

NOT REPORTABLE

**IN THE EASTERN CAPE HIGH COURT,
BHISHO**

CASE NO: CA&R 6/12

In the matter between

NCEDANI SAMSON KWELITA

APPELLANT

Versus

THE STATE

RESPONDENT

APPEAL JUDGMENT

HARTLE J

1. The appellant was convicted by the Regional Court, Zwelitsha, on charges of culpable homicide and failing to obey a road traffic sign by

driving in excess of the prescribed speed limit of 80 kilometers per hour respectively.¹

2. In respect of count 1, he was sentenced to undergo four years' imprisonment - wholly suspended for five years on certain conditions, and, in addition, was ordered to pay a fine of R60 000.00 or in default of payment to undergo two years' imprisonment. On count 2 he was sentenced to pay a fine of R1 000.00 or two months' imprisonment.
3. The present appeal is against both conviction and sentence.
4. The charges² arise from a fatal collision with a pedestrian on the R63 near Dimbaza on the early morning of 12 March 2008 in circumstances where the deceased suffered an apparently rare

¹ The charge sheet referred to a contravention of section 58(1), read with section 89(1), of the Road Traffic Act, No. 93 of 1996.

² With regard to count 1, apart from the main offence of culpable homicide, the appellant was charged in the first alternative with reckless/negligent driving and in the second alternative with inconsiderate driving. He sought and was ultimately furnished with particulars which foreshadowed the grounds of negligence the state intended to rely upon. These were that the appellant's vehicle "*was driven at a speed in excess of 80 km per hour which shows that he was negligent and did not have a proper lookout for other road users*". In respect of count 2 it was clarified by the particulars furnished that the single road sign which he failed to obey was one of "*80 km/h*" as was depicted in "*the photo albums*" and which was displayed on the road from King William's Town to Alice. (As an aside I mention that it was common cause that the sign was 2.6 kilometres back from the scene of the collision. On the other side of the road, going back in the opposite direction, a sign near the junction where the collision occurred depicted a speed limit of 100km/hr.)

transection of his abdominal cavity. The late Mr *Buya*, a 37 year old man, was last seen just before the collision by a local resident, Mr *Elvin Tamesi*, who testified that he was making his way on foot towards the R63 on the left side of the road as one drives from King William's Town to Dimbaza, approaching from the direction of Mamata administrative area. He himself was on watch duty at the gate of a brickyard near the road when the deceased passed him by. They had greeted one another and exchanged pleasantries, leading the witness to conclude that he was in his sound and sober senses. He furthermore appeared unhurried. According to his observations the deceased was proceeding towards a bus stop which was about 500 metres from where he was standing when shortly thereafter he heard a bang and the sound of a motor vehicle with "*high revs*". On looking in the direction of the R63, he saw something flying up in the air over the bus shelter and a solitary motor vehicle on the road emitting smoke as if it might burn.

5. He immediately rushed to the road and observed only the appellant's vehicle which had pulled up ahead of the bus shelter. The appellant, who had alighted from his vehicle by now, informed him that he

thought he had hit a pedestrian. On looking for the deceased they ultimately found his dismembered body lying in two different areas on the right hand side of the road not very far apart. He also observed a sports bag and a primus stove near the side of the road which he recognized as being the deceased's possessions he had seen him carrying earlier.

6. He confirmed that there was clear visibility at the time. It was already light although the sun was not yet up. From the point where he was standing at the time he heard the bang, he could not see the surface of the road.
7. Since there were no eye witnesses who saw how the collision occurred, save for the appellant himself, the State sought to rely on circumstantial evidence. It called certain police officers who had attended the scene of the collision to gather information and make observations, the most important being Sergeant *Tuze* who took photographs and prepared a sketch plan and key thereto.³ It further

³ Although the trial court praised Sergeant *Tuze* for his “*excellent*” plan and key, numerous errors and inconsistencies in them were pointed out during cross examination. Accuracy was fundamental to the state's case that the appellant drove at a high speed in excess of the prescribed speed limit as it's expert witness, Colonel *Poolman*, sought to calculate the speed alleged to have been travelled by the appellant

called Dr *Zondi* who conducted an autopsy on the deceased and noted the injuries sustained by him. He attributed the nature of these to a high impact velocity caused by a blunt object, yet ultimately conceded that the transection could also have been caused by the deceased's interaction with the front leading edge of the roof of the appellant's vehicle, which was a sharper object, or the uplifted leading edge of the bonnet. A collision expert, Colonel *Poolman*, who set out to "*prove*" that the appellant at the time of the collision was driving in excess of 112km/hr, also testified. He sought to establish this speed with reference to three different scenarios. The first of these was reliant upon the distance moved by the vehicle subsequent to the point of impact⁴, which he himself conceded ultimately could not be relied on. The second approach involved a comparison with other case studies, each obviously with their unique and different factors, and an unjustified generalisation that the dismemberment of the body at the pelvis area "*is common at speeds over 138 km/hr*", a hypothesis he also agreed was not going to be relied upon. The third premise was

with reference to Sergeant *Tuze*'s measurements as to point of impact, where the body was located and where the vehicle came to a standstill.

⁴ The state delivered further particulars which suggested *inter alia* that, having regard to the distance between the point of impact and where the car driven by the appellant stopped after the collision, the inference was to be drawn that the car was driven at a speed in excess of 80km/hr.

dependent upon the position of the two sections of the deceased's body after the impact and the assumed distance each travelled through the air, i.e. the projectile movement of the parts. But having stated the proposition that the appellant had probably achieved a speed of 112 km/hr, the witness was obliged to concede that this was merely an estimate based on numerous assumptions which he agreed were either untested or based on case studies which differed in many respects from the collision *in casu*.

8. Mr *Rodney Crawford* who is a senior manager in the Department of Transport responsible for the speed limits on national roads testified with regard to the speed limit at the time in place on the R63. He explained that speed limits are determined with reference to their suitability for safe travel and added that they need to be credible (in the sense that motorists accept the limit to be appropriate to the environment), failing which they are likely to be disobeyed. Although his own assessment of a safe and credible speed at the relevant junction was 100 km/hr in both directions, he confirmed that the limit applicable at the time and place (for traffic going in the direction of Alice) was 80km/hr. A decision had been taken to replace the existing

sign alleged to have been disobeyed by the appellant with one indicating a speed limit of 100km/hr - which should have happened in November 2008 since it was gazetted around that time, but to his knowledge it was only increased in 2009 or so.

9. The trial court further conducted an inspection *in loco* at the scene of the collision. The magistrate's observations were that the road was straight and wide open, leading her to accept that a pedestrian could easily be seen from quite a long distance away.
10. The appellant pleaded not guilty to both counts (as well as the alternatives to the main count of reckless/negligent driving or further alternatively inconsiderate driving) and made certain admissions in terms of section 220 of the Criminal Procedure Act, No 51 of 1977, relating to the identity of the deceased, the peculiar injuries sustained by him, the fact that he succumbed as a result thereof and that he, the appellant, was the driver of the motor vehicle at the time. His defence, however, was that he was faced with a sudden emergency at the scene of the collision. He had taken all the necessary steps he was able to, but was ultimately unable to avoid the collision.

11. He testified that he had seen the deceased as he neared the junction where the accident occurred from a distance of about 100 metres away as he was driving along the R63 in the direction of Dimbaza. He was driving an E Class Mercedes Benz which, according to him, was in a good condition. Although he was not looking at his speedometer, he was satisfied that he could not have been speeding as he normally observes the speed limits on the road unless he has a blue light and is driving for an emergency. (As an aside I mention that the appellant was at the time of trial a member of the executive council in the provincial Bhisho legislature.) On that day he did not have a blue light, however, and so was required to adhere to the speed limit. Although he was under certain time constraints (he had an early cabinet meeting at 7h00 and needed to visit his mother in Dimbaza who had called him the previous night complaining of being ill), he had given himself plenty of time to check on her and return to Bhisho in time for his meeting.
12. It was still dark at the time, although not pitch dark. As a result he travelled with his lights on. According to his observations the

deceased gave a clear indication that he was cognizant of his vehicle approaching because he had stopped on the side of the road. Since this was the case, he thought it was safe to continue along. There was no apprehension of anything untoward, neither any reason to reduce his speed.

13. As he got nearer the deceased, however, at a distance of approximately 10 - 20 metres away, he began to walk into the road. He weighed whether he should apply his brakes or rather swerve onto the wrong side of the road to avoid the collision. Since he did not think he could stop in time - given the short distance between his vehicle and the deceased, he opted for the latter, accelerating slightly as he did so to ensure a wider berth around him. To his surprise, however, the deceased began to run to the right and he collided with him. All at once he heard a bang on the left side of his vehicle resulting in the vehicle's airbag being deployed into his face and chest. He managed to bring the vehicle, which was veering over onto the right hand side of the road, under control and stopped a bit further along on the roadway in the middle, fairly straddling both sides of the median.

14. After alighting from the vehicle, he summonsed the police. He then met Mr *Tamesi* and together they searched for the pedestrian first to no avail on the left side of the road. Ultimately they made the tragic discovery of his mutilated body on the opposite side.
15. When the police arrived he estimated the point of impact as there was nothing that could assist him in confirming this exactly.
16. He confirmed that he had applied his brakes when he heard the bang, but not harshly as he was trying to bring his vehicle back to the left. Under cross examination he rejected the notion that he had not kept a proper lookout for pedestrians and livestock. In response to a question posed by the court, he agreed that he had not sounded his hooter to notify the deceased of his presence on the road when he had at first seen him, but clarified that this was in his view unnecessary since no danger was anticipated.
17. Professor *Baart*, an expert physicist who also specializes in the reconstruction of accidents, testified on behalf of the defence

essentially refuting Colonel *Poolman*'s postulations with regard to the speed at which he suggested the appellant must have travelled prior to the collision. Each of the approaches advocated him were dealt with in turn and discounted by Professor *Baart* especially with reference to some of the assumptions made by Colonel *Poolman* such as, for example, that the body is elastic and therefore would have bounced off the vehicle; that the body would have hit the ground and just stopped dead instead of sliding; that the appellant had fully applied his brakes and the realibility of the point of impact, each of which factors would have affected his calculations of speed. Professor *Baart* concluded that Colonel *Poolman*'s estimated speed of 112km/hr was unreasonable and imprudent because the information relied on was insufficient or imprecise, a view which the trial court, correctly in my view, accepted without question.

18. Professor *Baart*'s evidence revealed further that statistically 80 – 90% of drivers when faced with danger from the left swerve toward the right to try and avoid it. He also opined that if the appellant were travelling at a speed of 80km/hr it would take 35 metres to come to a halt. Accordingly, in his view, if the appellant had applied brakes

initially as a means to avoid the collision, rather than trying to get around the pedestrian, he would certainly have hit him in any event. He expressed the opinion that the appellant had therefore done precisely the right thing in the circumstances.

19. Notwithstanding the trial court's rejection of Colonel *Poolman's* conclusions with regard to the speed travelled by the appellant, the magistrate nonetheless went on to conclude in her judgment as follows:

“Having said that, the evidence of Mr Kwelita himself, on his own admissions during his testimony and on being asked by the Court he told he did not take all the necessary steps he was able to take to avoid the accident as he admitted not having (lowered) his speed at the time he saw a pedestrian coming from the residential area to join the road, seeing that witness at the time he was walking up until the time he stopped on the edge of the road, when he could have done so driving a vehicle, a C-Class Mercedes Benz, which was described by Mr (Poolman) without being challenged to have been a very efficient braking type of a vehicle. He failed to hoot to alert the pedestrian of his presence or of danger on the road to alert the pedestrian not to cross, when he could have done so – or when a reasonable person in his shoes could have done so. He himself tells the Court that when he failed to do so he was still at about 30 to 40metres⁵ away from the deceased person. He was not five feet away from the deceased or ten feet away from the deceased person, he had ample (time) to have manoeuvred that vehicle in the manner a reasonable person would have done in the circumstances. Even if it were to be accepted that with that vehicle he was driving at 100 kilometres per hour, the Court having observed the scene and that road and the distance, the

⁵ This is in fact incorrect. The appellant testified that he was 10 – 20 metres away when he was faced with the sudden danger of the deceased coming onto the roadway ahead of him.

Court feels he had ample opportunity to have stopped the vehicle – not even lowered his speed, to have stopped that vehicle before colliding with the deceased.

And it is for that reason that the Court finds that having listened to Mr (Poolman) and the authorities that he gave to the Court, that such dismemberment of the body is very rare and the studies shows that it only happens in (excessive speeds), that is why the academics refer to that – in relation to that as excessive speed. And according to Mr (Poolman), which the authorities that he showed to the Court showing that in most cases – or three or four cases where such incident according to the authorities had happened, the speed was alleged to have been far higher than 138 kilometres per hour. And that version seems to be corroborated by Dr Zondi, who describes with his own experience and a number of years in the autopsy,⁶ corroborates the version that for a person to have been dismembered on that part of the body which has strong muscles, it clearly was due to – or the only probability is that it was due to high kinetic energy.

And it is for that reason that the Court finds that the accused person was negligent at the time and drove at a speed that rendered him unable to properly – or to reasonabl(y) manoeuvre the vehicle in a manner a reasonable person would have done, which is why he ended up taking – or making a choice of trying to avoid the deceased person instead of stopping the vehicle.” (Sic)

20. This finding then provided the basis for the court to conclude that the appellant was similarly guilty on count 2 as well.

21. If there was any doubt that the conviction on both counts was motivated by the magistrate finding that the appellant had driven at an excessive speed in the circumstances and that she considered him liable on the basis of his own version amplified by his admission

⁶ This is a further misstatement. Dr Zondi testified that he had only had a few months’ experience before he conducted the autopsy.

under examination by the court that he had failed to hoot or decelerate, this was clarified in her reasons for judgment as follows:

“AD PARAGRAPH 1, 2 AND 3⁷

It is indeed correct that, the court found that mr (Poolman’s) conclusions regarding the estimated speed at which the applicant was driving could not be relied on and not all of mr (Poolman) evidence was rejected by the court but his ultimate estimated speed at which the applicant was driving at the time. The court in convicting he applicant considered amongst other things, applicants own version of events during examination by court, viz that he saw the deceased for the first time on the side of the road when applicant was about 100 metres away from him and that he was about 20-30 Metres⁸ away from the deceased started entering the road and running to cross over. It was his evidence that he never at any stage reduced his speed nor did he apply his (brakes) or hooter⁹ to avoid colliding with the deceased. That coupled with the evidence that applicants vehicle, in the absence of any suggestions of any mechanical defect, has a high level of (braking) efficiency (according to an expert Mr Poolman) as well as other evidential material in the sense the postmaster,¹⁰ the observations by the court during the inspection in loco, the evidence by Dr Zondi with regards to his chief post mortem findings that the dissection of the body on the torso is not only very rare but consistent with high velocity; the court found that the applicant drove at a high speed that rendered him incapable of properly manoeuvring his vehicle to avoid colliding with the deceased and was thus negligent in the circumstances.

AD PARAGRAPH 4¹¹

From applicants own version during examination by court, he did not apply his (brakes) to reduce speed when he saw the deceased on the side

⁷ These paragraphs deal with the court’s finding that the appellant had ample opportunity to stop his vehicle, and the unreliability of Colonel *Poolman*’s evidence.

⁸ This estimation by the appellant is again incorrectly stated. A distance of even 10 metres would make an appreciable difference to the assumption that the appellant could have stopped his vehicle well in time to avoid the collision.

⁹ It was never a ground of negligence relied upon by the state that the appellant had failed to hoot but in any event for the reasons indicated below, it appears entirely unnecessary for him to have done so when the deceased first came into his sight.

¹⁰ I could not discern, even from the context, what the magistrate meant in this regard.

¹¹ This paragraph dealt with the appellant’s submission that his version that he was confronted with a sudden emergency was reasonably possibly true.

of the road, he did not apply his hooter, coupled with the finding made by court that he travelled at a high speed that rendered him incapable of avoiding a collision with the deceased, it was the finding by court that his actions in trying to avoid the deceased by swerving to his wrong side on the road was not just an error of judgement on his part but were to a certain extent motivated by the high speed he was driving at and in the circumstances he was the creator of the sudden emergency he found himself in.

AD PARAGRAPH 5¹²

Having accepted DR (Z)ondi's evidence and having made a finding that applicant was driving at a high speed, the court found applicant guilty on the second count as well." (Sic)

22. Not surprisingly the appellant sought leave to appeal against his conviction *inter alia* on the basis that having recognized the limitations and unreliability of the evidence of Colonel *Poolman*, the court had nevertheless sought to rely thereupon for its finding of negligence. In this regard the premise that the appellant had travelled at an excessive speed provided a false basis for the conclusions reached by the court not founded in the evidence, *inter alia*, that he had had ample opportunity to stop his vehicle in time to avoid the collision, and that he himself was responsible for creating the danger in the first place. Further, the court had convicted him of findings of negligence not relied upon by the state either in the charge sheet or in the further particulars. The appellant also complained that the

¹² This final paragraph concerned the charge of disobeying a road sign.

magistrate had failed to apply the proper test with regard to circumstantial evidence and had similarly failed to have regard to the onus on the state to prove its case beyond reasonable doubt.

23. It was further submitted that, more critically, the trial court had wrongly rejected the evidence of the appellant when it was uncontroverted and certainly reasonably possibly true.
24. The State submitted on the other hand that the magistrate had correctly drawn an inference from the circumstances that the appellant had driven at an excessive speed in the circumstances.
25. As a premise there were two distinct issues before the trial court. The first concerned whether the State had proved beyond reasonable doubt that the appellant had driven at a speed which was excessive in the circumstances and was therefore negligent (this being the ground of negligence relied upon by the State) and, secondly, whether he had driven at a speed in excess of 80 km/hr, thereby disobeying the applicable road sign. A positive finding on the latter aspect would not necessarily have established negligence. Although the appellant was

charged with disobeying a road sign rather than speeding¹³ (perhaps because the State was relying on inferential reasoning in this regard), it was still necessary for it to be established as a fact that he drove his vehicle at a speed in excess of 80 km/hr. This is no mean feat especially since even estimates of speed in general are approached with great caution, yet the State sought to establish this fact by inferential reasoning.

26. The theme of the State's case was that this extremely rare transection of the deceased's body could only have been the result of the application of substantial force to it. Dr *Zondi's* evidence was calculated to support the view that because of the size and strength of the abdominal cavity and its muscles, realistically it could only be transected by the vehicle - which had no sharp edges to it, colliding with him at high speed. Colonel *Poolman's* evidence was similarly aimed at "*proving*" that the appellant had driven at high speed by relying *inter alia* on the extremely rare nature of the injury and a text book article which propounded that the dismemberment of a body at pelvis area is "*common*" at speeds over 138 km/hr.

¹³ A contravention of section 59(4)(b) of the National Road Traffic Act.

27. But this is in my view not one of those instances where the doctrine of *res ipsa loquitor* is applicable simply on the basis of the rare nature of the transection. The injury cannot speak for itself because it could have occurred in a myriad of ways as Dr *Zondi* conceded under cross examination, even where the vehicle interacting with the pedestrian was moving at a speed of less than 80 km/hr. Horrific and seemingly incredulous it may be to accept that the transection of a pedestrian can be caused by anything other than an impacting vehicle colliding with him at high speed, that in itself is not enough to sustain the conclusion that the appellant was driving at an excessive speed in the circumstances.
28. Once the magistrate recognized the fallibility of Colonel *Poolman's* calculations and the unreliability of his estimate of speed (and had she taken into account Dr *Zondi's* concession under cross examination that the deceased's injury could equally have been caused by his interaction with the appellant's vehicle on impact either on the sharp lifted edge of the bonnet or the windscreen, this providing a reasonable alternative explanation for the transection), the two

requirements for a conviction based on circumstantial evidence set out in *R v Blom*¹⁴ could not be met. Indeed the magistrate appeared to completely ignore the cardinal rules of logic postulated for inferential reasoning, simply pegging her conclusion that the appellant drove at an excessive speed on the two generalised observations referred to above which have no basis in the facts proved.

29. There is further no general legal principle that a presumption of negligence, both in fact and law arises against a motorist who knocks down a pedestrian in a road, even in broad daylight.¹⁵ In any event, the damage to the appellant's vehicle and the approximate area of impact pointed out by him are consistent with the deceased having "*force(d) his wilful act against the will of the road users*"¹⁶ by crossing the road when it was inopportune to do so. That this was the most likely scenario, i.e. that the deceased ran from left to right across the roadway in front of the appellant's approaching vehicle and that it swerved right in an attempt to avoid the collision appeared to be accepted.

¹⁴ 1939 AD 188 at 202.

¹⁵ *R v Jonas* 1949 (2) SA 801 (N) at 802- 803.

¹⁶ *Tyobo v Santam Versekeringsmaatskappy Bpk* 1981 (4) SA 900 (O) at 902 G – 903 A.

30. In this regard, the trial court found, correctly in my view, that the appellant was faced with a sudden emergency by the deceased entering onto the road. This is evident from her judgment on sentence in which she observed that:

“There is no doubt in this Court’s mind that the deceased person contributed to the accident that led to his fatal death on that day. He was a grown up adult who stayed not far from the area and evidence suggested he regularly used the road in question and as indicated during judgment, the road in question is a wide, clear road, the deceased obviously saw Mr Kwelita’s vehicle on the road and he himself should have exercised caution as an adult, before crossing the road.”

31. What she took issue with however is how he conducted himself in the face of this imminent danger. In this assessment she unfortunately reverted back to the premise that he had driven at an excessive speed, this evident from the rare nature of the transected abdomen, “*corroborated*” in her view by Dr *Zondi*’s evidence that such injury had been caused by high velocity. Once she had rejected Dr *Poolman*’s estimate of the speed travelled before the collision, however, there was no basis then to rely on this evidence in determining whether the doctrine of sudden emergency should apply or not. Dr *Zondi* had also made the important concession that there

were sharp edges on the vehicle equally responsible for the transection which the magistrate overlooked. The supposed “*blameworthiness*” on his part in this regard can therefore simply not be established on the evidence.

32. Further implicit in the magistrate’s reasoning that the appellant was responsible for creating the emergency was the idea firstly that he had failed to keep a proper lookout. This, however, ignores the evidence and her apparent acceptance of it, that the deceased only entered the roadway much later. Therefore, the advantage of being on a wide open road and clearly being able to see the deceased from a distance of 100 metres away is irrelevant because, from this distance, no danger presented itself. The deceased had not encroached onto the roadway as yet and there was no reason at that point to be especially cautious, or to take reasonable precautions, because of his presence there. By waiting on the side of the road it was reasonable for the appellant to infer that the deceased had seen him. The appellant’s mere sighting of him was no portent of what unfolded later as the

distance between them closed.¹⁷ It follows for this reason that there was no need for him to have either lowered his speed or to have hooted to warn the deceased.¹⁸ Absent any apprehension of danger, it was not unreasonable for the appellant to expect at that stage that he could safely pass the deceased.

33. Different considerations apply however from the moment the appellant realized that he was in a position of imminent danger. In this regard the magistrate - having no reason to reject the appellant's estimate of when the deceased began to enter the road (he says 10 – 20 metres), incorrectly records it as being at a distance of 30 – 40 metres away from the deceased. In her reasons for judgment she says the distance was 20 – 30 metres. This no doubt influenced her finding that the appellant had “*ample*” time to manoeuvre his vehicle in the manner a reasonable person would have done in the circumstances and

¹⁷ See *Santam Insurance Company Limited v Nkosi* 1978 (2) SA (AD) in which the duty of the *diligens paterfamilias* is discussed in the context of a motorist being bound to exercise especial care and vigilance not only to children whom he sees, or ought reasonably to see who are present in or near a street, but also towards hidden children whose presence there he ought reasonably to foresee or anticipate. The court called to memory that the *diligens paterfamilias* is not a “*timorous faintheart always in trepidation lest he or others suffer some injury*”, nor is he “*given to anxious conjecture and morbid speculation*”. These comments apply with equal force *in casu*.

¹⁸ See in this regard *Farelo v Minister of Police* 1973 (1) SA 431 (C) in which it was held that the driver had been entitled to infer that the pedestrian (who from a distance of 12 feet from him had crossed to the centre line of a 62 feet wide road, paused, and stopped, looking to the right and left) was aware of oncoming traffic and that he was going to wait in the middle of the road until it was safe to cross the other half of the road, and that he had not been negligent in taking no special precautions either to warn the pedestrian or take avoiding action in anticipation of his crossing the path of his vehicle.

indeed even to have brought it to a complete stop, a conclusion not founded in the evidence. In this regard she ignored the unchallenged evidence of Professor *Baart* that even at a speed of 80 km/hr a distance of least 35 metres was necessary to bring the vehicle to a stop. Seemingly she relied for this finding entirely on her own observations of the “*scene and that road and the distance*” and the incorrect assumption that preventative measures were necessitated from the moment of the appellant’s first sighting of the pedestrian.

34. The steps expected from a driver facing a sudden emergency are such as a reasonably careful driver would fairly be expected to take in the circumstances.¹⁹ In this regard the appellant convincingly explained why he thought it would be safer to swerve to the right in an attempt to avoid the collision and in so doing why he needed to accelerate. There was no time, given the short distance between him and the deceased when the danger first presented itself to stop his vehicle. There is no evidence that suggests that another approach would have been more appropriate or would have prevented the collision.

¹⁹ *Ntsala & Others v Mutual and Federal Insurance Company Limited* 1996 (2) SA 184 (T) at 192 F – H.

35. The appellant's own explanation of how he perceived the danger and responded, and his denial that he exceeded the prescribed speed limit or drove with an excessive speed so as to have been responsible for creating the sudden emergency and therefore being unable to react in time as a reasonable driver would, is not found wanting in any respect. Indeed, his credibility was not impugned neither was it suggested by the magistrate that his evidence was improbable. On the contrary, there is corroboration to be found in his account of how the events unfolded as I indicated above, for example in the recorded damage to the vehicle and the area of impact pointed out by him. Further, both Colonel *Poolman* and Professor *Baart* agreed that the defining event, that is the deceased entering the roadway and the trajectory which he took towards the right side of the road, was the most likely scenario in their reconstruction each of the collision.
36. As for the appellant's denial that excessive speed was a factor, in the absence of any reliable estimate to the contrary, there exists a reasonable possibility that his evidence in this regard may be substantially true. The same applies to his estimate of the distance

between himself and the deceased at the onset of the emergency. He ought therefore in my view to have enjoyed the benefit of the doubt.

37. Shorn of the premise that the appellant drove at an excessive speed in the circumstances, an examination of the situation to determine what a reasonable driver would have done takes on an entirely different gloss. In this regard, in assessing the manner in which he says he responded, it ought properly to be borne in mind that when a person is confronted with a sudden emergency not of his own doing, it is wrong to examine meticulously the options taken by him to avoid the accident, in the light of after acquired knowledge, and to hold that because he took the wrong option, he was negligent.²⁰

38. The test is whether the course which he ultimately adopted fell short of what a reasonable driver would have done in the circumstances. I am satisfied, having regard to the evidence, that the appellant took the proper steps to avoid the accident and that he acted reasonably in the circumstances. His attempting to steer a course around the deceased appears to my mind to have been the better option of the two which

²⁰ *Cooper v Armstrong* 1939 OPD 140 at 148; *Road Accident Fund v Jason King Grobler* [2007] SCA 78 RSA at par 12.

the trial court accepted presented itself to him at the time, especially since the evidence established that he would have been unable to timeously pull up his vehicle to avoid the collision over the short distance between him and the deceased when the latter stepped onto the roadway.

39. In the result the conviction on the charge of culpable homicide ought to be set aside.
40. Since the same reasoning concerning the estimated speed at which the appellant travelled before the collision applies in respect of the conviction on count 2, it must follow in my view that the inference drawn by the trial court that the appellant drove at a speed in excess of the prescribed speed limit and that he therefore disobeyed a traffic sign cannot be sustained. I suspect that the reason the State charged the appellant with the offence of disobeying a traffic sign, rather than failing to observe the prescribed speed limit (which requires specificity regarding the speed exceeded), is because it was reliant on circumstantial evidence in the first place.

41. It is unnecessary to traverse in detail each of the other specified grounds upon which it is submitted the magistrate misdirected herself, except to single out one of those in particular. I refer in this regard to the appellant's submission that during the course of the trial the magistrate sought actively by way of intervention and questioning to further the case of the prosecution and to refute his case.
42. One such example is that she sought by way of questioning Sergeant *Tuze* to clarify or attempt to justify certain irregularities pointed out by the defence in respect of the sketch plan prepared by him. She also sought to elicit evidence from Colonel *Poolman* in respect of an issue not pursued by the State. Notwithstanding an objection by counsel for the appellant that what she was seeking to extract from him had not been covered by the State, this did not deter her from pressing in with her own preconceived notion that the appellant could have stopped his vehicle over the longer distance of 100 metres in sufficient time to avoid the collision. When the appellant himself testified she again sought by way of extensive questioning to promote the premise that his failure to hoot constituted a basis for negligence. Again, and against the strong submission of counsel at the time that the State was

bound by the further particulars furnished by it that the grounds of negligence were specific to exceeding the speed limit,²¹ she vociferously maintained her entitlement to examine him further in the “*interests of justice*” and proceeded undeterred by the appellant’s complaint.

43. It is trite that a judicial officer must conduct a trial open-mindedly, impartially and free, and in a manner that instills confidence in an accused person that his fair trial rights are not under threat. Such conduct must be manifest to all those who are concerned in the trial and its outcome, especially the accused. The requirement that justice must not only be done, but be seen to be done has been recognized as lying at the heart of the right to a fair trial.²² When a magistrate conducts the examination he gives the unfortunate impression that, even absent any ulterior motive, his “*vision has been clouded by the*

²¹ See *R v Kroukamp* 1927 TPD 412 and *R v Andreka* 1946 EDL 254 at 258 regarding the proposition that the State was bound by the further particulars pleaded and could not raise additional grounds of negligence not pleaded or canvassed in the evidence during the trial. See also *Commentary on the Criminal Procedure Act: Du Toit* at page 14-27

²² See in this regard *S v Le Grange & Others* 2009 (1) SACR 125 SCA; *S v Rall* 1982 (1) SA 828 (A) at 831; *S v Msithing* 2006 (1) SACR 266 (N); and *S v Tyebela* 1989 (2) SA 22 (A).

dust of the conflict". Unconsciously he deprives himself of the advantage of calm and dispassionate observation.²³

44. In this instance the answers sought to be elicited from the appellant under examination by the court seemed designed to make out a case favorable to the State and the manner in which they were asked bordered on near cross examination. The appellant was in my view justified in submitting upon appeal that the magistrate had descended into the arena and that at least a perception of bias was created to negate his right to a fair trial. Bias denotes a state of mind that is in some way predisposed to a particular result, or that it is closed with regard to particular issues. Whilst some of the questions posed by her were in elucidation, the magistrate clearly steered a course with her examination which was predisposed towards finding the appellant guilty on the facts she elicited, and against the possibility that his version might be reasonably possibly true.

45. Contrary to what was submitted by the State in this regard, this was not one of those cases where the interests of justice²⁴ required the

²³ *Yuill v Yuill* 1945 (1) ALL ER 183 (CA) at 189A.

court to become involved in the matter and to seek to adduce evidence which did not form part of the State's case. Rather, I am satisfied that the magistrate's strained involvement in the matter amounts to a departure from the standard of even handed justice which the law requires of a judicial officer. This notwithstanding, in view of my findings above on the merits, I do not consider it necessary to determine if this irregularity necessarily vitiated the proceedings. It was incidentally not argued to be the case beyond the complaint of a perception of bias.

46. In the premises the appeal succeeds and the conviction on both counts is set aside.

²⁴ See *S v Mseluku & Others* 2006 (2) SACR 237 (N) at 242 b – d relied upon by the State in support of the submission that in a criminal case a judge has more latitude to intervene to ensure that justice is done, and that her intervention *in casu* was necessary to clarify the issues raised by her in the interest of justice. In the latter matter it was held that the inexperience of the prosecutor created the necessity for calling a witness so that the court could ensure that justice was done. Section 186 of the Criminal Procedure Act no 51 of 1977 provides for the power of a court to call a witness if the evidence of such a person appears to the court essential to the just decision of the case. In this instance however the matter was less about the necessity to clear up any points still obscure after the examination of the appellant by counsel than the need for her to elicit certain answers which would justify a finding of negligence on grounds that were not even a feature of the State's case.

B C HARTLE

JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED:

D Z DUKADA

JUDGE OF THE HIGH COURT

DATE OF APPEAL : 9 November 2012

DATE OF JUDGMENT: 14 March 2013

APPEARANCES:

***FOR APPELLANT: Mr E A S Ford SC instructed by Wesley Pretorius & Associates,
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***FOR RESPONDENT: Mr L L Mbusi, Care of the office of the Deputy Directorate of
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