This was the end of the call.*

2. *I gave evidence in mitigation in court.*

3. The next morning I, together with Adele (the Accused's sister), his father and the defence attorney were waiting outside the court and the following conversations took place:

3.1 The attorney said that the magistrate spoke to him in rooms the previous day alluding and or assuring the attorney that he was considering not to send the Accused to jail, but rather sentence the Accused to correctional supervision.

3.2 I responded to this, by saying, that I also received a telephone call from the court the previous day after my testimony and someone enquired about the definition for the concept of "remorse" that was the end of the conversation.

[16] It is well established that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is trite that a final order can only be granted in motion proceedings where disputes of fact arise on the affidavits, if the facts averred in the appellant's affidavits, which have been admitted by the first respondent, together with the facts alleged by the latter, justify such order. It may be different only if the respondent's version consists of bald denials that are not creditworthy, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. In this regard see

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at paragraph [25] and, of course, Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C.

[17] In the present instance, the denials by the first respondent of the purported misconduct complained about are not far-fetched or palpably implausible. Mr. Van der Westhuizen during argument correctly conceded that the appellant's case is entirely based upon hearsay. There is no supporting evidence, whether direct or circumstantial, that it was the first respondent who purportedly made telephonic contact with Pienaar.

[18] Mr van der Westhuizen did not persist in argument with the complaint of the alleged conversation in chambers between the first respondent and Dercksen, and in my view correctly so.

[19] It has not been explained why Dercksen, who appears to be an experienced attorney, did not immediately before sentencing and or immediately thereafter put on record the alleged misconduct of the first respondent, which the appellant now finds offensive. In fact the appellant waited almost a year before launching these review proceedings.

[20] In view of the above, it is unnecessary to deal with the complaint by the first respondent about the unreasonable delay that attended the institution of the review application.

[21] On the papers filed of record, the appellant failed to establish any misconduct on the part of the first respondent that justified interference by this Court on review.

[22] I now turn to deal with the appeal.

[23] The appellant's appeal against conviction was initially premised on three main grounds. Firstly, that the magistrate erred in accepting the evidence of the three passengers in the vehicle that the appellant drove his vehicle in a reckless and or negligent manner which resulted in the accident. Secondly, the magistrate erred in finding that the State proved beyond a reasonable doubt that there was a casual link between the death of the deceased and the multiple injuries she sustained in the accident. And thirdly, the magistrate misdirected himself in rejecting the appellant's defence of sudden emergency.

[24] The attack against sentence is that the magistrate over-emphasized the seriousness of the offence as well as the interests of society, at the expense of the appellant's personal circumstances. It was submitted that the magistrate failed to properly consider the evidence and reports filed by the professional witnesses that were called in mitigation of sentence for the appellant. It was further contended that the sentence imposed is also shockingly inappropriate and excessive under the prevailing circumstances.

[25] Mr Scholzel indicated at the outset that he would not persist with the ground of appeal against the finding by the magistrate that the death of the deceased was caused by multiple injuries sustained in the collision. This concession was correctly made. The medical evidence clearly demonstrates that the cause of death was the multiple injuries

to the body of the deceased, the most probable being the skull base fracture that the deceased suffered during the accident.

[26] The principal contention on behalf of the appellant was that the magistrate erred in finding that the available facts proved the appellant's guilt beyond reasonable doubt. It was argued that the three eyewitnesses called by the State contradicted each other in material respects. It was also suggested that these witnesses may have colluded and tailored their evidence against the appellant. Their evidence, so it was argued, was therefore unreliable and untrustworthy and should have been rejected by the magistrate. Furthermore, so it was submitted, the evidence of Colonel Poolman, regarding the reconstruction of the accident and calculation of the speed of the vehicle at the time of the collision was unsubstantiated and unreliable. Accordingly his evidence that the appellant had been travelling at an estimated minimum speed of 83km/h when he lost control of the vehicle, was mere opinion and not admissible expert evidence.

[27] It was also contended that appellant's version that he had lost control of the vehicle in reacting to a sudden emergency had been reasonably possibly true.

[28] The state called 13 witnesses in its case against the appellant. The appellant testified in his own defence. The witnesses of the State can essentially be placed in three categories. The first is the three friends of the appellant at the time, who were with him in the motor vehicle when the accident occurred. The second is comprised of the police officers who were at some point involved in the matter after the accident. These included Colonel Poolman, who compiled a report regarding the estimated

minimum speed of the appellant's vehicle before its collision with a lamppost. The third category is the medical personnel who testified in respect of the injuries and the resultant death of the deceased.

[29] It is not in dispute that on the day in question , Ivan Mentz, his mother (the deceased), Clinton Engelbrecht, Ryno Bosman and the appellant attended a live show at the Barnyard theatre in Mossel Bay. They all travelled in the appellant's sports car from Dana Bay to the venue on the night in question. On the return journey the appellant's vehicle veered off the road in Flora Road, Dana Bay, and collided with a lamppost. The deceased suffered multiple injuries in the accident and died a few hours later. The appellant does not deny he lost control of his vehicle. He claimed that an animal had appeared in the road, creating a sudden emergency. He had tried to avoid it and maintained that in the circumstances he could not be blamed for the accident and resultant death of the deceased.

[30] It is not an issue that there is a slight bend in the road in the vicinity of the accident. According to the photographs taken at the scene, a speed bump sign, with the speed limit indicated as 40 km per hour, is visible on the side of the road a few metres away from where the vehicle collided with the lamppost. The appellant who resided in Dana Bay would have been familiar with the character of the road.

[31] The evidence of the three surviving passengers Mentz, Engelbrecht and Bosman stands in stark contradiction with that of the appellant. I shall review the evidence each of them in turn.

[32] Mentz testified that the appellant, Engelbrecht, Bosman and he were all friends. He had known the appellant for approximately 10 years at the time of the accident. They attended the same school, visited each other regularly and frequently socialized over weekends. On the day in question his late mother decided to accompany the four young men to the Barnyard Theatre in Mossel Bay. They travelled in the appellant's Hyundai Tiburon sports car. His mother sat in the front passenger seat. He and the other two were sitting on the back seat. According to Mentz, he had cautioned the appellant to drive carefully as his mother would be travelling with them to the theatre. He did this because he knew that the appellant had a tendency to speed. According to Mentz, on their return journey from the theatre, the appellant was speeding on the N2. He testified that the appellant had even mentioned that they were travelling at a speed of approximately 200km/hr at one stage. At the Dana Bay turnoff the appellant reduced his speed. When the vehicle was approaching the first bend in the road Mentz felt the car move off the tar road onto the gravel shoulder. He requested the appellant to reduce his speed. This request was ignored and the appellant instead increased the volume of the music in his car. He said the appellant continued to drive too fast as they approached a four-way stop sign and did not reduce speed. He became uncomfortable and realized that the appellant would not be able to come to a halt at the stop sign. He started to scream at the appellant to stop. The appellant failed to stop and continued to drive at what the witness considered to be an excessive speed. There was a slight bend in the road. Owing to the speed at which it was travelling, the rear side of the vehicle started to slide to one side. The appellant tried to counter steer, but lost control of the

vehicle and as a result collided with the lamppost. Mentz's mother was still alive after the impact, but severely injured. Engelbrecht and Bosman left the scene to search for help at a nearby garage. Mentz testified that the appellant was standing next to the car and had enquired of him whether he was injured. He replied in the negative and requested the appellant for help to extricate his mother from the wrecked vehicle. The appellant replied that he could not remain at the scene and suddenly took off into the nearby bushes. Mentz then called the police for assistance on his cellphone. The police and other emergency vehicles arrived on the scene soon thereafter. Mentz further testified that whilst he, Engelbrecht, Bosman were sitting in the ambulance, the appellant's mother arrived at the scene. He said that the appellant's mother suggested to them that they should fabricate a story that a buck was in the road and that the appellant tried to avoid it and as a result lost control of the vehicle. Mentz testified that all three of them told her they could not do so as it was not the truth. Thereafter, the appellant's mother decided to pray at the scene. According to Mentz, the appellant apologized to him, Engelbrecht and Bosman at the Hospital. He was informed by the hospital staff early the following morning that his mother had passed away. The appellant called to return certain items to him later the same morning.

[33] Mentz was extensively cross-examined. His evidence was substantially unaffected by the cross-examination. He did, however, testify that he had noticed from the vehicle's license disc that it was licenced to transport a maximum of four people. This portion of his evidence was later shown to be incorrect whereupon he conceded that he

had not looked at the licence disc, but had obtained the information from a police officer who had checked the disc on the vehicle's windscreen.

[34] Engelbrecht testified that he had been 18 years of age and in his matric year at school at the time of the accident. He was a friend of the appellant, Mentz, and Bosman. On the way home from the theatre he was seated in the back of the vehicle with Mentz and Bosman. He testified that upon entering Dana Bay from the N2 the appellant had accelerated and increased his speed after the set of traffic lights. At a bend in the road the vehicle had veered off the tar onto the gravel shoulder of the road and then moved back onto the tarred surface. Mentz had asked the appellant to slow down but the latter took no notice and instead turned up the music playing in the vehicle. Engelbrecht said that he had been anxious and somewhat scared when the vehicle went off the road. He added that the appellant had ignored the stop sign and crossed the intersection at the four-way stop at speed despite being reminded of the stop sign and asked to slow down. He said that after the intersection, where the road made a slight bend, the vehicle's rear had started to slide to one side. The appellant lost control of the vehicle and it collided with the lamppost. He said that he and Bosman were thrown out of the back window and landed in the bushes, whilst the vehicle landed on its roof. He did not suffer any injuries and was only in a state of shock. He and Bosman then ran to the nearby garage for help, whilst the appellant and Mentz remained at the scene. Later he was put into the ambulance together with Mentz and Bosman while the emergency services were still busy trying to retrieve Mrs Mentz from

the wreck. He said that he had seen the appellant's parents while he was in the ambulance, but neither of them had spoken to him.

[35] In cross-examination Engelbrecht's perception of speed was debated. He said that did not hear the appellant mention that they were travelling at 200km/h on the N2. He also conceded that he could not say whether the appellant was driving recklessly, or at what speed he was travelling before the accident. He had not observed an animal in the road, but acknowledged that he could not dispute the appellant's version of having seen the reflection of light from an animal's eyes in the road just before the accident.

[36] Bosman also confirmed that he had been a friend of the appellant, Mentz and Engelbrecht. He said that on the return journey from the theatre, and near the robot-controlled intersection on the road off the N2 to Dana Bay, he had felt uncomfortable at the speed the appellant was driving. He confirmed that Mentz at one stage warned the appellant to reduce speed when the vehicle slightly veered off the tar road and onto gravel shoulder as a stop sign was ahead. The appellant had ignored Mentz. The appellant had paid no heed to the stop sign and continued to drive at a high speed. There was a slight bend in the road. As a result of the bend and speed, the rear of the vehicle broke away. He noticed how the appellant tried to counter-steer the vehicle, but in the wrong direction. He described that the vehicle had started to slide out of control and crashed into the lamppost. After the impact, he and Engelbrecht had crawled through the rear window and landed in the bushes. The two of them had walked to the nearby garage to get help.

[37] Bosman was also subjected to lengthy cross-examination. He was adamant that he had not seen an animal in the road or any reflection from an animal's eye. He recalled that he had looked downwards when the vehicle had started to slide out of control. Bosman readily acknowledged that he had discussed the matter with the other witnesses after the event. It would have been unnatural for him not to have done so.

[38] Colonel Poolman testified that he was the Head of the Engineering Unit of Pretoria Forensic Science Laboratory at the time. He has considerable experience in traffic collision reconstruction and is often called upon to testify in matters of this nature. In this instance he had been requested by the prosecution to determine at what speed the appellant's vehicle had been travelling before the collision. He obtained various photographs of the scene and of the appellant's vehicle. These photographs had been taken by the police photographers soon after the accident. The measurements of the tyre marks on the scene were provided to him by police officer Van Meyeren, who is a qualified vehicle collision analyst. Poolman also visited the scene after compiling his draft report. He said that the tyre marks visible on the photos were consistent with "yaw marks". Such yaw marks are caused when the tyres of a vehicle rotate while the vehicle is severely steered to one direction. Furthermore, the lateral friction limit between the tyres and the tarmac is then exceeded which causes the vehicle to swerve out of control. Poolman stated that the photographed tyre marks clearly illustrated that the driver of the vehicle swerved towards the right side of the road moments before the accident. He further testified that the tyre marks had a core of 10 metres and an arch of 0.15 metres. By making use of the critical speed formula and assuming a friction

coefficient between the tyres and the tarmac surface of 0.65, Poolman calculated the *minimum* speed of the vehicle before the impact to have been 83 km per hour. Poolman also observed that the damage to the vehicle was severe.

[39] In the cross-examination of Poolman there was much debate about the critical speed formula used by Poolman in his calculations and the friction coefficient of 0.65 that had been applied. Poolman was adamant that the 0.65 friction coefficient was the absolute minimum that one could assume as this would entail assuming that the tar road surface was virtually smooth and that there had been no or very little thread on the tyres. Poolman said that if he had taken the actual condition of the road surface and the thread on the appellant's tyres into account the friction coefficient should realistically have been at least 0.70. Had he used those quantities, instead of the ones more favourable to the appellant that he had applied in his calculations, they would have given a much higher speed than the calculated 83 kph before the impact. Hence his estimation that 83 km per hour had been the *minimum* speed at which the appellant must have been driving immediately before the accident.

[40] The appellant's evidence in summary was that he had been driving at a reasonable speed. He conceded he did not stop at the stop-sign in Dana Bay, but claimed to have reduced his speed and changed to lower gears. He said he had entered the intersection at a speed of approximately 60 kph. The car lights were on bright and he had a kept a proper look out. After the stop sign he saw what he assumed to be a buck to the left of his path of travel as he exited the curve in the road. He could not

drive straight ahead without a collision. He had not braked, but merely sought to drive around the animal. When he turned the steering wheel to pass safely, the vehicle had begun to skid and he was unable to regain control of it. He could not explain what had caused the car to skid. He had not observed sand on the road, although he suspected that it had been the cause because he had heard so from some-one else.

[41] In cross-examination the appellant's version of seeing a reflection or glint of an animal's eye developed into him giving a description of the height and colour of an animal with the features like a buck standing in the road.

[42] The magistrate relied heavily on the evidence of Mentz, Engelbrecht, Bosman and Colonel Poolman to come for his finding that the appellant had been travelling at an excessive speed in the circumstances and consequently lost control of the vehicle causing the accident and the resultant fatal injuries to the deceased. He also found that even on the appellant's own dubious version he had failed to keep a proper lookout and had driven his vehicle without the necessary care and skill reasonably expected from a person knowing that animals may cross the road in that area at night.

[43] In order to assess whether the conclusion reached by the magistrate was correct, it is important to view the evidence in its totality. Having read the record and taking into account the arguments advanced on behalf of the appellant, I am of the view that the magistrate's evaluation of the evidence cannot be faulted. He gave a well-reasoned and detailed judgment. The evidence of the three passengers in the vehicle was fairly and accurately summarized. Moreover, the magistrate evaluated the

witnesses' evidence in the context of the entire body of evidence taking into account the inherent probabilities and improbabilities and assigned appropriate weight to them. Where caution was called for it was exercised.

[44] There are indeed certain discrepancies in the evidence of Mentz, Engelbrecht and Bosman regarding their individual accounts of events that night. Bosman was also criticized because his *viva voce* evidence differed to an extent from a previous statement given to the police. Some of the inconsistencies of the witnesses relate to the speed the appellant was travelling and the manner in which he was driving on the N2 and in Flora Road moments before the collision; Mentz' evidence relating to his observation of the licence disc on the windscreen was also wanting; the evidence of Mentz that the appellant's mother suggested to the three of them to tell a fabricated version that an animal was in the road whilst sitting in the ambulance was not corroborated by Engelbrecht and Bosman.

[45] The case law is replete with examples of the correct juridical approach to contradictions between two witnesses and differences between a witness's evidence and a prior statement. The argument is often advanced, as it was in the current matter, that, because the witnesses' accounts of events disagree, they lack veracity. Nicholas JA in Credibility of Witnesses in (1985) SALJ 1985 32 stated the following at p. 35. '*In most instances considerable time and effort is spent in establishing and basing argument on, contradictions and discrepancies. This argument is fallacious*'. At p. 36 the learned Judge of Appeal continued:

"It follows that an argument based only on a list of contradictions between witnesses leads nowhere so far as veracity is concerned. The argument must go further, and show that one of the witnesses is lying. It may be that the court is unable to say where the truth lies as between contradictory statements, and that may affect the question whether the onus of proof has been discharged: but that has nothing to do with the veracity of the witness."

At p. 41 he proceeded :

"*In the light of experimental evidence, it is not surprising that eyewitness accounts are often not an accurate representation of reality, and that there are often profound differences in eyewitness accounts of the same event, even when it is observed by the witness under the same external conditions. This shows the futility of the exercise, frequently performed by cross-examiners, of raking at tedious length over the evidence of different eyewitnesses in order to uncover contradictions, variances, omissions, discrepancies, differences and inconsistencies. For the most part it shows no more than what is to be expected, namely that eyewitnesses differ from one another in their accounts and are liable to error.*"

[46] The flynote to the report of the judgment in S v Mafaladiso en Andere 2003 (1) SACR 583, which accurately captures the substance of the Court's judgment, sums up the applicable principles as follows:

"Material differences between witness's evidence and prior statement - Juridical approach to contradictions between two witnesses and contradictions between versions of same witness is, in principle identical - In neither case is aim to prove which version is correct, but to satisfy oneself that witness could err, either because of defective recollection or because of dishonesty - Court must carefully determine what witnesses actually meant to say on each occasion - In this regard adjudicator of fact must keep in mind that previous statement not taken down by means of cross-examination, that there may be language and cultural differences between witness and the person taking down statement and that person giving statement is seldom, if ever, asked by police officer to explain statement in detail - It must be kept in mind that not every error by witness and not every contradiction or deviation affects credibility of witness - Non-material deviations not necessarily relevant - Contradictory versions must be considered and evaluated on holistic basis - Circumstances under which versions made, proven reasons for contradictions, actual effect of contradictions with regard to reliability and credibility of witness, question whether witness given sufficient opportunity to explain the contradictions and connection between contradictions and rest of witness' evidence, amongst other factors, to be taken into consideration and weighed up - Lastly, there is final task of trial Judge, namely to weigh up previous statement against *viva voce* evidence, to consider all evidence and to decide whether it is reliable or not and to decide whether truth told, despite any shortcomings."

Applying that approach to the evidence in the current case as a whole, the argument that the evidence of the three witnesses is unreliable and lacks veracity as a result of certain discrepancies is misplaced.

[47] All three witnesses were good friends with the appellant. Mentz, in particular, had often spent time over weekends at the appellant's home. The fact that the witnesses may have discussed the matter amongst each other does not justify an inference that they have conspired to provide false evidence against the appellant. There were no credible indications to remotely support such a conclusion. All three witnesses testified that at one or other stage during the trip home they had felt uncomfortable in the vehicle as a result of the speed at which it was travelling. All three of them were adamant that the appellant had been beseeched to reduce speed, but he deliberately ignored the call. The witnesses were also *ad idem* that the appellant entered the four-way stop at speed and as a result of the slight bend in the road thereafter the rear wheels of the car had started to slide and the appellant had then tried to counter-steer. It was only after these events that control was lost over the vehicle and the collision occurred.

[48] The evidence of the eyewitnesses was corroborated by Poolman to the effect that the appellant was speeding at the time he lost control of the vehicle. Poolman testified that the damage to the vehicle was also consistent with the speed he had estimated. Poolman visited the scene after compiling his report and confirmed his calculations and observations were in keeping with the three eyewitnesses' version that

the appellant approached the bend in the road at speed and lost control of the vehicle as a result of counter-steering.

[49] The attack on Poolman's scientific approach and calculations to determine the speed at which the vehicle travelled moments before impact was contrived. He provided a cogent step by step explanation as to how he arrived at his conclusion and of the Critical Speed Formula ("CSF"), he used. It is a simple applied mathematical formula to calculate speed using the dimensions of curved tyre markings left by a vehicle on a tar road and the friction coefficient between the particular road surface and the vehicles tyres. The magistrate cannot be faulted in my view for accepting Poolman's evidence.

[50] The appellant testified he knew the area and road very well. He acknowledged that it is not unusual for animals like buck to cross the roads in that area. A speed bump and a speed sign of 40 km/h were clearly visible metres away from where the collision occurred. That clearly signified a reduction of speed was required to safely negotiate the road. Despite being fully aware of these circumstances the appellant failed to stop at the four-way stop sign. He claimed that he drove at an approximate speed of 60km/h where, by all accounts, the road leads into a residential area. The weight of the evidence clearly demonstrated that the appellant's conduct fell materially short of what was required of a reasonable driver in the circumstances. Moreover, despite warnings from his passengers to reduce speed, he deliberately maintained an excessive speed.

[51] On a conspectus of all the evidence it is evident that the state fully discharged its onus and the appellant's defence was correctly rejected as not reasonably possibly true. It follows that the appeal against conviction cannot succeed.

[52] Returning to sentence. It is well established that the determination of an appropriate sentence is pre-eminently within the discretion of the trial court. A trial court has a wide discretion in deciding which factors should be allowed to influence the court in determining the measure of punishment and in determining the value to attach to each factor taken into account. A failure to take certain factors into account or an improper determination of the value of such factors may amount to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed. Furthermore, a mere misdirection is not by itself sufficient to entitle an appellate court to interfere. It must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all, or exercised it improperly or unreasonably, or that the imposed sentence induces a sense of shock. In this regard see S v Kibido 1998 (2) SACR 213 (SCA) at 216 G-J and the cases referred to there.

[53] The considerations which should guide a court of law in determining an appropriate sentence in matters such as this are comprehensively set out in the matter of S v Nyathi 2005 (2) SACR 273. The basic criterion to consider in cases of this nature is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. 'Relevant to such culpability or blameworthiness would be the extent

of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded. If they have been serious and particularly if the accused's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed.' See in this regard: The State v Ngcobo 1962 (2) SA 333 (N) at 336H-337B; S v Nxumalo 1982 (3) SA 856 (A) at 861H and S v Humphreys 2015 (1) SA 491 (SCA) at para 22.

[54] In the present instance, the appellant testified in mitigation of sentence. His personal circumstances were further presented in a detailed manner by the witnesses that were called to testify in mitigation of sentence. This included the evidence of two social workers and a clinical psychologist. At the time of the accident he was apparently 22 years of age and at sentencing stage 26 years of age. The appellant is not a first offender. He has a previous conviction for speeding, where he exceeded the speed limit by driving at a speed of 207km/h. The appellant was fined R 10 000 or six months imprisonment, which was wholly suspended for a period of five years on certain conditions. He was further ordered to undergo 128 hours of community service for that period. His driver's licence was also suspended for a period of four months. The appellant at the time was 18 years old. He also received counseling after the incident from a clinical psychologist.

[55] The offence of which the appellant was convicted of is serious. He blatantly ignored warnings to reduce speed and displayed in a daring and arrogant manner a wilful disregard for the safety of his passengers. The consequences were fatal. The appellant has shown little remorse for his conduct. The magistrate took all the relevant factors into consideration in a balanced way. The sentence he imposed does not induce a sense of shock. No misdirection by the magistrate has been demonstrated that would permit this Court to interfere with it.

[56] It follows that the appeal against sentence cannot succeed.

[57] In the result the following order is made.

The appeal against conviction and sentence is dismissed.

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LE GRANGE, J

I agree.

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BINNS-WARD, J