

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN
NORTH EASTERN CIRCUIT, PONGOLA**

Case No: 03/2024

In the matter between:

THE STATE

and

SIBUSISO SIYAYA

THE ACCUSED

JUDGMENT

Davis AJ

Introduction

[1] On 16 September 2022 eighteen children and two young adults died from multiple blunt force injuries sustained when a truck carrying 34 tons of coal with a total mass of 55 tons collided head-on with the scholar transport vehicle that they were travelling in.

[2] All but one of the occupants of the motor-vehicle died on the scene from the multiple blunt trauma injuries sustained at the time of the collision, the surviving child succumbed later in hospital. The children who died were aged between 5 and 14

with 12 being children under the age of 10. The two deceased adults were the driver of the motor-vehicle who was 19 years of age at the time and an educator aged 28.

[3] The accused, Sibusiso Siyaya, was the driver of the truck, a DAF mechanical horse and two side tip trailers, laden with 34 tons of coal to be delivered to the coal terminal in Richards Bay. At the Godlwayo area Pongola his vehicle collided with the Toyota LDV in which the deceased were traveling, the deceased's vehicle was in the emergency lane of the N2 northbound carriageway at impact.

[4] The accused was indicted to stand trial in the high court on 22 counts, count 1 is a contravention of section 63 (1) of the National Road Traffic Act [NRTA], 93 of 1996. (Reckless or negligent driving). Count two is a contravention of section 61 (1)¹ of the NRTA, 93 of 1996, (Failure to perform the duties of a driver after an accident). On counts 3-22 the accused is charged with murder, read with section 51 (2) and part II of schedule 2 of the Criminal Law Amendment Act, 105 of 1997².

Legal Representation

[5] The accused has been defended by Mr. Marimuthu, the manager of the Legal Aid Board's High Court component and Mr. Shah³ has represented the state. I am indebted to them for the manner in which they have conducted this trial, their helpfulness in limiting the issues to be decided by this court and for their submissions made at various stages of the trial. At times this trial has been difficult and emotional particularly for the victims' families. I am indebted to counsel for their professionalism. This is particularly so due to the amount of evidence that had to be traversed in order for a complete understanding of what occurred on 16 September 2022.

Plea

[6] On 15 April 2024, after the import of section 51 (2) of Act 105 of 1997 had been explained to him the accused pleaded not guilty to all counts as set out in the

¹ The indictment was amended without objection on 29 April 2022, the incorrect section was cited in error.

² Prescribed minimum sentence of 15 years imprisonment unless substantial and compelling circumstances are present in terms of section 51 (3) of act 105 of 1997.

³ Senior State Advocate

indictment. He pleaded not guilty in count one to driving a motor vehicle, an articulated truck and double dipper trailer on the N2 near Godlwayo area on 16 September 2022 recklessly or negligently in that he failed to stop at a mandatory stop; and/or drove at an excessive speed; and/or failed to keep a proper look-out.

In count two he denied that at the same date, time and place, after his vehicle was involved in an accident in which persons were killed and damage to property suffered he unlawfully failed to perform the duties of a driver after an accident. Specifically, he denied he:

- (a) failed to ascertain the nature and extent of any injury sustained by any person; and/or
- (b) failed to render such assistance to the injured person as he may be capable of rendering; and/or
- (c) failed to ascertain the nature and extent of any damage sustained⁴; and/or
- (d) failed to report the information referred to in (a) above and to produce his driver's license and identity number to a police officer at a police station within 24 hours of the accident.

[7] The accused pleaded not guilty to twenty counts of murder, being counts 3-22 on the indictment. He denied at the same date time and place unlawfully and intentionally killing the following persons:

Count 3: M[...] N[...], a 14 year old male child.

Count 4: B[...] N[...], an 11 year old female child.

Count 5: A[...] M[...], a 14 year old female child.

⁴ Paragraphs (c) and (d) are repeated, seemingly in error in the indictment.

Count 6: Lethukuthula Nkonyane, a 19 year old adult male.

Count 7: L[...] N[...], a 7 year old male child.

Count 8: S[...] N[...], a 6 year old male child.

Count 9: T[...] N[...], an 11 year old female child

Count 10: Zinhle Mkhize, a 28 year old adult female.

Count 11: T[...] S[...], a 5 year old female child.

Count 12: A[...] S[...], a 10 year old female child

Count 13: K[...] G[...], a 5 year old female child.

Count 14: Junior A[...] T[...], a 6 year old male child.

Count 15: M[...] N[...], a 7 year old female child

Count 16: S[...] S[...], a 6 year old male child.

Count 17: N[...] N[...], an 8 year old female child.

Count 18: S[...] M[...], a 13 year old child.

Count 19: S[...] D[...], a 9 year old female child.

Count 20: K[...] G[...], a 7 year old male child.

Count 21: S[...] N[...], an 8 year old female child.

Count 22: M[...] M[...], a 7 year old female child.

[8] The accused, in terms of section 115 of the CPA⁵, confirmed a verbal statement from the bar made by his legal representative in which he denied driving recklessly or negligently or acting with the necessary intent to murder any person. This plea explanation was confirmed by the accused.

[9] In order for the vast amounts of evidence led by the state to be understood in context, it is apposite to note that the basis of the accused's defence as set out in cross examination and later in his evidence, is that sometime prior to the fatal collision the vehicle's stopping mechanisms had malfunctioned to the extent that he was unable to control the speed of the vehicle at all. The heavy duty vehicle he was driving had become a 'runaway truck' and at all material times he was unable to properly control his vehicles speed as a result.

Admissions

[9] A detailed set of admissions⁶ admitted by the accused in terms of section 220 of the CPA were then read into the record on behalf of the accused, signed and confirmed by him. These admissions has greatly limited the issues in the matter.

The accused admitted, *inter alia*:

1. He was the holder of a heavy duty truck drivers license, code EC and a valid public driver's permit.⁷
2. On 16 September 2022, in the course and scope of his employment he was driving a truck and two trailer combination transporting coal from the highveld to the Richard's Bay coal terminal⁸.
3. While travelling on the N2 in the vicinity of the Godlwayo area Pongola he collided with a Toyota vehicle transporting 20 occupants.

⁵ Criminal Procedure Act, 51 of 1977.

⁶ Exhibit A

⁷ Exhibits C and D

⁸ Exhibits A and B

4. As a result all 20 occupants of the Toyota vehicle were fatally wounded and succumbed to their injuries, 19 died at the scene, the remaining child in a hospital.
5. The mechanical horse and two trailers were secured intact and taken to the Pongola Traffic Department.
6. A photo album compiled by Warrant officer Jele of SAPS was admitted as true and correct.⁹
7. The post mortem reports compiled by various forensic pathologists in respect of the 20 deceased were admitted into evidence, it was admitted that the deceased died as a consequence of the injuries sustained during the collision.
8. All 20 deceased causes of death are multiple blunt trauma, polytrauma secondary to blunt force, polytrauma (motor-vehicle accident), blunt head and chest trauma, multiple blunt force injuries MVA, head injury, motor vehicle accident.¹⁰
9. A second photo album compiled by Warrant Officer Ntuli on 26 September 2022 at the Pongola Traffic department was also admitted.¹¹
10. The real time GPS tracking and CCTV dashcam operated by Autotrak was admitted, this included the real evidence contained in three video clips recorded by the dashcam of the collision and events leading up to the collision.¹² The state later admitted a fourth dashcam video clip of the descent of the accused's vehicle down the Itshelejuba pass.

⁹ Exhibits F and G

¹⁰ Exhibits H - BB

¹¹ Exhibits CC and DD

¹² Exhibits EE-JJ

10. A Mizno gas truck operated by N Joubert that was in the vicinity at the time of the collision had a dashcam fitted and two clips of real evidence recorded by the dashcam were also admitted as real evidence.¹³

The Issues

[11] The crisp issues are easy to delineate. In respect of count one, the state must prove that the accused drove his vehicle recklessly or negligently. On count two the state must prove that the accused failed to perform the duties of a driver after the collision. In respect of counts 3-22 the state must show that the accused's unlawful driving of the vehicle caused the accident that resulted in the death of the twenty deceased, in order to do so it must prove that the accused had the 'legal intention' to commit murder. If they fail to do so a consideration of whether or not the accused should be found guilty of culpable homicide falls to be considered.

[12] Crucial to the answer to the issue in counts one and three to twenty-two are an examination of the accused's contention that the vehicle's ability to reduce speed had become non-existent. In respect of the second count the issue is simply whether or not the accused was justified, out of fear for his life, to immediately flee the scene and whether or not he was at the Pongola SAPS to report the accident or merely to retrieve his belongings.

The State Evidence

[13] Mzolo Nkonyane is the owner and operator of a 'scholar transport' business that services the area around Godlwayo, Pongola. On 16 September 2022 he was due to undergo a surgical procedure at the Ngwelezane hospital and was accordingly absent from the area.

[14] The usual vehicle used for scholar transport in his business would not start that morning and he gave an instruction to his son Lethukuthula Nkonyane to advise his assistant Phumlani Mahlinze, who was the designated driver, to use the Toyota LDV for the afternoon school run.

¹³Exhibits KK and LL

[15] He does not know why, his son, Lethukuthula¹⁴ drove the Toyota LDV on that afternoon. His son was unlicensed but had been taught to drive by him on the rural roads in the area where they resided and carried on their business. He had driven on the rural roads for a year and the father believed he was ready to undergo his driver's license test but had not got around to doing the test.

[16] Nosiphiwe Makhowane and Siyabong Ntuli live in the household immediately adjacent to where the accused's vehicle and the Toyota came to rest after the collision. They live a short distance from the N2, their home is separated from the N2 by a low wire fence.

[17] Mrs Makhowane observed the scholar transport vehicle, driven by Lethukuthula Nkonyane stopped at the stop sign trying to enter onto the N2 to travel north. She was standing in her kitchen while she watched his difficulties in crossing the freeway due to heavy congestion on the N2 southbound. The occupants were waiting to exit the rural road at Emalakhathi station in the Godlwayo area to drive onto the N2 northwards in the direction of Piet Retief. Eventually she saw the vehicle enter onto the N2.

[18] Siyabonga Ntuli who lives in the same house confirms that while outside he saw the Toyota LDV waiting for an opportunity to enter onto the N2 due to heavy traffic. This vehicle was still at the stop sign when he went inside the house, as he reached the dining room he heard two noises indicating something had happened on the road. He went outside and saw a truck off the road in front of his home, he believed at the time, that it had veered off the road.

[19] He jumped over the fence and went to assist. It was at this time that he noticed there was a white vehicle under the front of the mechanical horse. At the same time, he observed a shirtless male person running after a truck with red trailers trying to flag it down. This male was followed by a woman who was running behind this shirtless male, the truck did not stop but the two people disappeared from sight. It is not in dispute that the shirtless male was the accused.

¹⁴ The deceased in count 6.

[20] There was no-one in the cab of the truck, the left door was open and there was smoke coming from under the cab behind the right wheel. He ran to the rear of the vehicle to get fire extinguishers to try to put out the fire from where the smoke was coming. It was at this time that he began to notice the bodies of the victims of the crash, he saw children lying on the road and near the truck.

[21] The extinguishers were empty, he flagged down another truck, used fire extinguishers obtained from this truck and managed to put out the fire behind the right wheel of the cab. He told the court that when he saw the children lying strewn around the road and truck he felt the need to preserve the scene and protect them.

[22] His bravery is to be commended. He left the scene when the authorities were present.

[23] The accused's employer Sabelo Masinga employed the accused in February 2022 as a heavy duty driver. The accused was originally employed on a contract requiring 45 hours work per week on a salary of R12500 per month plus a R100 allowance per day for food¹⁵.

[24] In April 2022 this contract changed, the drivers were placed on an incentivisation scheme where their remuneration was dependent upon the number of loads they managed to complete. Although this evidence was unchallenged when Masinga testified and accorded with the evidence that the accused gave when he testified in his bail application,¹⁶ however the accused when he gave evidence at the trial disavowed the idea that he was incentivised but maintained he was paid a basic salary.

[25] The accused's employer Sabelo Masinga and the accused's immediate supervisor Thomas Mpande are both part of a 'whatsapp group' used by the drivers

¹⁵ Exhibit B -Employment contract between Baobao and the accused.

¹⁶ Exhibit UU – bail application of the accused on Page 7 where the accused told the court that a full load from the mine to Richards Bay would result in payment of R1200 and the return from Richards Bay with an empty load was R800. This was his 16th trip of the month, on these figures he would have earned R9600 for the full loads and R6400 for the empty loads. He had already made trips sufficient to earn R16000.

of the trucks of the company. The group is a forum by which the drivers employed by Baobao would report any faults or difficulties experienced with their trucks.

[26] In accordance with this protocol on the 16 September 2022 the accused posted a video and two photographs taken by the accused showing an issue with the brakes on the rear trailer. The video was of smoke emanating from the rear trailer and was sent by the accused at 10:36am.¹⁷ Two photographs were, shortly thereafter shared on the group, the photographs showed that a pipe had detached.

[27] The smoke and heat was caused by the friction of the binding of the brakes. This was occurring because the air pipe had detached and this meant that the 'braking compound' remained on the tyre and did not release, this friction was causing the smoking and burning problem as it over-heated. The pipe needed to be reattached. The accused was advised by management to wait for a mechanic CJ who had been phoned and was en-route to conduct a repair.

[28] Mkhwanazi, a qualified mechanic when he testified, was shown the three 'WhatsApp' screen-grabs and confirmed that the dislodged pipe was the air brake booster which allows the braking compound, akin to a brake pad, to come off the wheel. When this pipe was dislodged the brakes attach or bind to the wheel and this friction causes the burning and smoke, that is apparent in the picture that is MM3 before the court. Ordinarily the repair would be to replace the air booster pipe with another one.

[29] A mechanic Mfundo Buthelezi stopped and after being put in contact with Thomas Mpande by the accused cable tied a pipe effectively creating a bypass of the problem. This did however mean that the braking system on that particular wheel was rendered inoperable. It is a temporary solution to allow the vehicle to travel to a workshop to be repaired. Thomas Mpande paid Buthelezi for his work and the accused was instructed to go CJ's workshop in Piet Retief and have the issue resolved.

¹⁷ Exhibit MM3

[30] Mkwanazi confirmed, when shown what Buthelezi did,¹⁸ that the repair in essence was a bypass of the air booster to release the wheel to avoid the binding and smoking. This would be to allow the vehicle to travel to where a proper repair could be done.

[31] Thomas Mpande and Masinga denied an assertion put to them by the defence that it was Thomas Mpande who informed the accused that as the vehicle seemed fine that he should not go to CJ's in Piet Retief but should continue on his journey.

Reconstruction of the final part of the trip using dash cam evidence and GPS tracking

[32] At the beginning of the second week of evidence, an inspection in loco was conducted prior to the evidence of the crash investigation experts been led. The inspection began at approximately 300 metres from the truck stop that the accused stopped at after he was advised that the N2 was closed due to a 'strike'¹⁹.

[33] During the inspection Mr. Marimuthu advised the court that approximately 200 metres after the Nthuthuko turn-off, some distance from the mandatory stop the accused had realised something was wrong with his vehicle.

[34] Thereafter vast tracts of the evidentiary material that was placed before the court, most of which is not in dispute and videos were admitted as real evidence, the GPS speed tracking data from the truck of the accused's vehicle has similarly been admitted as accurate.

[35] The admissions made in conjunction with the real evidence contained in the video clips taken from the dashcam cameras from the accused's vehicle and other vehicles has allowed a detailed reconstruction of events leading up to the incident, along with the evidence of the examination of the vehicles by trained crash

¹⁸ Photograph 28 on Page 27 of Exhibit TT, the report of Constable P.B. Makhanya titled "Vehicle Examination Analysis Report"

¹⁹ It was in fact a service delivery protest concerning the supply of water to residents.

reconstruction experts allows for a largely uncontroversial setting out of the facts in the matter.

[36] As per usual the accused travelled on the N2 and the route took him from Ermelo past Piet Retief onto Pongola and then to Richards Bay. He had driven this route from Ermelo to the Richards Bay Coal terminal return trip on 16 consecutive days. Each trip, without any issues, takes about 8.5 hours.

[37] The DAF mechanical horse was fitted with a real-time GPS tracking and CCTV dash-cam technology operated by a company known as Autotrak. A detailed compilation of the recoding of the GPS real time tracking has been handed in along with dash camera recordings obtained from other vehicles or originate from other vehicles²⁰. These recordings and GPS tracking which accurately monitors the travel and speed of the accused's vehicle forms the basis of the two crash investigation reports compiled by Suman Singh of the Road Traffic Management Corporation and Warrant Officer Fredricus Snodgrass of the SAPS Accident Combating Unit.

[38] The data and images have been included in both reports, they comprehensively and accurately depict the journey of the accused and his heavy duty vehicle from midnight until just after the collision. Other footage from a bulk gas transporter which was in the immediate vicinity has also been admitted and forms part of the reports compiled by the SAPS and the Road Traffic Management Corporation²¹. It is an invaluable asset in allowing for the full facts and picture to be disclosed to the court, as Goliath DJP said in *Mthethwa* about video recordings.²²

“With the advancement of technology, closed circuit television (CCTV) cameras in public places are now a worldwide feature. As a result the production of electronic evidence in the form of CCTV footage has progressively become an important source of evidence in criminal proceedings. As a silent observer, CCTV footage can play an invaluable role in collecting evidence in search for truth in criminal trials. It

²⁰ Reports include footage aired on the news channel ENCA, the original footage has been admitted in terms of section 220 of the CPA as exhibit, obtained from the company whose gas truck recorded it.

²¹ Exhibits KK and LL.

²² *S v Mthethwa* [2017] ZAWCHC 28 WC Per Goliath DJP at [70].

has the ability to accurately capture, in an objective and independent manner, evidence in a case which can effectively established the guilt or innocence of an accused.”

[39] Warrant-Officer Snodgrass of the Durban Accident Combating Unit did a detailed analysis of the dashcam footage and the GPS tracking information and this is contained in his detailed Crash Investigation report²³. He also has had sight and taken note of other dashcam evidence including evidence that appeared on national television shortly after the incident.

[40] Unfortunately the camera installed to record the inside of the cab, the driver view camera was blocked with tape by the accused covering the camera lens. If the interior of the cabin had been recorded, then the issues in this trial would be easier to resolve.

[41] GPS tracking and dashcam evidence has enabled the state to detail evidence of the speed of the accused’s journey to and from Mpumalanga at an average speed for ten seconds of travel. Although with a slightly different focus Suman Singh of RTMC utilises largely the same information in the compilation of his report. They also had sight of the mechanical examination of Constable Makhanya of the Accident Combating unit in Durban in addition to their visual examination of the braking system of the vehicle of the accused.

[42] Their reports largely reflect the same information and draw similar conclusions that the accused was responsible for the collision due to driver error. Both compilers at the time of completing their reports were unaware of the contention by the accused, that shortly after the Nthuthuko turn-off, more than a kilometre before the compulsory stop at the top of the Itshelejuba Pass, he was having brake issues with his vehicle making it difficult to control. This information was first suggested at the inspection in loco.

²³ Exhibit PP

[43] The accused's journey in terms of the speeds and distance travelled on 16 September 2022 are captured in great detail. It is not necessary to set it out in any great detail but some reference needs to be made to the time and distance travelled and notes as to speed and stopping ability of the truck en-route to the fatal collision.

[44] At midnight the accused is travelling northwards on the N2 towards where his vehicle is to be loaded with coal on the R517. His vehicle is parked at 01:54 am at the Ikoti mine in Breyten near Ermelo.²⁴ That night his vehicle is regularly travelling at speeds in excess of the speed limit with a maximum speed recorded at 107km/h at 1:11am.

[45] There appears to be no issues with the stopping ability of the vehicle at this time with rapid decreases in speed possible. This is easily ascertainable when the maximum speed recorded of 107km/h is quickly reduced to 63kmh in 30 seconds. His vehicle commences its journey back to Richards Bay at 8-30am just six and a half hours after he switched the engine off two minutes before 2am the morning before.

[46] En route from Ermelo and before Piet Retief²⁵ at around 10 40am he developed issues with the brakes of the rear trailer on the right hand side, this necessitated him contacting his employer for assistance.

[47] The accused later informed his supervisor that the repair had solved the problem and that he was proceeding towards Richards bay and would not be stopping at Piet Retief for the mechanic CJ to examine the vehicle.

[48] During this period there appears to be no issues with the stopping ability of the truck driven by the accused. The accused travels at speeds in excess of the 80km/h speed limit for heavy duty vehicles on a regular basis. His maximum speed travelled is 122km/h that is quickly reduced to 49km/h within 50 seconds, indicating that at this juncture, the accused was capable of ensuring that his vehicle was able

²⁴ Suman Singh's report at page 91 of exhibit SS.

²⁵ Piet Retief has been officially renamed as eMkhondo. Road signs in and around the area of Pongola however refer to the town as Piet Retief.

to reduce speed rapidly²⁶. There are numerous other instances of quick reductions of the speed of the vehicle.

[49] The accused at 12h 54 pulls his vehicle over a short distance before the Itshelejuba Pass at an informal truck stop on the N2. The reason he did so was that heavy trucks had stopped at this juncture due to the N2 being closed due to a service delivery protest on the N2 near Pongola at Waterbas.²⁷ The undisputed evidence is that service delivery protests had occurred along the N2 at this point and that the N2 had to be closed. The army had also attended to maintain law and order.

[50] The N2 was only opened after lunch.²⁸ The consequence was heavy congestion on the N2. The accused remained at the truck stop for nearly an hour leaving at 13h 50 after information was received that the N2 had re-opened.

[51] During cross examination and at the inspection in loco, it was put to the witnesses that shortly after he left this truck stop, some 200 metres past the Nthuthuko turnoff he completely lost the use of his retarder which is an important part of a heavy vehicles speed management system which works through the engine of the vehicle.

[52] Retarders augment or replace some of the functions of primary friction based braking systems on heavy duty vehicles. Retarders serve to slow vehicles and enable trucks to maintain a steady speed while travelling downhill. They prevent ordinary brakes from burning due to friction when going down prolonged downhills. Singh and Snodgrass's undisputed evidence is that gearing and the use of the retarder are the primary ways that a heavy duty driver should regulate speed.

[53] It was suggested to the witnesses during cross examination that the spot where he lost the proper use of his retarder was a few kilometres before the pass

²⁶ Page 33 of Exhibit BB at 11h 57 minutes and 9 seconds to 11h 57 minutes and 59 seconds.

²⁷ It is referred to by some witnesses as a strike but the reliable evidence is that it was a service delivery protest concerning water.

²⁸ Evidence of Pongola traffic officer Muzikayise Ndlangamandla, this is common cause it is not disputed.

when the decline became steeper and the maximum speed permitted for a heavy vehicle was reduced to 60km/h.

[54] The situation was aggravated by his losing his brakes before he reached the mandatory stop at the summit of the Itshelejuba Pass, and when he tried to gear down he was unable to engage lower gears as the semi-automatic gear system did not accept his attempts at a manual change to a lower gear.

[55] The accused was unable to maintain his speed under the speed limit at this junction. It is for this reason that he was unable to stop at the mandatory stop for heavy duty trucks at the summit of the Itshelejuba pass.

[56] The evidence does not support this contention. When one approaches the stop sign at the summit of the pass, from a distance of about a kilometre the road declines then flattens out considerably where the Itshelejuba primary school is situated on the N2²⁹. The road is flat for a few hundred metres and the final approach to the stop sign is a slight but steady incline for about 500 metres. The stop sign is situated at the summit and thereafter a steep decline for approximately 3 km until the descent flattens slightly, with flat stretches and even slight inclines before descending further.

[57] Despite the issues with his vehicle as put to the witnesses the video clips being stopped almost frame by frame and the speed data recordings of the GPS tracking system capture a somewhat different picture of the accused's approach to the stop sign.

[58] Despite the accused's averments of the difficulties with his vehicle, by the time the accused drives up the hill towards the stop sign at the top of the pass his speed is as low as 42km/h, the vehicle accelerated up towards the stop sign reaching a speed of 49km/h immediately before it failed to enter the concrete truck lane but instead remained on the road and went past the compulsory truck stop and began its descent down the steepest and longest decline on the Itshelejuba Pass.

²⁹ Exhibit NN, photograph 2

[59] The video and speed data unequivocally shows that the fastest the vehicle was travelling from the informal truck stop referred to by the accused as Mabanini was 76 km/h and that point would have been as it entered the flat section adjacent to the primary school after a moderate descent from the point where the speed limit was reduced to 60km/h with a warning of a steep descent. The speed dropped quickly when the accused's vehicle got too close to a heavy duty truck transporting logs, as the vehicle began the moderate incline to the compulsory stop the accused's vehicle speed had reduced to as low as 42km/h.

[60] The vehicle then accelerated up the slight incline as it approached the summit of the hill. Despite road signs warning of the approaching compulsory stop and directing where a driver of a heavy vehicle should enter onto the concrete road leading to the stop sign, the vehicle remained perfectly within its lane with no attempt to enter onto this concrete lane and continued within its lane passing the stop sign and began its descent of the pass. At this juncture it is still following the heavy duty vehicle carrying logs.

[61] The video unequivocally shows no attempt by the accused to enter onto the slip road and stop at the compulsory stop.

[62] There is no visual evidence of any difficulties being experienced by the accused as he controls his vehicle at this point, there is no attempt to enter into the concrete road leading to the truck stop sign but on the contrary, as appears throughout the video, the accused displays a steady hand while driving, he accelerates to the summit at between 52 and 59 km/h³⁰ and then holds the speed at an average of 60km/h for 50 seconds on the steepest part of the descent. He travels in excess of 800 metres at this speed down the hill.

[63] Immediately after the stop sign there is a long steep descent of the pass, indeed it is by far the longest and steepest descent of the N2 in this area. In accordance with this fact there are road traffic signs indicating this and a sign

³⁰ Page 42 of exhibit EE read with the screen shots on page 63 of exhibit PP, crash report of warrant officer Snodgrass, read with the report of Suman Singh of the RTMC, Pages 95 and 96 of exhibit SS.

instructing drivers of such vehicles to engage low gear due to a steep descent for 4.2 km.

[64] The steepest part of the descent lasts approximately three kilometres. On the evidence of both the accident reconstruction experts, Singh and Snodgrass without brakes, a functional retarder and braking system the accused's vehicle would not have been able to maintain consistent speeds at this time, it would have become a runaway vehicle and would not have made it down the steepest part of the pass.

[65] The accused's vehicle travels approximately 830 metres down the steepest part of the descent retaining a constant gap between his vehicle and the truck in front of him at a time that the accused says he has no control of the brakes, retarder and cannot use the gears to slow the vehicle.

[66] At this juncture the accused's vehicle and the logging truck begin to steadily increase speed but the accused maintain a constant gap between his vehicle and vehicle transporting logs. The speed at which this descent was made was well in excess of the speed limit at this point the accused's vehicle is not in a low gear as would be appropriate for the road conditions. The speeds travelled by the accused and the log truck in front of him are well in excess of what might be termed ideal or expected. Despite the speed of the vehicles both drivers of the vehicle appear completely in control of their vehicles.

[67] Significant is that the accused in this descent is able to control his vehicle, maintains a safe following distance. Warrant Officer Snodgrass described the driving of both vehicles as being very skilled. When the steep descent is over he is able to maintain a speed of between 70 km/h and 79 km/h for nearly a kilometre.³¹ According to Snodgrass the accused is at this time completely in control of his vehicle he is able to both stop and slow down the vehicle as required by circumstances.

³¹ Page 43 of exhibit EE, 14h 06 minutes 03 seconds until 14h 06 minutes 53 seconds.

[68] On the descent of the pass the accused's vehicle reached a maximum speed of 96 km/h,³² where the pass flattens out the video clip shows that the logging truck is no longer in front of the accused. The accused's vehicle is now travelling at 82 km/h and that the road is quiet. The log truck has most likely been overtaken. At this point the accused has an unobstructed view southwards on the N2.³³

[69] The accused shortly thereafter steers the heavy duty vehicle so that it straddles the double barrier line on the N2 while travelling steadily at approximately 84 km/h. one sees two trucks approaching toward him and the accused's vehicle reduces speed in fifteen seconds from 84 km/h to 70 km/h on the flattest stretch of the pass. There is no indication of any difficulty in the execution of the manoeuvre with a quick reduction in the speed of the vehicle, this is so despite the fact that at the place where this occurs is a flat road.

[70] The accused traverses the steepest part of the pass with absolutely no indication of any loss of control of his ability to control the vehicle's speed or for that matter the vehicle.

[71] It is at this juncture that the accused for the first time arrives at major traffic congestion, as far as one can see the N2 is heavily congested particularly in the southerly direction towards Pongola. As far as the eye can see there is a queue of cars and trucks travelling slowly in front of him. This congestion is as a consequence of the earlier service delivery protest at Waterbas. As he approaches this traffic congestion there is no outward evidence that the accused is unable to control his vehicle or is in any difficulty whatsoever.

[72] The vehicle is travelling at a speed around 73km/h when he approaches this congestion which has a red motor-vehicle as the rear most vehicle, the accused some distance before he reaches this rear most vehicle travelling south directs his vehicle over the double barrier line into the right hand lane of the northbound traffic. The N2 at this juncture is a two lane road northwards.

³² Page 43 of exhibit EE at 14h 05 minutes 33 seconds

³³ Exhibit HH at 14h 07 minutes 01 seconds.

[73] As far the eye can see the N2 southbound is now heavily congested and traffic is slow moving. At this point the accused can see all the way to the spot where the collision occurred, he can also see the spot where the vehicles came to rest. Visible is where the road southbound has becomes moderately uphill and around this point the south bound lane become a two lane road. This point is shortly after the spot where the vehicles came to a stop.

[74] This congestion is confirmed not only by a visual observation of the real evidence of the video clip but also by the two video clips recorded by the cameras of the Minzo gas truck at the time of the collision between the accused vehicle and the Toyota LDV. The speeds recorded by the Minzo gas truck confirm that at the point of impact the Minzo vehicle was only travelling between 10 and 15 km/h.³⁴

[75] The real evidence shows beyond doubt that at the time of the overtaking of the red motor vehicle at 14h 07minutes and 40 seconds the southbound traffic was travelling slowly.

[76] The accident impact occurs 1.2 kilometres south of where the accused overtook the red motor-vehicle at 14h 08 minutes 25 seconds, 45 seconds after he crossed the double barrier line onto the fast lane or overtaking lane of the northbound traffic on the N2.

[77] The accused remains on the contraflow lane on the wrong side of the double barrier line until 3 seconds before the impact when his vehicle begins a move to the right into the emergency lane of the northbound traffic where it collides with the Toyota LDV. During this time there is no visible attempt of any kind to move back into the correct path of travel.

[78] The video clips taken from the dash cams of the accused's vehicle and the Minzo gas truck capturing the final 1.2 km of the accused's journey and the collision is difficult viewing. During the two clips, exhibits HH and JJ the accused's vehicle remains at all times in the oncoming path of traffic, travels at excessive speeds

³⁴ Exhibits KK and LL

reaching a highest speed of 105km/h ten seconds before the point of impact. The manner in which the accused's vehicle proceeded is extremely jarring and disturbing for any road-user to view.

[79] At point of impact the accused's vehicle was travelling at 91km/h, his speed reduced by 10km/h in the 10 seconds before the collision. A vehicle travelling at 105km/h travels at just over 29 metres per second, the Toyota LDV in which the 20 deceased were travelling entered onto the N2 approximately 200 metres from the point of impact, this is at most seven seconds before impact.

[80] Initially the video clips reveal that the road at the point of the first overtaking by the accused 1.2 km from the crash site, the N2 consists of two lanes northbound, one southbound with emergency lanes on both sides. The southbound traffic is confined to one lane by a double barrier line. This continues until 14h 08minutes 7 seconds when the road narrows in the vicinity of the Spekboom bridge to one lane in both directions. The vehicles collide about 16 seconds later.

[81] During this descent numerous vehicles are seen rapidly moving or travelling in the emergency lane to avoid the accused's truck. The accused passes two trucks who are travelling in the left lane of the northbound N2 before one observes a blue 'polo' vehicle on the right lane having just overtaken a truck, it swerves at an acute angle into the emergency lane narrowly missing the truck driven by the accused. A head on collision with the accused's vehicle which was travelling at a speed of 91km/h was narrowly averted by the driver of the polo.

[82] The descent continues until the road narrows into one lane in both directions. The vehicle increases speed, vehicles travelling northwards are required to drive in the emergency lane, there are two heavy duty vehicles travelling north in the emergency lane and as they pass the vehicles are extremely close. A Corsa bakkie is seen taking avoiding action into the emergency lane, three other motor vehicles hug the emergency lane to allow room for the accused's truck to pass.

[83] As the accused's vehicle completes a right hand turn we see for the first time the Toyota LDV carrying the deceased, it has entered onto the N2 from the rural

road at Godlwayo and is visible for the first time as it emerges next to a red trailer at 14h 08 minutes 20 seconds. Just over three seconds later the collision occurs, the driver of the Toyota LDV, the deceased in count 6 performs a sharp turn into his emergency lane in a futile bid to avoid the collision as the accused has steered his vehicle into the emergency lane. The Toyota LDV is prevented from driving off the road by an Amco barrier. The accused's vehicle is travelling at 91km/h when the vehicles collide.

[84] The Toyota LDV is trapped under the bakkie, it remains lodged under the front of the accused's truck, the bin of the Toyota LDV is dislodged and flies off, the accused's motor vehicle with the bakkie still lodged under the front of the cab pushes the trapped Toyota LDV approximately 240 metres up the incline.

[85] After impact the accused vehicle initially travels slight right hits the pavement and is diverted left back into the road. It goes across the N2 narrowly missing two trucks, traverses the dirt rural road travelled upon by the deceased, knocks over a stop sign, hits the culvert and goes into the drainage ditch where it comes to a rest just more than 30 metres south from the road, opposite the home of Mrs Makhowane.

[86] At the time it struck the culvert it was still travelling at 45km/h up the hill. As it strikes the culvert there are images of three children been flung from the bin of the Toyota LDV like rag dolls, it is a most disturbing visual. All 20 occupants died, 19 on the scene and one died later at hospital.

[87] A few seconds after the truck comes to a stop, the accused is running southwards away from his vehicle, initially he is on the pavement some ten metres from the road, but enters onto the N2 trying to flag a truck with red trailers down. He is followed closely by a female running after him, we now know she was a passenger in the truck at the time of the collision.

[88] Ayanda Mkhwanazi is a qualified mechanic from Richards Bay who works for Ndwandwe Trucking. He sometimes does freelance work for the accused's employer

on an ad hoc basis. He was at Pongola attending to a truck that had an issue and was parked at the Puma Garage in Pongola the day after the accident.

[89] Between 11:00am and 11-15am the accused approached him at the Puma Garage which is situated on the northbound side of the N2. Mkhwanazi was surprised to see the accused as he thought he had died during the collision the previous day. The accused reported to Mkhwanazi that he had run out of brakes.

[90] Mkhwanazi contacted his employer a Mr Ndwandwe, the accused also spoke to Mr. Ndwandwe, and shortly afterwards the accused's employer Masinga called Mkhwanazi. The accused spoke to his employer for about three minutes. Thereafter Masinga spoke to Mkhwanazi and asked him to assist in taking the accused to the station.

[91] On arrival at the police station in the community centre³⁵ the accused surprised Mkhwanazi when he informed a police officer that 'we' were the owners of the truck and that he we required some items from the truck. The police office told them the matter was very serious and took them to a private office. On questioning in the office the accused repeated that they were the owners and required items from the vehicle.

[92] A police officer then informed them that the matter was extremely serious as people had died in the accident and that the items sought could not be returned at this time as they might be evidence in the matter. The officer informed them that in all likelihood they were all going to be arrested and that it was the driver who has to explain.

[93] Mkhwanazi found the situation very unpleasant, fearing arrest he outed the accused as the driver to the police. The accused, then for the first time acknowledged this fact to the police, shortly thereafter he was arrested.

The Vehicle Examination

³⁵ Previously referred to as the charge-office

[94] Warrant Officer Snodgrass and Suman Singh of the RTMC³⁶ did not do a mechanical examination of the accused's vehicle, they only did a visual examination of the vehicle, even from that visual examination they could see issues with the brakes, in respect of the engine and suspension a visual examination revealed no defects.

[95] Constable Makhanya of the Durban Accident Combating Unit did a detailed brake examination of the truck and trailers of the accused vehicle but confined himself to a visual examination of the engine, suspension and gearbox. His key findings in respect of the visual examination are:-

1. The steering and suspension components showed no defects other than those sustained as a consequence of the collision.
2. The tyres and rims complied with legal requirements³⁷ both on the trailers and the truck.
3. Rear and front suspension was legally compliant and in good working order.
4. There was no indication by way of oil leaks to any major engine issues.

[96] A more detailed examination of the brakes was undertaken on both the truck and the trailers. The brakes were not well maintained and did not comply with Regulation 149 (9a) (b) (1) of the NRTA.³⁸ On the right rear axle of the truck there was no disc or brake pad fitted, this wheel had no braking capacity.

[97] The brakes and the trailers were not in good condition, suffering from the same malady, poor maintenance of the brakes and signs of wear and tear caused by over use. Makhanya concludes that the brakes were non-compliant, defective and in

³⁶ Road Traffic Management Corporation

³⁷ NRTA 93/1996 Regulation 212(J)

³⁸ Act 93 of 1996

a generally poor condition. There were signs of excessive wear on some brake shoes.

[98] Importantly the emergency brake line and service brake were undamaged. He observed the tampered rear trailer wheel bypass performed by Buthelezi that rendered that wheel inoperable from a braking perspective. The history of the smoking and burning was evident on the right rear wheel where the bypass procedure was done.

[99] A wheel attached to the second rear axle had no brake pad fixed, there was bonding material present from the steel to steel friction. Three of the 14 wheels had no or almost no stopping capacity. Also significant was that the brake air tanks (reservoir) was not contaminated, even after the accident it was not leaking. The brake master cylinders were without damage and no leaks could be seen.

[100] During his examination he directed braking pressure to the truck and both trailers, all emergency brakes, service brakes and park brakes responded positively. There was no complete brake failure, the brakes were defective with diminished stopping power but overall notwithstanding three wheels of fourteen had no brakes, the brakes had stopping power and there was no evidence of complete brake failure. If there had been there would have been evidence of binding, evidence of associated heat and smoke damage, there was therefore no evidence of complete brake failure.

[101] On test the brakes engaged, the mechanical examination of the vehicle reveals a compromised braking system not a failure, the emergency and service brakes air booster and line are all intact which suggests that Makhanya's evidence that there was no total failure of the brakes is reliable.

[102] In his original report Makhanya made a preliminary finding that the evidence suggested mechanical failure as a possible cause or contributing factor to the collision as this truck had suffered a brake failure. In context this preliminary conclusion must also be seen in light of his own test after the accident found that that the braking mechanism, even though with diminished capacity, on test worked.

[103] Makhanya after watching video footage of the incident filed a supplementary report in which he confirms:-

1. By defective he means non-compliant with the regulations which makes them unroadworthy in terms of legislation.
2. Without knowledge of the accident he believed that under normal operating conditions the brakes might have been responsible for the collision.
3. The brakes did not fail.
4. The vehicle had stopping power even if diminished.
5. Watching the video he believes if the driver had used brakes the vehicle would have slowed.
6. There is no evidence either on the video of any overheating of brakes other than on the tyre brake that had been tampered with.

[104] Before the state closed its case the state, without objection, handed in the record of the bail application of the accused.³⁹ This application was heard in the Pongola Magistrates court on 16 January 2023 and a transcript of when the accused gave his evidence was handed in.

[105] These proceedings are of significance when the accused gave his evidence and was cross examined and I will refer to the bail application when the evaluation of the evidence is undertaken.

[106] It suffices to note at this time that the defence confirmed that there was no objection to the handing in of this portion of the proceedings, they had scrutinised the proceedings held before the learned magistrate Mrs S Barnard, and that the

³⁹ Exhibit UU

accused's rights against self-incrimination, and that the proceedings may be admissible in any subsequent trial had been explained to him fully. Mr Marimuthu acknowledged that the admissibility of these bail proceedings 'could not be challenged'.

Defence Case

[107] The accused testified in his defence, his evidence in chief and cross-examination took a week to complete⁴⁰. Although the passenger was present at court Mr. Marimuthu advised the court that he did not call her to give evidence as she could take the defence case no further.

[108] I will briefly summarise the accused's evidence at this juncture and will generally deal with the cross examination of his evidence during the evaluation of the evidence as a whole.

[109] The accused confirms his employment at BaoBao with Mr. Masinga as his employer but his immediate supervisor was Thomas Mfundo. He confirms that on 16 September 2022 he left from Ikoti mine in Mpumalanga for Richards Bay at around 8-30am. He was in the company of a female relative, Lucanda Zulu, who he had picked up at Mkuze the previous day when he returned from the coal terminal at Richards Bay. She had a job interview in Mpumalanga and he was giving her a lift despite it being strictly against company policy.

[110] She did not attend the interview, the accused only completing his journey to Ikoti Mine at 01:57am and he left for the Richards Bay coal terminal with her in the truck at 08-30am.⁴¹ I am not quite sure when she was supposed to attend an interview on these time constraints. The accused later denied switching off his vehicle at the mine at this time but the incontrovertible evidence of the Autotrak system shows he is wrong on that score. The data was admitted as correct at the commencement of the trial.

⁴⁰ Accused began giving his evidence at 10-30am on Monday 29 April 2024 and completed re-examination on Monday 6 May 2024. 1 May 2024 is a public holiday.

⁴¹ Exhibit EE, Page 11.

[111] He was descending a hill shortly after he left Ermelo when he noticed smoke from the rear trailer, he extinguished the fire. A van stopped and told him he knew what needed to be done, he went under the vehicle and completed a 'repair' and the accused paid him R30-00. He sent the photographs of the repair to Thomas who advised him to go to CJ, the mechanic in Piet Retief for him to do what was necessary.

[112] Shortly thereafter the problem repeated when he descended another hill only with more smoke and heat. He used fire extinguishers to put out any fire. He took a video and pictures and sent them to Thomas. Thomas told him to go to Piet Retief which was about 40 km away to see CJ but before he could do so a mechanic pulled in behind him. The mechanic was Mfundo Buthelezi and he inspected the problem, liaised with Thomas who effected the agreed payment of R300 for the repair.

[113] The repair appeared to have solved the problem and the accused descended a steep hill with no issues. Shortly thereafter he was advised by Thomas to proceed to Richards Bay and not take the vehicle to the mechanic CJ .

[114] He had no further issues on the road until he arrived at the informal truck stop where he heard that the N2 was closed due to protest action. As he was going to have a rest in the cab he placed a tape over the lens of the camera as he did not want to be seen shirtless by his employers as that would have consequences for him.

[115] Having a travelling companion with him for the entire trip does not seem to concern him despite it being strictly prohibited by the company. He was resting in the back when he noticed that the vehicles had started to move as the N2 had been re-opened. He jumped into the driver's seat without putting his shirt on and without removing the tape on the internal camera.

[116] Two hundred metres after the turn off to Nthuthuko, still some distance from the summit of the Itshelejuba pass, at a spot where there is a speed warning for trucks not to exceed 60km/h he became aware of problems with his truck. He tried to engage his retarder but he could not feel it 'engage or grip'. There was no reduction

in speed when he did so in accordance with what normally happened when he applied the retarder.

[117] As he approached the mandatory stop for heavy duty vehicles at the top of the Itshelejuba Pass he tried to engage his brakes to stop the vehicles but they did not slow the vehicle down at all. He then tried to manually engage a lower gear but that also failed. He could not stop and therefore crested the summit of the pass and began the steepest part of the descent towards Pongola.

[118] At this point he noticed his speedometer was fluctuating and shaking so that he could not ascertain the speed he was travelling, later on when taxed as to the generally excessive speeding depicted on the Autotrak recordings he stated that the speedometer had been dysfunctional for some time. This dysfunctional speedometer was the reasons for the vehicle travelling in excess of the speed limit during the recorded time, as he does not usually speed.

[119] He manages to control the truck down the steepest part of the pass and where it flattens slightly he sees a red motor vehicle travelling slowly in the southbound lane of the N2. He is now in a state of panic. He sees the northbound lane is clear at this time and goes into the contraflow lane of traffic across the double barrier line. He is constantly warning oncoming traffic by flicking his lights and pulled his handbrake in order to jack-knife the truck in a bid to stop it, but nothing worked.

[120] In the final few seconds before the collision he saw the Toyota LDV and it was still in his path of travel. He tried to move to the northbound emergency lane to avoid the collision. It would appear that simultaneously the driver of the Toyota LDV as most drivers would do sought the sanctuary of his emergency lane, the two vehicles collided and came to rest just over two hundred and twenty metres up the hill on the N2.

[121] When he jumped out of the vehicle on the passenger side he went around the front of the truck and saw people lying injured, went to the driver's side and saw more bleeding and injured people. He was afraid he would be harmed or killed, so he

tried to flag down a passing truck but it would not stop. He then along with his passenger fled the scene.

[122] He tried to get assistance from people to get clothing, hid in a cave and eventually ended up at his uncle's home. He was unable to immediately go to the police as he had no way of getting to the police station.

[123] The next day he met Mkhwanazi, thereafter he spoke to his employer Masinga but denied that Masinga told him to go and report the matter. He went to the police station and almost immediately after they were taken to a private room reported that he was the driver. He disagrees with Mkhwanazi's detailing of the manner of his arrest.

[124] After the cross examination had been completed the defence admitted the statement of Mfundo Buthelezi who was the person who did the brake by-pass on the trailer. Despite the best efforts of the parties and the SAPS he could not be found. Although it was suggested that with the state having no objection it should be admitted in terms of section 3 (2) of the Law of Evidence Amendment Act, 45 of 1988, the correct section is 3 (1) (a).⁴²

Issues to be decided

[124] I am not going to set out what is common cause, the state's evidence is exhaustive of any dispute as to what actually occurred on 16 September 2022. A 55 ton truck was on the wrong side of the road for 1.2 kilometres going at dangerously high speeds until it struck a scholar transport vehicle with catastrophic consequences, killing all 20 occupants.

[125] The key issue on what the prosecutor referred to as the main counts is:

Did the accused vehicle suffer mechanical failure that rendered his ability to slow or stop his vehicle futile, or put colloquially was this a 'runaway vehicle'?

⁴² Hearsay evidence section 3 (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings.

[126] if this answer is positive, then secondary issues need to be considered in respect of whether the accused's conduct as the driver prior to the vehicle becoming uncontrollable warrants a criminal sanction.

[127] In the event of the court finding that this mechanical failure did not occur and that the accused volitionally embarked on this path of driving in the manner he did, then a further legal question needs to be answered, do the facts found proved justify a finding, as the prosecutor has argued, that the accused had 'legal intention'⁴³ to commit the offence.

[128] In respect of count one, if no mechanical failure is found to have occurred then the accused is fairly obviously guilty of reckless driving, in fact Mr. Marimuthu who appears for the accused has conceded that the evidence properly evaluated shows that the accused deliberately did not stop at the mandatory stop sign at the summit of the Itshelejuba Pass.

[129] In respect of the second count of failing to report and/or render assistance in accordance with the duties of a driver involved in an accident two questions arise; the first is did the accused flee the scene out of necessity as his life was in danger or is it as the prosecutor put it the 'classic hit and run' scenario. The second question is did the accused go to the Pongola SAPS to report the matter as statutorily a driver is required to do, or was he at Pongola SAPS to retrieve items he had left behind?

Legal Representative Submissions

[130] The prosecutor, Mr Shah has sought a conviction on all counts as charged. He submits that the condition of the brakes played no role in the collision at all. The accused's driving conduct is what caused the collision. The empirical evidence suggests that the accused was in a hurry that day motivated in all likelihood by his wage structure. His submission is that the manner the accused drove in the immediate lead up to the collision satisfies the test for *dolus eventualis*.

⁴³ *Dolus Eventualis*

[131] In response to the argument that the accused was faced with a sudden emergency he argued that even if this had happened which he disputed, the accused's evidence is that he was aware of the deficiencies of the vehicle he therefore cannot escape culpability, even if on a lesser charge.⁴⁴ Due to the view I take of the matter it is not necessary to deal with this issue in any detail.

[132] Mr. Marimuthu for the accused has correctly conceded that the accused was not a good witness and in particular his evidence in court conflicts to such a degree with the evidence he gave in the bail application, that the differing testimony is simply irreconcilable. The concession is fairly and correctly made. Similarly, he conceded that the accused's evidence of why he failed to stop at the mandatory stop at the summit of the pass cannot be sustained.

[133] His argument is that notwithstanding the accused's unsatisfactory evidence the state has not proved beyond reasonable doubt that the accused's braking system, which includes the malfunctioning retarder and gearing system did not fail. As the state has not proved this, at best for the state the accused might be guilty of culpable homicide.

[134] Mr Marimuthu is of the view that the binding nature of the SCA judgment in *Humphreys*⁴⁵ precludes a finding of guilty on the murder counts. The facts of this matter, in his submission, does not satisfy the test for *dolus eventualis* as set out in *Humphreys*.

Onus

⁴⁴ The doctrine of sudden emergency does not apply where — (a) the emergency has been created by the negligence of the person who is raising it as a defence. So the defence has been rejected where, e.g. through his own negligence a driver failed to see timeously a pedal cyclist who suddenly appeared in the road ahead of him; (b) a person's conduct has not been dictated by a "position of imminent personal danger" or has had an opportunity for "deliberation and conscious decision", e.g. when the driver on the correct side of the road, on seeing a vehicle approaching on its incorrect side of the road, drives onto his incorrect side of the road when he is not in danger; (c) a driver has had warning of the emergency that subsequently arose. For example the defence of sudden emergency did not prevail where a vehicle's lights had failed shortly before a collision but the driver had had a warning that they were defective; likewise, where a driver's vision was impaired by smoke which was being blown across the road ahead of him. Footnotes omitted. Coopers Motor law. chapter B11 Offences at B11-26

⁴⁵ *Humphreys v The State* (424/12) 2013 ZASCA 20 (22 March 2013) *S v Humphreys* 2013 (2) SACR 1 (SCA)

[135] The court when evaluating the evidence must consider the totality of the evidence in order to decide whether or not the guilt of the accused has been proved beyond reasonable doubt. It is trite law that the burden of proof rests on the State to prove the guilt of the accused beyond a reasonable doubt.

[136] The approach is that the onus rests upon the State to prove the accused's guilt beyond a reasonable doubt and the corollary of that is that if the accused's version in the light of all the evidence on record is reasonably possibly true and an innocent explanation then he is entitled to an acquittal.⁴⁶

[137] It suffices if he gives an explanation, even if the court does not believe him, if it is reasonably possible true, then he is entitled to an acquittal; In the matter of *S v Van Der Meyden*⁴⁷ it was held that:

‘The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocentⁱ. These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. Evidence must be evaluated in light of all the evidence and not compartmentalised’.

[138] In *S v Hadebe and Others*⁴⁸ the SCA the said the following:

‘The question for determination is whether, in light of all the evidence adduced at the trial, the guilt of the appellants was established beyond a reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful

⁴⁶ *R v Difford* 1937 AD 370 especially at 373, 383

⁴⁷ 1999 (2) SA 79 (WLD) at 80H-81C

⁴⁸ 1998 (1) SACR 422 (SCA) at 426f-h

aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubt about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgence approach is appropriate when evaluating evidence. Far from it there is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees’.

[139] In *S v Chabalala*⁴⁹ the Supreme Court of Appeal reiterated and endorsed this view that:

‘A court must take into account the ‘mosaic of proof’ and the probabilities emerging from the case as a whole in determining whether the accused’s version was reasonable possible true. It is trite law that a trial court must “weigh up all the elements which points towards the guilty of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt’.

Analysis

[140] The state’s evidence is largely common cause in this matter, voluminous and in pain staking detail. The prosecution has in immense detail painted a full and comprehensive picture of the driving of the accused on that fateful day. The canvas in intricate detail shows the accused as a person who is perpetually in a hurry, he works 16 days back to back because he works on an incentivised payment program, the more loads of coal he delivers the more he earns.

⁴⁹ 2003(1) SACR 134 (SCA) at 139 i-140a.

[141] His employer confirms he was on an incentivised scheme at work largely being paid per load which is unchallenged during cross-examination.

[142] On the figures supplied in the middle of the month he is already exceeding the wages he was paid when he worked a 45 hour per week for a salary and a subsistence allowance. This is perfectly illustrated by the record of his travels contained in the Autotrak GPS vehicle report, he drove through the night to Ikoti Mine near Ermelo only switching his vehicle off at two minutes to midnight. At 8.30 am he is on his way again thereby preventing his relative from keeping her job interview appointment. He is clearly a man in a hurry.

[143] The manner of his driving substantiates this, he is continually at regular intervals exceeding the speed limit, on occasion by more than 40 km/h. The examination of his brakes are consistent with bad driving habits consistent with speeding. Speed tracking confirms that the accused readily and frequently drove his motor vehicle in excess of the speed limit, he exceeded 80km/h 381 occasions, in excess of 90km/h on 70 occasions, exceeded 100 km/h on 19 occasions, over a short period of time.

[144] On four occasions he exceeded 120km/h. When confronted with these facts the accused's response is to blame a faulty speedometer, faulty idling all raised as an afterthought late in the trial. In his bail application he maintained that when his vehicle started down the pass his speedometer was past 120 km/h, the faulty speedometer was clearly yet another fabrication made to counter the suggestion that he deliberately broke the speed limit.

[145] In an effort to distance himself from the suggestion that the accused's driving was motivated by his desire to complete trips as quickly as possible in order to maximise his earnings, the accused when he gave evidence denied that he was paid per trip completed. The lie was exposed when he was cross examined on the contents of his evidence he gave in the bail application in which he confirmed that he was paid per trip completed and he is the one who told the court the amounts he was paid on completion of a trip.

[146] There are many examples of where the accused tries to adjust his sails to the changing gusts of the winds of the state case but this deceit is exposed during the cross examination, to the extent that there is a concession by the defence that the accused's evidence cannot be accepted on many aspects. His evidence and credibility receded to a very low ebb, he was both argumentative and fundamentally dishonest.

[147] A key point in the state's case is their contention that the accused deliberately did not stop at the mandatory truck stop at the summit of the Itshalejuba pass. Their contention as testified to by various experts that if he had stopped at this stop sign, engaged a low gear and proceeded down the steepest three km of the pass in low gear this accident could not have happened. In a rather strange turn of events the accused tried to convince the court that as the vehicle accelerated up a fairly long slight incline after traversing a flat section near the Itshalejuba Primary School, this was due to the weight of the coal behind him pushing him, thereby defying gravity.

[148] The real evidence shows the accused gently accelerating up the incline from a low speed of 42km/h until he crests the summit of the pass at 59km/h. his vehicle is completely steady, there is no attempt to access the concrete road leading to the stop sign and no indication whatsoever of any distress. This is so despite the accused telling the court that at this time his retarder had failed shortly before, his brakes had failed on the incline when he tried to slow to enter the concrete road leading to the stop sign. He tried to manually gear down but failed, at the time he crested the summit he was steering a runaway vehicle, he had no means available to him to stop the vehicle other than gradient.

[149] He had forgotten that he had told the court in his bail application that the first time that he had a hint of any stopping issues was when his braking was compromised as he indicated to turn left into the compulsory stop. He was then overtaken by a quantum and after it passed he moved back into the lane. None of this is visible on the video, the evidence was dishonest and also contradicted his evidence in court.

[150] His mendacity on this aspect was fully exposed during the cross-examination of the accused. His version is irreconcilable with the video of his ascent to the top of the summit, the speed data of the first 800 metres of the descent where the vehicle was held at between 60 and 64 km during this time is a sure and completely reliable indicator that this speed had been maintained in all likelihood by the gear he was travelling in or by a properly operating braking system. There can be no other conclusion.

[151] The experts are ad idem that if the accused had been confronted by such a situation a runaway truck would not have managed the first few bends of this steep descent before spiralling out of control, yet his vehicle after travelling just more than 800 metres down the steepest part of the descent is still only travelling at 60-64 km/h and retaining the same distance between himself and the log truck in front of him. This is impossible without having complete control of your vehicle including the ability to stop the vehicle. The concession by the defence that the accused's version is not acceptable on this aspect is correctly made.

[152] The prosecutor has argued that the accused has continually adjusted his evidence to 'suit the pinch of the shoe', nowhere is this more obvious than when being cross-examined about his gear issues the accused indicated that the LCD screen was not working and he was unable to see what gear he was in. This is another clear example of the accused willing to conjure up explanations when he has difficulty accounting for the factual reality of his conduct.

[153] After the descent down the steepest parts at which time the speed rose to a maximum speed of 96 km/h and then slowed slightly to 94 km/h, he is then in 20 seconds able to reduce his speed to 73km/h. this is a strong indicator that the accused is fully in control of his vehicle. Indeed, the various videos all show that the accused was fully in control of his vehicle, he has a steady hand in the approach to the stop sign at the top of the Itshelejuba pass and the descent although at inappropriate speeds displays skilful and confident driving.

[154] A further strong indicator that the accused was fully in control of the vehicle and able to control its speed is seen when the accused directs his vehicle to straddle

the double barrier line at a point when the road is very quiet. The road northbound is two lanes. Two trucks abreast can be seen approaching the accused returns to his lane without difficulty and going back into his lane and is perfectly capable of reducing his speed from 83km/h to 72 km/h within a short space of time.

[155] The accused describes a frenetic panic in the cab, he was on occasion trying to stand on his brakes, engaging and disengaging the retarder, trying to engage lower gear, even trying to pull the emergency handbrake all to no avail. None of this is supported by the real evidence of the video clips or in the speed data which at this juncture shows swift decreases in speed which would simply not be possible if the vehicle was in the condition he says it was. The video shows a remarkably steady hand on driving; not consistent with the wild panic that the accused describes.

[156] The defence that the accused's braking systems had completely failed him at this time is rejected as, on a conspectus of all the evidence at this point, as false beyond doubt.

[157] It is at this juncture that he approaches the heavy congestion in the south bound lane and he can see that this build up of traffic continues for a considerable distance. The Accused moves his vehicle into the oncoming lane deliberately allowing plenty of space between himself and the red car. He can see a considerable distance down the road including the spot where the collision takes place, the point where his vehicle stopped after the collision and 100 metres thereafter where the N2 south bound becomes two lanes. Once again he is going to be delayed on his trip to the coal terminal. He overtakes and accelerates.

[158] For 1.2 km the truck is on the wrong side of the road accelerating and passing the slow moving southbound traffic with not a single attempt to try to move into the left lane. The vehicle travels almost perfectly steadily in the right lane of the northbound traffic. There is no reliable evidence of him hooting or flicking his lights warning other vehicles of his difficulties.

[159] Vehicles move to the left to get out the way, there are near misses and shortly after the N2 narrows to one lane the collision occurs in the emergency lane of the

northbound traffic. When questioned about what he foresaw when driving on the wrong side of the road the accused stated that he foresaw the possibility that he might collide with vehicles travelling northbound. He conceded that cars might not see him due to the curves in the road, due to being behind other vehicles and that vehicles turn onto the N2 from the rural roads. He said that driving a 55 ton coal truck like his, in these circumstances, that if a collision occurred the results might be catastrophic including the loss of life.

[160] Mr Marimuthu has argued that despite the accused's performance as a witness the state has not proved beyond reasonable doubt that the accident was not caused by brake failure at the moment critique. He argues that no mechanical examination of the engine and gear box was not done, reliance been made instead of a visual inspection that everything appeared in order.

[161] One cannot look at the issue of complete mechanical braking failure including the loss of the use of the retarder and inability to engage gears manually in isolation. It is correct that no mechanical examination was done of the gearbox or the engine to check if the retarder malfunctioned, in a perfect world it would have been done as Makhanya testified the state does not generally do those examinations nor do they have the equipment to do so.

[162] Whereas the brakes were defective the evidence of all three reconstruction experts was the same, the vehicle and trailers appeared in reasonably good condition other than the brakes that were defective. Importantly the brakes showed no sign of recent stress caused by the friction of heavy braking as described by the accused. On examination the brakes still worked there was no complete failure of the operating system, under test the mechanism worked. Seen in the context of the real evidence there is no evidence of braking being the cause of the accident. The only evidence on record suggesting that the accused's brakes failed comes from the unreliable evidence of the accused. More importantly, on a conspectus of all the evidence, there is absolutely no evidence of brake failure or engine problems affecting the retarder.

[163] His evidence is unreliable, riddled with deceit and mendacity. He never tried to take the court into his confidence at all he tailored his evidence and contradicted the evidence he gave under oath at his bail application. He was argumentative, did not want to answer simple questions directly, despite being repeatedly asked to do so.

[164] His passenger Lucando Zulu was present at court on the day the accused's cross examination was completed. The defence consulted with her and declined to call her to give evidence. Mr Marimuthu advising that after consultation she could take the accused's version no further.

[165] As this person was supposedly in the truck at all material times in this matter one would have expected her to be called as a witness. She was a few feet from the accused and would have been able to testify exactly what the challenges were that he faced. In *S v Mulaudzi*⁵⁰ the court said, 'Each case must be considered on its own merits, but, for the court to draw an adverse inference against an accused from his failure to call a witness, the availability of the specific witness at the trial must be properly investigated. Furthermore, circumstances must be such that the adverse inference should be a matter of logic. The trial court must come to the conclusion that a reasonable man would really have expected the accused under the specific circumstances to have called the witness, the witness being available'. The failure to call this witness, on the facts of this matter does not redound to the benefit of the accused.

[166] The correct approach is to assess on a conspectus of all the evidence led whether or not the state has discharged the onus that rests upon it. In this matter on the key issue of whether a completely malfunctioning braking system was responsible for the collision serves to be rejected as false beyond doubt.

[167] The full gamut of the evidence paints a compelling mosaic of proof that there was no mechanical failure at that accident, the only evidence suggesting otherwise is the self-serving discredited evidence of the accused. To surmise that he may have

⁵⁰ 1982 (1) SA 193 (V)

had a belated mechanical failure not consistent with any of the evidence presented and after he has been found to be lying on nearly every material aspect cannot be accepted, it would be unwarranted conjecture⁵¹.

[168] I am satisfied that the state has proved beyond reasonable doubt that the accused's manner of driving of the coal truck on the N2 was not at any stage as a direct result of complete brake failure. The reduced braking capacity of the 55 ton vehicle played no role in the accident.

[169] I turn to the second count, which encompasses the following alleged failures on the part of the accused after the accident:

- (a) failed to ascertain the nature and extent of any injury sustained by any person; and/or
- (b) failed to render such assistance to the injured person as he may be capable of rendering; and/or
- (c) failed to ascertain the nature and extent of any damage sustained⁵²; and/or
- (d) failed to report the information referred to in (a) above and to produce his driver's license and identity number to a police officer at a police station within 24 hours of the accident.

[170] On counts (a) to (c) the accused's version in court initially, was that he went to the front of the truck where he noticed injured children bleeding, went to the driver's side of the truck where he saw a similar picture. He was traumatised, fearing for his life he fled. In his bail application he stated that people in the vicinity threatened him

⁵¹ *S v Mlambo* 1957 (4) SA 727 (A) at 738 C dissenting judgment of Malan JA approved in *S v Nkomo* 1966 (1) SA 831 (A) at 833 D-F; *S v Rama* 1966 (2) SA 395 (A) at 401 B-C; and *S v Sauls and Others* 1981 (3) SA 172 (A) at 182 H - 183 B: 'Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.'

⁵² Paragraphs (c) and (d) are repeated, seemingly in error in the indictment.

and that is why he fled the scene. The real evidence reveals something entirely different, he did not come to the front of the truck nor for that matter to the driver's side but rather that he fled immediately and with respect with indecent haste. No person on the scene had time to engage with him, he left the scene immediately. It is, as the prosecutor has stated, a classic hit and run.

[171] The real evidence reveals that within 3-4 seconds of the accused exiting the truck he is seen 10 -15 metres in the front of the truck on a dirt road or path that is some five metres from the truck. He immediately tries to jump onto a passing truck in order to escape, he is seen gesticulating for the driver to allow him to board the truck. Once again he has sought to deliberately mislead the court.

[172] In respect of the offence of failing to report to the police within 24 hours of the accident and produce your driver's license and identity number, which are statutory requirement of motorists and common knowledge. The state led a neutral witness Mkhwanazi, his evidence is single evidence and the evidence needs to be approached with caution and only accepted if on a careful scrutiny of the evidence and probabilities of the matter found to be clear and satisfactory in all material aspects⁵³ or put differently that after an analysis of the evidence the court must be satisfied that the truth on this issue has been told⁵⁴.

[173] Mkhwanazi's evidence is clear and satisfactory in all material respects, his evidence was not damaged at all on this aspect, it is probable and is consistent with Masinga's evidence pertaining to discussions held at the Puma Garage. The accused's evidence is improbable, his mendacity assists in the rejection of his evidence that he immediately told the police he was the driver. The reliable evidence on record suggests that the accused tried to retrieve his driver's license and personal documents including the mother of his child's bank cards rather than report that he was the driver.

⁵³ Section 208 of the CPA provides: 'An accused may be convicted of any offence on the single evidence of any competent witness'- *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-C; see also the various cases where *Mthethwa* has been cited with approval.

⁵⁴ *S v Sauls and Others* 1981 (3) SA 172 (A)

[174] The degree to which the accused would choose to lie to the court rather than tell the truth is probably best illustrated by his evidence in respect of a bank card found in the truck by the SAPS. The prosecutor asked him twice whether he knew a Miss N Mkhwanazi, he denied any knowledge of her but when her bank card was shown the accused acknowledged that she was the mother of his child, the same child he said he was supporting in his bail application.

[175] I accept the evidence that the accused when he went to the police did not report an accident he was involved in but tried to pass himself off as one of the owners of the company at Pongola to retrieve documents from the cab of the truck. In its totality, where the accused's version diverges from that of the state on this issue it falls to be rejected as false beyond doubt.

Facts found proved

[176] In order to correctly apply the test for legal intention that follows inferential reasoning becomes important, it is necessary to, in some detail set out the proven facts.

Beyond reasonable doubt the state has proven:-

1. The accused was employed on an incentive based salary package and was paid in accordance with trips completed.
2. He was paid more for trips transporting loads of coal from Mpumalanga to the Richards Bay Coal terminal than for an empty return.
3. If he had completed the trip on 16 September 2022 he would have been due payment that exceeded the amount due in terms of the original employment contract of R12500 by R4000-00 with 14 days remaining in the month.
4. The number of trips made in the month, the limited time he slept and the speeds he travelled, throughout the GPS recordings of the

excessive speeds recorded are ample proof that the accused was in a hurry to complete trips in order to maximise his earnings.

5. The removal of his front number plate was to avoid speed timing law enforcement.
6. His haste to re-join the N2 once it had re-opened vindicates this conclusion.
7. On the approach to the mandatory stop there was no mechanical issue affecting his driving.
8. He was fully in control of his vehicle and capable of reducing speed within a short space of time.
9. He made a clear volitional choice not to stop at the mandatory stop at the top of the Itshelejuba pass.
10. He crested the pass at 55-60 km/h and held the speed to no more than 64 km/h for just over 800m down the steepest part of the pass.
11. He accelerates when the truck that has been in front of him does so, but maintains a safe constant distance behind this log carrying vehicle despite excessive speeds.
12. The video clips justify Snodgrass's opinion that the accused is a skilled driver.
13. At the bottom of the steepest section he is able to reduce his speed swiftly to 73 km/h.
14. At this point there can be no doubt there is no failure of the retarder, brakes or an inability to properly gear the vehicle appropriately.

15. The brake examination shows defective brakes not compliant with the regulations in the NRTA but there no signs of complete failure or residue consistent with excessive use of brakes consistent with someone 'standing' on their brakes.
16. Subsequent to this the accused makes a conscious volitional decision to straddle the double barrier line, he is able to easily move back into the correct lane of travel when confronted by two trucks abreast in the northbound lane.
17. Just over 1.2 km before the collision he could see heavily congested traffic traveling very slowly.
18. He make a clear volitional decision to deliberately overtake the red car crossing the double barrier line into the right hand lane of the northbound lane of the N2 which is two lanes northbound at this juncture.
19. He then accelerates his vehicle to dangerously high speeds, reaching a maximum speed of 105km/h.
20. The accused remains in this lane until 3 seconds before the collision where his vehicle entered into the emergency lane for northbound traffic and struck the deceased's vehicle travelling at 91km/h.
21. He drove his vehicle in the northbound lane at all times, even when the two northbound lanes merged into one near the Spekboom bridge.
22. He never once attempted to go back into his lane.
23. There is not one instance where it appears that he indicated to the traffic around him of any distress.
24. For 45 seconds, or 1.2 km there are numerous incidents of vehicles taking evasive action and near misses occurring.

25. There are absolutely no signs of distress emanating from the accused's vehicle, he maintains a steady line completely at odds with his description of events and his struggles.
26. I find mechanical failure and for that matter the mechanical deficiencies of the vehicle played absolutely no part in the accident.
27. The cause of the collision was the deliberate volitional act of the accused in deciding in the most dangerous of circumstances at deliberately high speeds in order to overtake the congested traffic going south that was caused by the service delivery protest at Waterbas.
28. The accused has failed to take the court into his confidence as to why he did this.
29. 1.2 km later or approximately 45 seconds later he collided with the vehicle transporting the deceased in the emergency lane of the northbound path of travel of the N2.
30. The driver of the Toyota LDV was unlicensed but is in no way responsible for the accident.
31. When he saw the accused on the wrong side of the road he, in the circumstances, did what any driver would have done and sought the sanctuary of the emergency lane.
32. The Amco steel barrier did not allow him to drive off the road completely, he quite simply had nowhere to go.
33. At impact the accused was travelling at 91km/h.

34. The Toyota LDV was trapped under the front of the truck and pushed back some 220 metres until they hit a culvert and came to rest in a drainage ditch.
35. A short distance after the point where the vehicles came to rest, further along the moderate incline the N2 southbound becomes two lanes.
36. From the time he left the truck stop at 13h 49 until his vehicle came to a halt after the collision his vehicle travelled for 21 minutes, completed 14.68 km with a maximum speed recorded of 107km/h
37. Within a few seconds the accused and his female companion fled the scene.
38. He made no attempt to render any form of assistance or to ascertain injuries.
39. He had ample opportunity to approach the police safely once they had arrived at the scene which was within a short space of time.
40. The accused went to Pongola SAPS not to report the matter, but to try to retrieve his personal belongings.
41. 19 of the occupants of the LDV died on the scene, one died at hospital all from injuries of blunt force trauma.
42. 18 of the deceased were children aged between 5 and 14 with 12 being under the age of 10.

Facts applied to the Law

[177] Mr. Shah has not suggested that the accused had a direct intention to kill the deceased but argued that the state has proved murder on the basis of legal intention or *dolus eventualis*. Mr. Marimuthu submits that even in the event of the court accepting that mechanical failure was absent the court cannot convict the accused of

murder as it is bound by the ratio decidendi in *Humphreys*' case and therefore the appropriate conviction can only be culpable homicide.

[178] In *S v Pistorius*⁵⁵ the Supreme Court of Appeal articulated the concept of *dolus eventualis* in murder cases as follows:

'In cases of murder, there are principally two forms of *dolus* which arise: *dolus directus* and *dolus eventualis*. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. *Dolus eventualis*, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to *dolus directus*, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act 'reckless as to the consequences' (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been 'reconciled' with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.'

[179] In *Humphreys*, Brand JA⁵⁶ expresses the test as follows;

'(a) did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and (b) did he reconcile himself with that

⁵⁵ 2016 (1) SACR 431 (SCA) at [16]

⁵⁶ *Humphreys* (supra) at [12]

possibility (see e.g. *S v De Oliveira* [1993 \(2\) SACR 59](#) (A) at 65i-j). Sometimes the element in (b) is described as ‘recklessness’ as to whether or not the subjectively foreseen possibility ensues (see e.g. *S v Sigwahla* [1967 \(4\) SA 566](#) (A) at 570). I shall return to this alternative terminology, which sometimes gives rise to confusion⁵⁷.

[180] The first component of the test for *dolus eventualis* sometimes referred to as the cognitive aspect is not in issue in this matter. The accused when he gave evidence conceded that he foresaw and knew that a collision at the speeds he was travelling coupled with the weight of his vehicle could result in death to other road users including his passenger. He described it as such in his evidence, ‘I was aware that the consequences could be catastrophic, the coal could even explode.’

[181] Secondly like any other fact, subjective foresight can be proved by inference, the Supreme Court of appeal in *Humphreys* continued at [13];

‘Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population’.

[182] Not only did the accused acknowledge in his evidence that he shared this foresight, but to paraphrase from *Humphreys*; it can confidently be accepted that on the facts of this matter, that a 55 ton vehicle travelling at the speeds recorded in this matter, across a double barrier line for 1.2 km where oncoming vehicles were travelling may have fatal consequences for those travelling on that road, the possible consequences might be horrific. Every right minded person would understand that driving a heavy duty vehicle weighing 55 tons on the wrong side of the road at

⁵⁷ The first component of *dolus eventualis* is purely subjective. He must have subjectively foreseen the possibility of fatal injuries, it is not sufficient that the accused should have objectively foreseen the possibility of fatal injuries, this conflates the different tests for *dolus* and negligence.

dangerous speeds far in excess of the speed limit for the period that it was done creates the possibility that fatal consequences may actually occur. The accused without doubt actually foresaw as a strong, concrete or real possibility of fatal consequences arising, the cognitive aspect of the test for *dolus eventualis* has been satisfied.

[182] It is the second aspect of the test in *dolus eventualis*, sometimes referred to as the conative aspect that is in dispute. The Supreme court of Appeal in *Ndlanzi*⁵⁸ followed the formulation of the test on this aspect in *Humphreys*;

‘The second element of *dolus eventualis* requires proof that the appellant reconciled himself with the foreseen possibility of the death of a pedestrian. As pointed out by Brand JA in *Humphreys* ‘The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his action. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.’

[183] Whether or not this can be reasonably inferred is a fact based enquiry where the unique nature of every case needs to be considered. The facts in *Humphreys* are very different to the facts in this case. In light of the argument by the defence that the ratio in *Humphreys* prevents a finding that *dolus eventualis* was present in this matter it is necessary to examine the facts of *Humphreys* in some detail.

[184] In *Humphreys* all the charges arose from a single incident which occurred on 25 August 2010 when a minibus, driven by the appellant, was hit by a train on a railway crossing near Blackheath on the outskirts of Cape Town. There were fourteen children in the minibus, ranging in ages between seven and sixteen years. Ten of the children were fatally injured in the collision, which gave rise to the ten charges of murder. Four of them fortunately survived, but were seriously injured.

⁵⁸ *Ndlanzi v The State* (318/13) [2014] ZASCA 31 (28 March 2014)

They were cited as the complainants in the four charges of attempted murder. At the end of the trial the appellant was convicted as charged on all fourteen counts and sentenced to an effective period of 20 years' imprisonment. An appeal was lodged against both the convictions and the sentences imposed. On appeal, one of the appellant's main contentions was that the State had failed to prove the element of murder described as *dolus* or intent, and more in particular *dolus eventualis*.

[185] One of the key issues that arose was the issue of conscious negligence or 'luxuria'. Brand JA⁵⁹ relied upon the following explanatory dictum by Jansen JA in *S v Ngubane*:

'A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, e.g. by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility ... The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers... . Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain"... . Our cases often speak of the agent being "reckless" of that consequence, but in this context it means consenting, reconciling or taking into the bargain ... and not the "recklessness" of the Anglo American systems nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterises *dolus eventualis* and which is absent in *luxuria*.'

[186] The SCA set aside the conviction finding that the trial court had elevated the aggravated recklessness of the driving by the appellant to conduct that satisfied the second element of *dolus eventualis* whereas recklessness in this context constitutes aggravated negligence and that means that the conative aspect of *dolus eventualis* was absent.

⁵⁹ *Humphreys (Supra)* at [15].

[187] The true enquiry under this rubric was whether the appellant took the consequences that he foresaw into the bargain; and whether it could be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the court found, that the principle was that if it could reasonably be inferred that the appellant might have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.

Mistaken belief that accident would not occur

[188] In this case Humphreys who was very aware of the operation of trains in the area as he had previously been employed as a shunter before he started a children's transport business. He overtook a line of cars waiting to cross railway line. The boom gates had closed with red signings instructing all vehicles to stop at the railway crossing. A vehicle can manoeuvre between the two boom gates and continue driving. The reliable evidence was that the accused had done this on two previous occasions without mishap. On this occasion a collision ensued killing 8 children and injuring four.

[189] The accused was convicted of murder and attempted murder. The court found that the appellant in Humphreys was consciously negligent on two basis, I deal with the second reason first, the court held:⁶⁰

'My second reason for concluding that the appellant did not reconcile himself with the consequences rests on the evidence that the appellant had successfully performed the same manoeuvre in virtually the same circumstances previously...[T]he fact that the appellant had previously been successful in performing this manoeuvre probably led him to the misplaced sense of confidence that he could safely repeat the same exercise.'

[190] This accords with the concept of conscious negligence or *luxuria*, If the appellant, fuelled by his confidence in previously successfully ignoring the warning signals with no ill effects, genuinely believed that he would not collide with the train

⁶⁰ *Humphreys (supra)* at [19]

when repeating this course of conduct, then he would not have the necessary intention, and could indeed not be held liable for murder. At best, as was ultimately held by the court, he should be convicted of culpable homicide for any deaths occurring in such circumstances on the basis of his conscious negligence. Conscious negligence cannot equate to intention and/or the satisfying of the requirement of *dolus eventualis*.

[191] The facts of this matter is very different to those in *Humphreys*, there is no reliable evidence on record as contained in the facts found proved that the accused had ever driven in such a manner before, nowhere on record is there any evidence or even a suggestion that the accused had driven in such a manner on a previous occasion. To do so would mean that the court must speculate on his behalf that this might have occurred beforehand, this conjecture would be out of place, inferences must be drawn from proven facts. Furthermore the foresight subjectively held by the accused in this matter is a strong real possibility of death resulting whereas in *Humphreys* the accused believed that the harm would not arise.

[192] This is not an instance where the accused when overtaking on a double barrier line knew and foresees the risk but believes because of the relatively short duration that he will be on the wrong side of the road and that the feared consequence of a head on collision would not arise, in this matter the harrowing evidence contained in the real evidence of the videos in the lead up to the collision are ample evidence of this. The foresight on the part of the accused of substantial harm arising is elevated.

[193] The accused is travelling at high speeds, is in the northbound lanes at all times, makes no effort to slow down and get into the correct lane of travel despite being in full control of his vehicle, there are a number of near misses in the lead up to the fatal impact with the Toyota LDV in the emergency lane of the northbound carriage way of the N2. There is no evidence of any fact suggesting that he had done so before. Viewing the video clips reveal a level of dangerous driving that might be unparalleled.

[194] The accused is on the wrong side of the road for 1.2 km, he is driving a fully laden coal truck with a mass of 55 tons. The recording conclusively shows how dangerous the volitional action of the accused was in deciding to overtake the slow moving traffic on the N2 in his haste to get to the Richards Bay coal terminal.

[195] The accused conceded that other road users might not have seen him, their view of the oncoming traffic is obscured when cornering and/or by other vehicles, that other vehicles might be turning onto the N2 from the rural roads that abound and as a result might not have seen him. In fact, the 'catastrophe' that he referred to in his evidence came to pass.

[196] In respect of this aspect the fact specific enquiry in this matter lends itself to a substantially different finding to *Humphreys* as the facts are so different. As the Supreme Court of Appeal said, 'The true enquiry under this rubric was whether the appellant took the consequences that he foresaw into the bargain; and whether it could be inferred that it was immaterial to him whether these consequences would flow from his actions.' The facts found proved by the state in this matter support a finding contrary to that of *Humphreys*, that the accused here foresaw the consequences factored them into the bargain and proceeded nonetheless indifferent to the consequences.

[197] There is no reliable evidence on record to suggest any genuine but misplaced confidence by the accused on his ability to prevent the risk from materialising. In fact the only evidence on record is the disingenuous explanation by him of mechanical failure.

Reconciling with your own death

[198] The first reason given by Brand JA in *Humphreys* for his finding that the accused did not reconcile himself with what he foresaw is stated as follows;

'First, I believe that common sense dictates that if the appellant foresaw the possibility of fatal injury to one or more of his passengers – as I found he did – he must by the same token have foreseen fatal injury to himself. An inference that the appellant took the death of his passengers into the bargain when he proceeded with

his action would unavoidably require the further necessary inference that the appellant also took his own death into the bargain. Put differently, the appellant must have been indifferent as to whether he would live or die. But there is no indication on the evidence that the appellant valued his own life any less than the average person or that it was immaterial to him whether or not he would lose his life. In consequence I do not think it can be said that the appellant had reconciled himself with the possibility of his own death. What must follow from this is that he had not reconciled himself with the occurrence of the collision or the death of his passengers either. In short, he foresaw the possibility of the collision, but he thought it would not happen; he took a risk which he thought would not materialise.⁶¹

[199] The accused states he was aware that he and his passenger might die in this collision in addition to any other road-user. Mr. Marimuthu has stressed that this dicta is binding on this court and on the application of this dicta the accused can only be convicted of culpable homicide. The prosecutor, Mr. Shah criticised⁶² the decision and argued that on the facts it was distinguishable.

[200] I am of the view that it is distinguishable on the facts. I am, of course bound by the ratio decidendi in *Humphreys* unless it is distinguishable on the facts.

[201] In *Humphreys* all the victims were passengers in the vehicle driven by the appellant, he chose to take a risk in the sense that he dangerously sought to ‘race and beat’ a large train through a railway crossing. A course of action he had successfully completed before as he knew the time that the train ordinarily took to reach the crossing. Further all the victims when one compares the two ‘vehicles’

⁶¹ *Humphreys (Supra)* at [18].

⁶² See criticism of this aspect of the judgment in “*Death on the roads and dolus eventualis – S v Humphreys 2013 (2) SACR 1 (SCA)*”. South African Journal of Criminal Justice/2013 volume 26 at page 75. Professor Shannon Hoorntje See further page 83; “Whatever his own belief about what may happen to him, the critical consideration for the purposes of criminal liability for harm caused to others is the accused’s mental state in respect of such harm to others”. The question arises whether the attitude of the accused driver to his own death has any bearing on whether he can be indifferent to the lives of others? In *Humphreys* (as in Middleton’s argument) the view is taken that one cannot differentiate between the accused driver’s *dolus eventualis* with regard to his own death and his *dolus eventualis* with regard to the deaths of others — if he had not reconciled himself to the foreseen possibility of his own death, then he cannot be said to have done so with regard to the death of the other parties involved in the collision. This amounts to an all-or-nothing approach: the *dolus eventualis* must extend to the deaths of all parties, the appellant and the others, or there is no *dolus eventualis* with regard to any of them.

involved in such a scenario, as it transpired, were likely to be, or more probable than not likely to come from his own vehicle.

[202] The principle might similarly apply where the accused is driving a normal vehicle and is just as likely to kill himself as the occupants of the approaching vehicle a court would have some difficulty in coming to the conclusion that he had in fact reconciled himself to the possibility of the collision occurring as this would imply he was prepared to commit suicide⁶³. This is particularly so where there is no other realistic danger to other road users at the time.

[203] This is not the case here, the accused was driving one of the biggest and heaviest heavy duty vehicles. It weighed 55 tons, his driving position is extremely elevated above the roof of an ordinary light motor-vehicle. If he struck any other vehicle other than another heavy-duty truck there was, with respect, no expectation of him dying, I cannot find on the facts of the matter and by a careful study of the real evidence and facts found proved that the accused was in any way a suicidal driver or foresaw his own death at the time. He left the vehicle completely unscathed and unharmed. The clear impression from the videos is that he expected that others would get out of his way. On the facts of the *Humphreys* matter, the accused's vehicle was more like the train.

[204] The important aspect is he foresaw the death of other road users as a substantial and real possibility yet volitionally and deliberately embarked on a most dangerous course of driving fully alive to the possible consequences to other road users. That came to fruition, on these facts he should not be able to escape the consequences of his action because he foresaw that he might be killed also.

[205] I am of the view that the decision in *Humphreys* in respect of foreseeing his own death cannot be taken further than on the facts in that matter. The appellant in *Humphreys* foresaw the consequences only in terms of himself and his passengers, and as he had previously successfully completed the manoeuvre believed the harm would not occur. In this matter the accused himself confirms that he possessed

⁶³ C1 Culpable Homicide versus Dolus Eventualis C1-9.

foresight of a real or substantial concrete possibility of death occurring to other road users, common sense brooks no other conclusion. In *S v Dlamini* the Supreme Court of Appeal held that “*once it is inferred that the accused subjectively foresaw the real, reasonable or substantial possibility of death occurring then credibility is stretched beyond breaking point where the accused denies that he accepts that death would ensue*”.⁶⁴ The fundamental difference in the two matters is that the accused in this matter did not have any reason to believe that the foreseen harm would not occur. His own evidence is that he saw the harm occurring as a real and substantial possibility. The only conclusion that can be drawn is that he reconciled himself with that substantial possibility.⁶⁵

[206] Where the foresight extends to foresight of a real and substantial danger to other road users, when the accused is almost certainly one of the largest vehicles on the road and capable of exerting horrific carnage but he himself is comparatively safe, is so vastly different to *Humphreys* that the rationale cannot be extended to these facts.

[207] On this aspect of the *Humphreys* judgment the facts are fundamentally different and the dicta is distinguishable on the facts. It would be akin to almost a blanket prohibition to a finding of *dolus eventualis* in respect of dangerous driving where people are killed and with respect that was not the ratio decidendi of Brand JA. The ratio, with respect, is that it is a fact specific enquiry and that on that fact specific enquiry the state must prove beyond reasonable doubt that conscious negligence was absent when answering the conative aspect on the issue of *dolus eventualis*. His conduct shows that it was immaterial to him that these consequences occurred, they were fully taken into the bargain by the accused. At [20] Brand JA said; “An inference that the appellant took the death of his passengers into the bargain when he proceeded with his action would unavoidably require the further necessary inference that the appellant also took his own death into the bargain. Put differently, the appellant must have been indifferent as to whether he would live or die”. A viewing of the real evidence, disturbing as it is, of the accused’s driving in the minutes before the collision shows fairly and squarely that on the particular facts

⁶⁴ *S v Dlamini* 1991 (2) SACR 655 (A) at [11]

⁶⁵ *S v Qeqe* 2012 (2) SACR 41 (ECG) at 51 D-F

of this matter the accused had taken his possible death into the bargain, albeit the probabilities of his death were substantially lower than those not driving heavy duty vehicles.

[208] In my view on the 20 counts of murder the key issue to be answered was, as set out by Brand JA that, ‘The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his action. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.’ In my view the issue has to be answered in favour of the State, the inference to be drawn from the proven facts, including real evidence, is that the accused’s actions show it was immaterial to him what consequences would flow from his actions. The evidence supports that compelling inference to the extent that it excludes all other possible inferences that might be drawn.

[209] In this matter innocent road users were endangered, the accused foresaw that subjectively and took it into the bargain, the videos conclusively show this to be the case, he was ensconced and protected by the vehicle that he was driving, he had reason to feel that he would probably survive any collision other than one with a similar type vehicle. His conduct went beyond conscious negligence. In fact this an instance of driving so dangerous that it invokes visions of the heavy duty vehicle being a weapon as envisaged by Beck CJ in *S v Mncunza* where the court said,” the driver of a motor-vehicle is in charge of an instrument that is as lethal as a firearm if it is not handled with proper care”.⁶⁶

[210] am satisfied that the state has proved beyond reasonable doubt that the accused, on the basis of the application of *dolus eventualis* and is guilty of all 20 counts of murder.

Judgment Order

⁶⁶ *S v Mncunza* 1990 (2) SACR 96 (TK) at 98 A-B.

[211] In respect of count 1, the accused is found guilty as charged of reckless driving in contravention of section 63 (1) of the NRTA, 93 of 1996, in that the state has proved beyond any doubt that the accused failed to stop at a mandatory stop, drove at excessive speeds in the circumstances and failed to keep a proper look-out.

[212] On count two, the accused is found guilty of contravening section 61(1) of the NRTA, 93 of 1996, in that he failed to perform the duties of a driver after the accident and failed to report the accident.

[213] On count 3 to 22, the accused is found guilty as charged of murder read with section 51(2) of Act 105 of 1997.

DAVIS AJ

APPEARANCES

Counsel for the State:	Mr K Shah
Instructed by:	Director of Public Prosecutions-Durban
Counsel for the accused	Mr P Marimuthu
Instructed by:	Legal Aid South Africa Durban
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