In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE: CC 03/2014

In the matter between:

THE STATE

And

ZWELETHU HAROLD JOSEPH MTHETHWA ACCUSED

JUDGMENT DELIVERED ON 16 MARCH 2017

GOLIATH, DJP:

Introduction

[1] On 14 April 2013 the CCTV cameras located at the Stockyard business premises in Ravenscraig Road, Woodstock was a silent witness to a vicious attack on the deceased, Nokuphila Moudy Kumalo. The deceased was attacked by a person kicking and stamping her body repeatedly with a booted foot. The accused, Mr Zwelethu Harold Joseph Mthethwa, was arraigned before court on a charge of murder. The accused pleaded not guilty to the charge. He admitted that he is the registered owner of a motor vehicle Porsche 911 Carrera 2 S Coupe with registration number 911 Z WP.

[2] The visuals on the video footage depict the following:[1] At around 02h47.01 a dark coloured sedan car arrives in Ravenscraig road and parks next to the kerb. A male figure gets out and purposefully strides across to the opposite side of the road, disappearing on the left side of the screen. From 02:47.11 until 02:47.34 neither the assailant(s) nor the victim can be seen and this ends with the victim stumbling on screen and falling down. It is not recorded what happened in those ± 23 seconds off-screen. From 02:47.39 until about 02:52.19 the footage shows repetitive, apparently very forceful stomping and kicking of the victim, mainly centred to the trunk area of the victim. Slaps and fist blows to the (mostly off-screen) head area are also recorded. The main perpetrator of these actions appear to be a male, with a smaller, apparently female, person adding a few kicks to the head area of the victim. At 02:47.39 there is a depiction of the male perpetrator delivering a powerful stomping action to the right side of the trunk of the victim. From 02:48.00 onwards the victim appears motionless apart from when the body is jostled by repetitive stomping and kicking actions.

[3] On Sunday 14 April 2013 at approximately 03:50 **Constable Asanda Shasha** responded to a complaint about a body found along the road. On his arrival at the scene, a security guard made a report to him. On further investigation he observed the body of a female lying on her back alongside the road. Her body was fully clothed and she had injuries on her face. He did not observe any blood on her clothes. An ambulance was dispatched and Captain Arendse was contacted. He cordoned off the area and a

[1] As described in the testimony of Dr Liebenberg.

photographer, Warrant Officer Maneli, arrived at the scene. The photos of the crime scene are depicted in exhibit D.

[4] **Mr Morgan Ndava** testified that in the early hours of the morning, between 2am and 4am he was on duty, with a colleague, as night shift security at the Industrial Tollgate Building, Ravenscraig Road, Woodstock. He and his colleague were sitting inside the guard room when they heard funny noises resembling people fighting with each other. Both of them exited the guard room and went to stand at the gate inside the Tollgate building to ascertain what was happening. He saw a black vehicle parked opposite the Stockyard Building in Ravenscraig Road. He wrote down the registration number of the vehicle as "9112" but he could not remember whether the last two digits were MP or WP. He then observed a black man coming from the top of the road towards the black car. The man opened the car, started the engine and left. He reported the incident to his supervisor called Freddy.

[5] He does not know the whereabouts of his colleague who was on duty with him. The last time he saw him was on this particular shift. He explained that his colleague was not a permanent member of the security staff. He confirmed that the investigating officer consulted with him the same morning on 14 April 2013 before he left work. During cross-examination Ndava stated that contrary to his statement he did not describe the vehicle as a Porsche, but identified it as a black vehicle.

[6] **Mr Khangelani Freddy Miya** testified that he worked for Daleglen Properties as Head of Security. He confirmed that the Stockyard and Tollgate buildings belong to Daleglen Properties. He confirmed that Morgan Ndava worked as a security guard at Daleglen Properties and he was his supervisor. Further, he confirmed that in the guard room there is an occurrence book for the purpose of recording everything that happens inside the yard or premises.

[7] All security officers are required to record suspicious activity in the occurrence book. On 14 April 2013 in the early hours of the morning he was telephonically contacted by Morgan Ndava. Ndava informed him of a suspicious noise emanating outside near the Stockyard building as well as a black car parked in Ravenscraig Road. He instructed Ndava to record the registration number of the vehicle.

[8] The next morning on his arrival at work he observed a covered body outside the Tollgate premises. He also observed that there were security and police officers at the scene. He approached Ndava who explained to him what he had observed. Ndava then handed him a piece of paper with a registration number written on it. He handed this piece of paper over to the police. He testified that the security guard that was on duty with Ndava was a part time reliever and not in permanent employment. The security guard was no longer in the employ of Daleglen Properties and he could not remember his full details.

[9] **Warrant Officer David John Miles** works for the South African Police Service attached to the Woodstock Detective branch. He was briefly involved in this matter. He was on standby duty for the weekend of 14 April 2013, but he was also involved in another murder investigation. He testified that Captain Arendse informed him that there is footage that needed to be secured relating to a murder investigation. He approached Freddy to enquire about who the person in charge was in order to gain access to the footage. He was advised by Freddy that Maureen De Wet is the only person who has access to the footage. He confirmed that Freddy handed over a piece of paper containing details of the motor vehicle in question. According to Miles, the paper referred to a Black Porsche registration number 911 2 WP/MP. He confirmed that he handed over the piece of paper to Warrant Officer Smith. During cross-examination he stated that he never recorded the details of the piece of paper in the police docket or his pocket diary. He conceded that the piece of paper should have been retained.

[10] **Maureen De Wet** is the Building Supervisor at Tollgate which is owned by Daleglen Properties. She has exclusive control of all video footage captured by the cameras at Tollgate and Stockyard. The Tollgate video recorder is located in her office. She is the only person who has the key to the office and holds the password to access the system. At Stockyard, the recorder is locked in a cabinet and she also controls access to this system. A report was made to her about an incident at Tollgate and the matter was reported to the South African Police Service. Constable Basson contacted her and requested permission to download the footage.

[11] She identified the premises and location of the cameras. She granted Basson access to the computer to enable him to download the footage. According to her, the cameras were fully operational during April 2013. She explained that Nathan Bearman was the person responsible for the installation and maintenance of the CCTV systems at Tollgate and Stockyard.

[12] **Randall Robert Basson** is a Constable in the South African Police Service stationed at the Provincial Command Centre in Cape Town. He is a video analyst. His duties entail the downloading of surveillance footage of crime scenes and the capturing of still images for identification. He testified that he was contacted on 18 April 2013 by the investigating officer, Warrant Officer Smith, and directed to attend a crime scene at the Tollgate and Stockyard buildings in Woodstock to download footage of a murder incident. Maureen De Wet granted him access to the system. At the time, he had no knowledge of the merits of the case. He viewed the surveillance footage as pointed out to him by Maureen De Wet. He recorded the starting and ending time of the incident from two o'clock to four o'clock in the morning.

[13] He testified that there is more than one method to download material. In this instance he used a single USB flash drive to download the footage from both Tollgate and Stockyard. He went back to his office and copied the information from the flash drive to CD. The first CD copy was his master copy, handed in as exhibit 2, which was created on 18 April 2013. He also made working copies for further investigation. The master copy CD was sealed in a forensic bag and handed in at the SAP 13 for safekeeping on 22 April 2013.

Subsequently, the master copy was booked out and handed to Warrant Officer Smith.

[14] He followed standard police training procedures when he downloaded the footage. He is also aware of guidelines endorsed by Business Against Crime[2] and to the best of his abilities complied with those guidelines. He expressed the view that the footage was downloaded in a forensically acceptable manner.

[15] He also made photos of still images after downloading footage from the working copy. He explained the procedure followed, namely he paused the image, captured it, and then printed it. He confirmed that the footage depicted on the master copy is the same footage he viewed at the time of downloading. He confirmed that he never changed, altered, deleted or added anything to the footage.

[16] Constable Basson was recalled regarding a cloned copy of the video footage. On 12 February 2016 he went to the home of defence expert, Mr Atkinson to make a clone of the master CD. A DVD duplicator was used to make an exact copy of the master copy. He established that on the cloned version the creation date of the footage depicted 23 April 2014. He compared the footage on the cloned version with his video files and observed that the footage was the same.

[2] *Recommended CCTV Industry Guidelines Third Edition* (February 2013).

[17] He checked the footage on his computer which still indicated 18 April 2013 as the date of creation. He then proceeded to copy the footage on a flash drive, and the date remained the same. However, when he copied it to a CD the date changed. He then realized that the date is only amended when transferred from flash drive to CD. He does not have an explanation for this phenomenon. However, he confirmed that the sealed master disc remains intact. The change of date did not change or affect the footage at all. The date of 18 April 2013 is still on the video files. All video folders correspond with this date. Consequently the master copy, working copies and the original footage remain the same. All the images also remain the same.

[18] **Nathan David Bearman** is the co-owner of Eagle Technology. The company specializes in video surveillance systems. He is responsible for the day to day business such as the design, implementation and upgrade of systems. He has fourteen years' experience in the trade and was involved in the installation of systems at National Key Points, the South African Police Service and Parastatals. He has extensive experience in the supply and installation of video surveillance.

[19] Bearman installed the surveillance systems at the Tollgate and Stockyard buildings. He explained how the systems were installed and how they operate. Both systems are stand-alone systems which consist of cameras at the premises as well as a recording system in a secured location. Neither of the recording systems is connected to a network which raises the security features. He further went on to explain the systems security features. The first level of security is the physical security at both locations in secure

areas with limited access. The next level is password security needed to log onto the system. It also features a time date stamp which shows when footage was created. The final layer of security is the creation of the video footage and the storage thereof. The systems do not have a watermark. A watermark is where a piece of digital information is added to the video footage to strengthen the security features. The digital information is encoded with the still image or video clip. A watermark can be added during a live recording or be added for backup of existing footage to preserve and identify the footage. He explained that only the machine can write the footage onto the hard drive. You cannot copy a new video onto the hard drive. Once the footage is on the hard drive it remains there and cannot be manipulated or tampered with.

[20] He further explained that one cannot cut and replace sections of the footage, nor can one delete sections and record over it. He also attended to the maintenance of the systems when needed. He had not received any reports of problems with these two systems. He explained that a camera is an optical reflection of the world and whatever it is facing, that is recorded. Any footage can be played back. The fact that the manager could play back the footage shows that the recording system was fully operational.

[21] **Warrant Officer Zimmerman**, a forensic analyst at the South African Police Service was requested to perform an authenticity inspection on the DVD's. On 12 June 2015 he received three sealed evidence bags containing three DVD's. He examined the exhibits through a process that requires skill in computer science technology and specific analytical techniques. He conceded that the quality of the footage was not good, and therefore image

enhancement was not possible. He confirmed that notwithstanding the brief jumping on the footage of the Tollgate camera, the integrity of the footage remains intact. He attributes the jump in the Tollgate footage to time delays in the motion detection or motion sensitivity. According to him, the brief jumping of the images could also indicate a missing file in the Tollgate footage. However, the Stockyard footage was consistent in all respects.

[22] He explained that the visual inspection involved an examination of inconsistencies of time or date, the flow of the pixels, the sudden appearance or disappearance of people or objects, or missing frames. He also considered lighting of the footage such as the sudden appearance of ambient light or darkness. He examined focal points in the video such as people, cars, animals and the shadows of objects to assess whether it matches the reality of the background. He would also consider the movement of objects in relation to the actual flow of the video necessitating a frame by frame assessment. He stated that he could not locate any objects or clips that were inconsistent with the rest of the footage. He concluded that the footage of all three DVD's to be authentic, consistent and free of any editing or manipulation.

[23] The defence called **Mr Timothy Patrick Sheridon Atkinson** to testify as an expert regarding the authenticity of the CCTV footage downloaded at Tollgate and Stockyard. He holds a BSc degree in electrical engineering. He expressed the view that electronic evidence is inherently unreliable, if not actually dangerous. Such evidence can easily be changed or altered.

[24] He was handed three or four discs relating to this case, viewed the footage and made copies of same. He criticized the technical analysis of Warrant Officer Zimmerman and reiterated the importance of retaining the original recording on the hard drive. In the absence of the original recording or primary recording, any subsequent downloads cannot be verified as authentic. He also criticized the manner in which the footage was downloaded by Basson and highlighted the risks associated with the reliability of the footage. He avers that Basson did not comply with proper standards in securing the footage.

[25] Atkinson illustrated how footage and still images can be manipulated by using certain formats and programmes. He disputed the reliability of the Tollgate footage due to the jump in sequence when the two security guards appeared at the Tollgate driveway gate. He disagrees with Zimmerman's theory that the reason for the jump could be motion sensitivity or motion detection. He appears to align himself with the missing file theory in explaining the inconsistency. He conceded that the Stockyard camera footage is consistent and continuous. However, he could not clearly indicate how an inconsistency in the Tollgate footage impacted on the Stockyard footage.

[26] Atkinson continued to highlight potential problems and risks associated with the handing of electronic evidence. He did not identify any significant problems and therefore conceded that he is not in a position to find that anything was added to the footage. He conceded that he did not conduct an authenticity test of the footage because he was requested to deal with the content.

[27] Atkinson gave a demonstration to the court regarding the scene of the footage, and his perception as to what had transpired on screen. He refers to "the walking man" and "the kicking man" in the footage, and expressed the view that it is not necessarily the same person. He also stated that an incident could have happened off screen which could have triggered the death of the deceased. He saw the kicker entering the screen running at considerable speed and speculated as to the reason why. He regards it as far-fetched to conclude that the kicker was responsible for the victim being pushed on screen. He averred that objectively seen, the victim was being attacked off-screen. He stated that there is a lack of continuity as to what happens on screen, off screen and the later return of the driver to the vehicle. He concluded that there is no evidence that the kicker and the driver is the same person. He illustrated the phenomenon of *commotio cordis*[3] by way of a video presentation. He also testified with regard to a Google Earth map which he used to indicate the precise location of Ravenscraig and Upper Ravenscraig roads.

[28] **Ruhaan Steynfaardt** is a sales executive at Porsche Summer Greens since 2010. He testified that they are the only Porsche dealership in Cape Town. On 25 April 2013 Warrant Officer Smith attended to their business premises and enquired from him whether he could identify a certain Porsche motor vehicle with registration number 9112. He did not initially recall the number but later remembered that he had sold a Porsche vehicle bearing

[3] To be expanded on further below.

registration number 911 Z WP to a certain Mr Mthethwa. He informed the police accordingly.

[29] He viewed certain video footage which was shown to him by the police. He confirmed that he viewed both still images and video footage of the vehicle. He testified that he could identify certain elements to the vehicle. He identified the model and make of the vehicle as well as the colour of the wheels on the footage. He recognized the vehicle as the one he had sold to the accused. He elaborated on specific distinct features of the vehicle such as the taillights, rounded headlights, and the coupe shape at the back. He stated that the vehicle has a very distinguished silhouette and that its shape is iconic. The shape of the vehicle is unique and never changed over the years. He stated that Porsche customize the wheels of the vehicles and orders them from Germany according to a customer's personal choice. According to him, he only sold one black Porsche Carrera Sport in Cape Town which was ordered by Mr Mthethwa.

[30] Certain documentary information relating to the vehicle was requested by the police during their visit but he refused to provide it to them because of the privilege and confidentiality which existed between customer and dealer. However, all documentary information concerning the Porsche was provided to the police after they presented a warrant. During cross-examination he revealed that the accused purchased the vehicle on 17 December 2012. He confirmed that the colour of the vehicle was basalt black and that it was the only vehicle sold with black wheels in Cape Town at the time.

[31] Mr Steynfaardt was recalled as a witness regarding his version as to what transpired at Porsche during the police visit. A version of his colleague Mr Heathcock was put to him. However, Mr Heathcock was never called as a defence witness.

[32] **Mr Carel Lourens Wessels** is the Chief Technology Officer at Tracker in Gauteng. He testified that tracker technology is approximately nineteen years old. The tracker process or vehicle telematics solution makes use of a global positioning system (GPS) used worldwide. The telematics system is a live system and records the location of a vehicle at all times. The GPS satellites have a CGM clock embedded in the satellites which determines the location of a vehicle in three dimensions, namely latitude, longitude and altitude. The GPS receiver also calculates the speed of the vehicle. The GPS receiver needs to be logged to at least two or three satellites to determine the location of a vehicle accurately. The system is very accurate and operates as a continuous system.

[33] There are strict security protocols in place for tracker and data cannot be tampered with on a network. The information received from vehicles comes through a private protective network. The software used does not allow time and location data to be changed. Access to the information can be obtained by means of a VIN number, vehicle registration number or customer identification number. Tracker trip reports are compiled once all the information is interpreted. The detailed trip log report represents all transactions received from the vehicle and records the location of the vehicle

as well as the status. The status refers to whether the ignition is on or off and whether the vehicle stops or moves. The trip log report formats details of a route followed and the status. He explained that they will overlay this information on a map data set, to make it easier to interpret the information. He confirmed that the VIN number of the accused's vehicle reflected on their database. The account was active at the time, reflecting a Porsche vehicle fitted with a skytrax tracking system. He expressed the opinion that the tracker system is within two and a half metres accurate when it locates a vehicle, but this is merely a statistical calculation.

[34] **Jane Eleanor Morrison** is an Investigation and Compliance Investigator with Tracker. Her duties at Tracker entail internal investigations, as well as assisting the police and other investigative units where Tracker fitted vehicles are involved. She confirmed that a section 205 subpoena was served on Tracker requiring information about a certain vehicle which was active on their system. She accessed the system using the VIN number to call up information relating to the vehicle of Mr Mthethwa. She compiled a detailed trip log report and mapping which were handed in as exhibits. She explained that mapping is basically the trip log placed on a map. She testified in detail about how she compiled the report and analysed the data in the exhibits. She concluded that the vehicle in question was in Ravenscraig Road, Woodstock on the morning of 14 April 2013 from 02:48 until 02:55.47.

[35] **Kenneth David Speed** is a Captain in the South African Police Service attached to the organized crime component of the Directorate for Priority Crime Investigation, also known as the "Hawks". He has 17 years' service of

which 14 years have been in specialized investigation units. In the last 10 years he has been utilizing GPS devices in his investigations, in conjunction with the analysis of telephone “call data”. He was called as a witness to assist with co-ordinates that were presented as evidence by the Tracker specialist as compiled in the tracker trip logs. The first investigation he had to do was to take the co-ordinates provided by Tracker and drive the route using those co-ordinates to see where the vehicle ended up. The second issue related to an allegation made by the defence that there were two streets, having the same name, in close proximity to the crime scene. He was unable to determine the precise route followed using the co-ordinates, since the trip log report does not contain information pertaining to the direction the vehicle was travelling when the “waypoints” were recorded. A waypoint is a reference point or a set of co-ordinates determined by the GPS device that precisely identifies a location. He therefore expressed the view that it would be extremely difficult to speculate on a specific route since there could be various routes between locations.

[36] With regard to the second investigation he went to the scene of the crime where certain key points were pointed out to him. Warrant Officer Smith indicated the location where the body was found, as well as two CCTV cameras relevant to the proceedings. He explained that he took a hand held GPS device and plotted out the position of the three locations called “waypoints”. He recorded the positions of the specific locations. The purpose of the exercise was to get the GPS co-ordinates of the location of the body and the two cameras, and compare those GPS co-ordinates to the car. He

selected the most relevant waypoints on the tracker trip log to the location of the accused's motor vehicle. He obtained co-ordinates for the three positions and measured the distance between those co-ordinates and those provided by the tracker trip log. He measured the distances between those co-ordinates that he plotted and the five co-ordinates provided by the tracker trip report to determine the distances between those waypoints. He then used the GPS to calculate the distance between those co-ordinates. Consequently the street name is of no consequence, since his focus is purely on the co-ordinates, its location, and the distance between them. He concluded that the vehicle, allegedly belonging to the accused, was in close proximity to the CCTV cameras and the location of the body in Ravenscraig Road during the course of the offence. He conceded that the GPS device is not always accurate, but he was able to determine the precise location of the vehicle at the time.

[37] **Dr Nicholas Tam** is a postdoctoral research fellow at the Sport Science Institute and has a BSc in Physiology and Human Movement Studies as well as an Honours, Masters and PhD in Exercise Science obtained at the University of Cape Town.

[38] He testified that the concept of gait is a study of human locomotion, which includes running and walking. Gait patterns are very specific to someone's locomotion. His brief was to access the anthropometric and gait related similarities between the perpetrator and the accused to determine if there is any congruence between the two. He was provided with closed circuit

television footage of the murder scene of 14 April 2013, as well as CCTV footage captured of the accused when he appeared in the Cape Town Magistrate's Court on 25 November 2013. The crime scene footage was not of a very high quality. He testified that he conducted a gait and anthropometric analysis to determine whether the accused and the perpetrator present with any similarities. His key findings were as follows: He explained the nature of the anthropometric analysis with reference to stature, posture and handedness. He concluded that the height of both the subjects was found not to be different. He indicated that the height of the perpetrator fall within the range of 1750mm and 1950mm, which falls within the range of the known height of the accused.

[39] He found a distinguishing factor of the perpetrator to be that of forward head posture (FHP). It is a common recognizable type of poor head posture. The accused exhibits similar FHP. Alongside a FHP, similarities are also found in the manner both of them enter the same make of vehicle. The CCTV footage of both "*document the dominant use of the left hand whilst using a mobile phone whilst assuming the same arm (upper arm remain close to the torso) and the distinct forward head posture*."[4]

[40] With regard to the gait analysis he observed that both the accused and the perpetrator present with a compass-like gait pattern. He found that the gait speed of the perpetrator walking away from the motor vehicle was faster than the gait speed of the perpetrator walking back to the motor vehicle. However,

[4] Dr Tam *Forensic Gait Analysis Woodstock CAS 365/4/13* – exhibit RR.

the accused's gait speed when walking on the street outside the Cape Town Magistrate's court was similar to that of the perpetrator's speed while walking towards the car. Both subjects present with similar step lengths and their step frequency is also similar to the similar gait speeds. He therefore concluded that the accused and the perpetrator share certain similarities. However, based on the poor quality of the CCTV footage he is not in a position to include or exclude the accused.

[41] **Warrant Officer Themba Ntobeko Maqhubela** is in the employ of the South African Police Service since 2012. He performs duties as an official photographer, draughtsman, video operator and forensic examiner since February 2010. He was requested by Warrant Officer Smith to conduct a forensic examination in regard to a Black Porsche 911 Carrera 2 S confiscated from Mr Mthethwa. He was also requested to investigate possible DNA evidence and finger prints from door handles. He testified that he photographed the vehicle and thereafter proceeded with his forensic examination. He removed the mats inside the vehicle and took it to the laboratory for further examination. He did not examine or investigate the pedals of the vehicle for possible DNA. He confirmed that he was not asked to focus on specific aspects of the vehicle but rather to process the whole vehicle. He did not find any DNA evidence emanating from his forensic examination.

[42] **Miss Gulam Petersen** is a sex worker operating in the Woodstock area. She knew the deceased to be a sex worker. She testified that she initially saw the face of the accused in a newspaper article posted on the Sweat Office notice board. She then recalled that she had previously seen him in the Woodstock area looking for a specific girl. At the time he was driving a black Porsche. She reported her observations to the Sweat Office and was advised to report the matter to the police. She confirmed that she was shown the CCTV footage on two occasions by the police. She subsequently only identified the accused the second time she viewed the footage.

[43] **Dr Linda Liebenberg** is a forensic pathologist, who conducted a post-mortem examination on the body of the deceased and compiled the post-mortem report. She also viewed the video footage sometime after compiling the said report. She accordingly testified in respect of her post-mortem findings as well as her observations from the footage. Her main findings are that the cause of death was due to a massive laceration of the liver. She confirmed that the body presented with various blunt force injuries to her face as depicted on the photographs. The body also had various rib fractures and abrasions. She expressed the view that the fluid depicted in the background of the photos as depicted in exhibit B resembles vomitus.

[44] She testified that the deceased suffered severe blunt force injury to the trunk, with the most remarkable and apparently most fatal injury being that the liver was virtually torn in half through both lobes. The effect of this laceration was significant internal blood loss, reflected in 400ml of free blood in the

abdomen and pallor of the organs. The deceased suffered crack fractures of the ribs 3-5 on the right anterior chest and of the 8th rib cartilage of the right costal margin. These injuries would also be consistent with the stomping and kicking of the body as seen in the footage.

[45] There were also blunt force injuries to the face of the deceased, consistent with the fist blows / slaps and kicks apparently delivered to the head area. There were relatively minor skin abrasions to the anterior and posterior trunk and right elbow of the deceased. The deceased suffered a total liver injury, consistent with the stomping actions seen in the footage.

[46] Dr Liebenberg testified that the victim may also have developed cardiac arrest due to "*commotio cordis*'' caused by blunt force to the anterior chest wall. Commotio cordis or cardiac concussion is described as "*sudden death due to a non-penetrating chest wall impact in the absence of injury to the ribs, sternum and heart*".[5] She stated that the marked lack of defensive type injuries to the upper limbs are in keeping with the apparently motionless victim during most of the attack. Also, the marked paucity of visible bruises to the trunk of the deceased when compared to the multiple blunt force impacts seen in the footage, raises the probably that she died very soon during the attack, with cardiac arrest resulting in the lack of formation of bruises.

[47] During cross-examination Dr Liebenberg expressed the view that the deceased was still alive at the time of falling to the ground. She stated that the deceased was dying of the liver injury and something intervened to hasten the

[5] Link M *Mechanically induced sudden death in chest wall impact (commotio cordis)* Progress in Biophysics & Molecular Biology 82 (2003) 175-186 at 175.

death. She explained to the court that there were many medical reasons that could result in hastened death. She mentioned that stopping of the heart could lead to the death of the victim, or stopping of blood circulation could also have hastened the death. Dr Liebenberg was extensively cross-examined by the defence as to whether the deceased could have developed cardiac arrest due to "*commotio cordis".* She conceded that such an investigation is the speciality of a cardiologist.

[48] **Warrant Officer Warren Stephen Smith** is a member of the South African Police Service with 22 years of service. He took over from Warrant Officer Miles as investigating officer. He received the docket on 16 April 2013. Miles reported to him that he consulted Freddy and received a note written by Morgan Ndava reflecting a vehicle's details and a registration number. Miles handed the note to him. The note reflected the vehicle as a black Porsche with registration number 911 2 WP or MP. He checked on the eNatis system whether he could trace the vehicle to no avail. This occurred in the presence of Miles with whom he shares an office. He confirmed that he recorded the note in his diary and obtained a statement from Freddy. He did not file the paper in the docket but threw it away. He did however record the information in his diary on 18 April 2013. He conceded that he should have retained the paper but considered it as of no evidentiary value at the time. He firmly believed that the paper had no evidential value until a statement has been obtained. He subsequently obtained a statement from Morgan Ndava.

[49] An entry was made in the docket regarding possible CCTV footage. He proceeded with his investigation regarding possible footage at the Tollgate Building. He initially contacted Freddy who referred him to Maureen De Wet. He made arrangements with Constable Basson to contact De Wet to facilitate the downloading of the footage. Basson duly attended to same and downloaded the footage on his laptop on 18 April 2013. Basson also made working copies of the footage. In total there were three discs which were handed in at the SAP 13. The quality of the footage was not good and he subsequently established from Zimmerman that the images on his laptop could not be enhanced.

[50] On 23 April 2013 he collected the sealed master disc from the SAP 13 for safekeeping. He testified that the disc was always safely secured in the docket which was locked in his draw until such time that the matter was ready for trial. At some stage he was requested to take the footage to the Plattekloof Forensic Laboratory for an authenticity test. Warrant Officer Zimmerman compiled a report to this effect.

[51] Having received information regarding the vehicle he attended to Porsche Summer Greens for further investigation. He consulted Ruhaan Steynfaardt who viewed the footage and identified the vehicle as one he had sold to a certain Mr Zwelethu Mthethwa. He obtained a statement from Steynfaardt on 25 April 2013 and 25 August 2013. A warrant of arrest for Mr Mthethwa was authorized. Mr Mthethwa was out of the country at the time and he was subsequently arrested at the airport on his return to South Africa

on 5 May 2013. He also conducted a search at the residence of Mr Mthethwa on the day of his arrest. Nothing of significance was found at his residence. The Porsche vehicle in question was confiscated for further examination. The forensic examination found no incriminating evidence inside or outside the vehicle.

[52] He obtained a section 205 subpoena to obtain further information of the vehicle. It was established that the vehicle was fitted with a tracker and he facilitated the necessary procedures to obtain a Tracker report. The tracker evidence placed the vehicle in Ravenscraig road at the time of the incident. He also obtained cell phone records of Mr Mthethwa which did not take the matter further. On 11 March 2014 he arranged viewing of the footage with Dr Liebenberg and elicited her comments.

[53] He further explained various aspects of his investigation regarding potential witnesses or suspects. Morgan Ndava who appears on the Tollgate footage, was questioned the very same morning of the incident. The other security guard visible in the footage had moved and was untraceable. Miss Gulam Petersen was consulted more than a year after the incident. She viewed the footage on two occasions and subsequently identified the accused as a person frequenting the Sea Point area. He could not trace the identity of the other persons in the footage namely the unknown male who passed the gate and the female accomplice in the footage.

[54] He was advised by the Prosecutor to obtain evidence from a gait expert to assist in the investigation. He applied for a section 252A operation which was duly authorized. However, the police did not get the opportunity to actually record the accused. They then settled to use video footage which was obtained from two other premises as control samples. Eventually the services of Dr Nicholas Tam were obtained to prepare a gait expert report.

[55] The State closed its case and the defence brought an application for the discharge of the accused in terms of the provisions of section 174 of the Criminal Procedure Act, 51 of 1977. The application was refused since the court was of the view that the defence had a case to answer. Mr Mthethwa elected not to testify and the defence called 6 witnesses.[6]

[56] **Mr Wouter De Swardt** is a former police officer with sixteen years' service, who continued his career at Fox Forensics as a private investigator. He was consulted by the defence and provided with all relevant documents concerning the case. He specifically testified about the CCTV footage and the procedure followed in downloading and the protection of same.

[57] He testified that in this particular case he would have followed a different protocol to download the footage. Firstly, he would have confiscated the hard drive, removed it and taken it to a laboratory to make a master copy as well as working copies. He would have confiscated both the hard drives at

[6] The testimony of Mr Atkinson was discussed above.

the Tollgate and Stockyard Building. He would have started downloading footage an hour before the incident. This process should involve downloading the whole incident and recording the time of the incident. One should also investigate how many cameras are involved and record their position in relation to the scene that you are investigating. He would have downloaded the footage on all the cameras. He would replay the copies of the footage to ensure it is correctly downloaded. All the evidence, such as the hard drive, memory stick and CD's should have been sealed in an evidence bag and handed in at the SAP 13. He referred the court to Guidelines[7] followed in the United Kingdom which are currently in use by the Metropolitan Police, London and other major police forces worldwide. He conceded that there are no guidelines in place in South Africa in this regard. He also criticised the manner in which Smith destroyed the paper containing details of the vehicle. He stated that the paper remains evidence and it should have been tagged and bagged. Evidence should also not be kept at an office.

[58] During cross examination he conceded that it was a simple crime scene depicted on the footage which was adequately recorded by the police with regard to the timing of the incident. He conceded that the UK model does not consider the hard drive a vital component for downloading footage. Furthermore, the manner in which Basson downloaded the footage does not necessarily impact on the authenticity of the footage. Additionally he conceded that the fact that the original footage was retained by Smith does not necessarily mean that the footage had been tampered with. He also

[7] Cohen N & MacLennan-Brown K *Retrieval of Video Evidence and Production of Working Copies from Digital CCTV Systems v2.0* (Publication No. 66/08) Home Office Scientific Development Branch.

agreed that there was nothing wrong in Smith's approach during the investigation when he would first show the footage to witnesses in order to determine whether the vehicle or person is identifiable. He stated that he could not assist the court as to the authenticity of the video footage in this matter.

[59] **Mr Jan Francis Pretorius** is a chartered accountant who previously dealt in second hand Porsches. During the years he kept contact with the brand and was called to testify about his knowledge of Porsche vehicles. He was shown video footage pertaining to the case as well as still photographs and a power point presentation he believed was provided by the State. He viewed the footage of the crime scene. He identified the vehicle as a Porsche 911 dark in colour with dark coloured wheels. He could not determine the colour of the wheels and found nothing specific or unique to the vehicle. He could not identify the specific design of the wheel and tyre profile. He confirmed that a buyer can spec his vehicle to his specific needs. He expressed the view that the footage was of such a poor quality that he could not identify specific features of the vehicle.

[60] **Ms Petronella van der Westhuizen** is a former Lieutenant Colonel in the South African Police Service. She has 21 years' experience in crime scene investigation. She is currently the owner of Crime Scenes Solutions which specialise in crime scene decontamination. Her main area of expertise is fingerprint and facial recognition. She is not an expert in DNA transfer. She testified in general as to procedure followed to examine a crime scene. She

stated that she had observed a laceration and marks on the face of the deceased. She also noted that the assailant made physical contact with the victim. In her view forensic examination of shoes and clothing is also important. She would accordingly have expected DNA evidence in this matter. She conceded that it is not easy to remove DNA, but possible. The washing of a motor vehicle would also dilute a sample to such an extent that it would no longer be viable for analysis. She conceded that the time lapse between the incident and forensic investigation can result in degradation of DNA material.

[61] **Mr Alwyn Landman** is employed as a risk manager at Shimmy Beach Club at the V&A Waterfront. He knows Mr Mthethwa as a client at another venue, The Grand in Granger Bay. On occasion he would drive Mr Mthethwa‘s convertible vehicle when he had consumed too much alcohol. He would then drive him to his residence in Devil’s Peak. When he moved over to Shimmy’s, he saw Mr Mthethwa as a patron on a few occasions. According to his knowledge, Mr Mthethwa was living in Devil’s Peak and he was driving a black Porsche with registration number 911 Z at the time. He never drove the Porsche. In early 2013 when Mr Mthethwa had too much to drink he saw Sheldon, a person employed at Shimmy’s, drive the Porsche. During cross-examination he conceded that he cannot assist the court as to the identity of the driver at the time of the murder of the deceased.

[62] **Professor Tuviah Zabow**, an experienced psychiatrist testified that he had seen Mr Mthethwa on 9 November 2016 for a psychiatric consultation. The consultation was conducted in order to assess Mr Mthethwa's lack of recall pattern for the period of time of the alleged offence, as he reported that he could not remember anything relating to his actions or movements at the time of the attack. He was assessed by interview and psychiatric examination. He has not had previous psychiatric management, assessment or counselling. The focus of the assessment was on his emotional and cognitive functioning, and the possible contributing facts, as well as the nature of his inability to remember the events of the night.

[63] He found him to be of average intelligence with no cognitive defects. In particular, his memory function is intact. There is no amnesia, but due to his consistent lack of ability to provide any additional information recall remains absent. On evaluation of his overall function, accounts and behaviour there is no indication of pathology or any sort of basis for this. Automatism is not present nor any personality characteristics such as aggression, paranoia or antisocial behaviour. Alcohol can affect his motor abilities as well as his cognitive or planning abilities; hence alcohol could be contributory to his blank period. As a result of his inability to recall, no exculpatory account is possible.

[64] During cross-examination Professor Zabow conceded that his opinion and inferences drawn is solely based on what was told by Mr Mthethwa. He conceded that if someone says he cannot remember, it is not possible to determine whether that version is truthful. Alcohol consumption could be a

possible reason for memory loss. Although he consumed alcohol there has never been an account of aggression hence he concluded that Mr Mthethwa would be acting out of character if he had acted aggressively. He conceded that the fact that someone is unable to recall does not mean he was not involved. He also conceded that he did not obtain any collateral information to determine the extent of alcohol consumption and lack of recall. He concluded that there is no sign of mental illness, no memory disorder, no mental defect and no personality disorder. He found no pathological reason for the lack of recall. This concluded the evidence on behalf of the defence.

[65] It is trite that the State must prove its case beyond reasonable doubt against the accused.[8] Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt.[9] Our law does not require that a Court should only act on absolute certainty, but rather on justifiable and reasonable convictions founded upon just and reasonable grounds.[10]

[66] Evidence must be evaluated holistically and all evidence should be assessed in its totality.[11] The court must consider inherent strengths and weaknesses in the evidence, and consider the merits, demerits and probabilities.[12] In **S v Trainor[13],** the court stated the following:

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[8] *S v Van As* 1991 (2) SACR 74 (W) at 82D.
[9] *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373.
[10] *S v Reddy and Others* 1996 (2) SACR 1 (A) at 9D-E; *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182D-E.
[11] *S v Mbuli* 2003 (1) SACR 97 (SCA) para 57; *S v Van der Meyden* 1999 (2) SA 79 (W) at 82A; *S v Hadebe and others* 1998 (1) SACR 422 (SCA) at 426E-H.
[12] See *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.
[13] 2003 (1) SACR 35 (SCA) para 9.

> *"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the* onus *on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."*

[67] The evidence against the accused is primarily based on circumstantial evidence. In **R v Blom**[14] Watermeyer, JA referred to the two cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial. The first rule is that "*the inference sought to be drawn must be consistent with all proved facts. If it is not, then the inference cannot be drawn; secondly, the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn".*

[68] Circumstantial evidence needs to be considered in its totality in order to apply the two cardinal rules of logic formulated in **R v Blom** (supra). In **R v De Villiers**[15] the Court held that:

> *"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may*

[14] 1939 AD 188 at 202-203.
[15] 1944 AD 493 at 508-509.

have as to whether the inference of guilt is the only inference which can reasonably be drawn."

[69] In **S v Reddy and Others** (supra) the court said the following regarding the assessment of circumstantial evidence:

*"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in **R v Blom** 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored."*[16]

[70] 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 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.

[16] *Reddy* n 3 at 8C-E. Also see *Naude & another v S* [2011] 2 All SA 517 (SCA) para 37; *S v Cwele and Another* 2013 (1) SACR 478 (SCA) para 19.

[71] In **S v Mpumlo and Others**[17] it was stated that a video recording "*is real evidence, as distinct from documentary evidence, and, provided it is relevant, it may be produced as admissible evidence, subject of course to any dispute that may arise either as to its authenticity or the interpretation thereof*". This approach was confirmed by the Supreme Court of Appeal in **S v Mdlongwa.**[18]

[72] The departure point in terms of possible incriminating evidence against the accused in this matter is the CCTV footage. From the outset of the trial the defence therefore launched an attack, on firstly, the admissibility of this evidence, and secondly, the reliability and credibility of the evidence that emanated from the footage. A trial within a trial was therefore held to determine the authenticity of the footage. It became evident during the proceedings that the defence attacked the method used to download the footage, the manner in which it was secured and preserved, and the absence of the hard drive. It was therefore contended that the video footage was not original. In **S v Ramgobin and Others**[19] the court held that for video tape recordings to be admissible the State had to prove beyond reasonable doubt that the recording is original, that they relate to the incident in question and that no interference with the recording had taken place.

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[17] 1986 (3) SA 485 (E) at 490H-I.
[18] 2010 (2) SACR 419 (SCA) para 22. See also *S v Baleka and Others* (1) 1986 (4) SA 192 (T) at 197C.
[19] 1986 (4) SA 117 (N) at 135F-H.

[73] Nathan Bearman installed the cameras and explained that both systems are stand-alone systems. The cameras recorded and functioned properly, and the footage was recorded from the recording system to the hard drive. The footage remains on the hard drive and cannot be manipulated or tampered with. De Wet received a report and as a result viewed the footage. She gave Basson access to the relevant footage by using her unique password. Basson viewed the footage and downloaded what was captured on the CCTV cameras. Both De Wet and Basson confirmed that what they saw on the hard drive is what they were shown in Court. Smith was clear in his evidence that he "*tagged and bagged*" the exhibit which was only opened in Court in the presence of the defence when the footage was given to Zimmerman to conduct an authenticity test. Zimmerman was the only expert that testified on the authenticity question.

[74] The attempt by the defence to challenge the authenticity of the footage was still born since the defence never briefed an expert to determine authenticity. Atkinson testified that he did not conduct an authenticity test and was merely briefed to focus on risks and content. The evidence of Atkinson regarding potential problems and risks associated with the handling of electronic evidence were mere speculation. The central theme of the attack of the defence is the fact that the hard drive was not secured and therefore there was a real possibility that the footage was tampered with. Much emphasis was placed on the preservation of the hard drive but the defence witness, Mr De Swart, conceded that the hard drive is not essential in preserving the

footage. There was not even a suggestion that one of the State witnesses tampered with or altered the footage.

[75] In **S v Mdlongwa**[20] the footage was also downloaded from the hard drive. However, there was no suggestion by the SCA that the method by which the footage was downloaded compromised the originality and authenticity of the footage. The court further held that it need not be established that the original footage was used because the purpose of introducing the video footage into evidence was to identify the scene and to identify the perpetrators.[21]

[76] Zimmerman made a number of concessions but remained convinced in his expert opinion that the footage is authentic. The fact that Basson kept the master copy for a few days before it was handed into the SAP 13 and that it was then securely kept by Smith, may be criticized but it clearly did not impact on its authenticity. The infamous jump in the Tollgate footage was adequately explained and is not crucial in determining authenticity. In any event the all-important Stockyard footage depicting the murder scene remained intact. In **S v Nieuwoudt**[22] part of a sound recording was deleted, yet the Court found that the authenticity of the tape was proved.

[20] 2010 (2) SACR 419 (SCA)
[21] *Ibid* para 24.
[22] 1990 (4) SA 217 (A).

[77] In these circumstances, this Court is satisfied that the defence had failed to show that the footage had been altered, deleted, manipulated or tampered with in any way. For these reasons, the footage is found to be authentic and exhibit 2 is conclusively accepted as evidence.

[78] In South Africa there are no clear technical guidelines with regard to the authentication of video evidence such as CCTV footage. In the UK best practices were adopted in respect of digital evidence including the creation of audit trials to authenticate it. Notwithstanding the recommended best practice, the rule of evidence in UK remains that digital evidence should not be inadmissible solely because it does not conform to specific technological requirements. The UK still considers the layman's approach as a valid mode of authentication.[23] The authentication technology merely increases the evidential weight of a digital image. I agree with this approach. I am of the view that evidence should not necessarily be inadmissible merely because it does not conform to technological requirements. In **Director of Public Prosecutions v Kirwan,**[24] the Court held that:

> *"There may have been a point in time when CCTV footage was so new and so unusual that some element of explanation as to what was involved was required. However, that day is well past. CCTV cameras are now ubiquitous. Almost every investigation of any significance by the gardaí involves accessing CCTV footage and footage is now played during a very large number of trials. The footage that is generated by the cameras is real evidence. Ordinarily no evidence is required as to how a* CCTV *camera operates and how the footage is*

[23] Lim F *CCTV footage as evidence* (17 October 2014) AccraLaw - Point of Law.
[24] [2015] IECA 228 para 38.

generated any more than evidence is required as to how a traditional camera operates or for that matter how the internal combustion engine operates. The Court has no hesitation in rejecting this ground of appeal."

[79] In **R v Nikolovski**[25] the Canadian Supreme Court of Appeal acknowledged the importance and usefulness of videotapes in criminal trials and held that:

"*Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. […] It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. […] The weight to be accorded that evidence can be assessed from a viewing of the videotape."*[26]

[80] The degree of clarity and quality of the CCTV footage is not perfect but the visuals show the attack on the deceased in detail. Ndava was on duty at the time of the incident and is clearly visible on the Tollgate footage where he stood in front of the driveway gate with his colleague. This is the jumping section of the Tollgate footage where the two security guards appeared to have surfaced out of the blue. However, the Stockyard footage shows the movement of the two security guards at the Tollgate driveway gate. The security guards looked outside the gate onto Ravenscraig Road where

[25] [1996] 3 SCR 1197 .
[26] *Ibid* paras 28-29.

the vehicle had parked. It is evident that they could clearly see a vehicle from their vantage point and the footage supports Ndava's version that they went to the gate to investigate noises outside. However, the exact location of the attack was obscured from their view. Something happened which attracted them to the gate to investigate. Ndava explained that he heard a noise resembling people fighting. This evidence is clearly not fabricated because their actions on the footage are corroboration for his version that something suspicious had happened which prompted them to investigate and move towards the gate. Considering the fact that something alerted them, it is highly likely that the security on duty would have recorded the incident.

[81] The defence took issue with the details that were written on a piece of paper by Ndava. It is so that there were discrepancies in the State case as to what precisely was recorded on the paper, more particularly the description of the vehicle. The piece of paper was received by Smith before he viewed the footage. He then proceeded to use this information to check on the eNatis system. Thereafter he went to Porsche to enquire about the registration number as provided by Ndava. It would be completely illogical for an investigating officer to interrogate Porsche based on a fabricated piece of paper. I am therefore satisfied that the information written on the piece of paper resulted in the Porsche visit. It must also be borne in mind that Smith and Miles speculated that the vehicle resembled a Porsche after initially viewing the footage.

[82] Ruhaan Steynfaardt identified the vehicle as one he had personally sold to Mr Mthethwa. He was extensively cross-examined on the identification of the vehicle. He was even recalled by the defence to scrutinize his testimony further. He was an excellent witness who withstood the most intense scrutiny. He exhibited extensive knowledge of specific features of the Porsche brand in all its facets. He displayed exceptional knowledge of all the various Porsche models, past and present. He confidently explained how he identified the vehicle and linked it to his former client. The defence witness Pretorius also identified the vehicle seen in the footage as a Porsche 911 and corroborates Steynfaardt in this regard. The Court has no hesitation to accept his version as credible and honest.

[83] Once the vehicle was positively identified by Steynfaardt the focus shifted to another independent source, namely the Tracker which was fitted to the vehicle. The detailed tracker trip log report reflects that the ignition of the vehicle was switched on at 02:34:10 in Vredehoek. The vehicle then followed a route heading towards Woodstock. At 02:49:55 the ignition of the vehicle was switched off in Ravenscraig Road. The total period that the vehicle was stationary in Ravenscraig Road was approximately 6 minutes. The incident on the footage occurred in a period of approximately 6 minutes. The Court is mindful of the fact that the tracker time was not synchronized with the Stockyard and Tollgate cameras.

[84] At 02:55:47 the ignition was switched on and the vehicle departed from Ravenscraig Road, arriving back in Vredehoek at 03:03:06 when the ignition was switched off. The odometer reading on departure from Vredehoek was 4742 and on arrival in Ravenscraig Road the reading was 4746. On its departure from Ravenscraig Road the reading was 4746, arriving back in Vredehoek with a reading of 4750. The distance travelling in each direction is 4km.

[85] The defence admitted the tracker records to be very accurate both in terms of positioning and time. It was not in dispute that the tracker records relate to a Porsche vehicle which is owned by the accused. Having made these concessions the defence questioned the exact location of Ravenscraig Road and alluded to the existence of another Ravenscraig Road, later referred to as Upper Ravenscraig Road. This dispute was dealt with decisively by Captain Speed. He conceded that his device is not perfect, but his method of confirming the tracker location in Ravenscraig Road where the Stockyard cameras were functioning and where the body was found could not seriously be challenged. His method was entirely focused on location and not street names. He was an excellent witness who showed great insight and experience in GPS technology. Speed corroborated the tracker evidence and found beyond reasonable doubt that the vehicle in question was in the vicinity of Ravenscraig Road at the time of the attack on the deceased. The defence expert Mr Roux[27] did not significantly alter the location of the vehicle. The tracker evidence clearly established that it was the motor vehicle sold by

[27] Affidavit by Shaun Peter Roux – exhibit MM.

Steynfaardt to Mr Mthethwa that was present at the time of the incident, left the scene in Ravenscraig Road and returned to Vredehoek. Furthermore, considering the fact that the vehicle was stationary in Ravenscraig Road for approximately the same period of time as the recorded time captured by the CCTV footage, the evidence incontrovertibly establishes that the vehicle in question is that of the accused.

[86] It was contended by the defence that the driver and the kicker was not the same person. The hypothesis is mainly based on the fact that the driver first disappeared off-screen and thereafter we see the attack executed by the kicker. Then, when the attack was concluded the kicker disappeared off-screen. It was at this stage that the two security guards came to the gate and observed the vehicle.

[87] The footage introduced the kicker as he ran onto the screen. According to the defence, he was clearly in fear of someone or running away from someone. There was no one in sight chasing the kicker. The kicker stopped on screen, turns around and immediately launched the attack on screen. The kicker was clearly not pursued by anyone and in no danger at all, otherwise the alleged danger would have manifested itself on screen whilst the kicker was launching the attack. In the face of real or imminent danger one would reasonably have expected the kicker to abandon the scene. Instead he had the courage and tenacity to launch a vicious attack on the deceased. The defence's hypothesis that the kicker was running from danger is far-fetched since the kicker transformed into the aggressor on screen.

[88] It is significant that the driver and the kicker never appeared on screen at the same time. Furthermore, it is only when the driver appears on the scene, that we see the attack and only after he arrived at the scene that the security guards heard the noise in the street. Similarly it was only after the attack was concluded, that we see the driver depart from the scene. It was not disputed, and the footage clearly shows that there is only one driver who arrived at the scene, and the same driver departed from the scene. Furthermore, a visual examination of the footage shows the top garment of both driver and kicker is lighter than the bottom garment. There is also a marked resemblance in the silhouette and height of the kicker and the driver. Dr Tam was conservative in his assessment of similarities between the perpetrator and the accused and conceded that he could not include nor exclude the accused. He identified three specific similarities, which in my view is not insignificant, namely the height, compass-like gait and forward head posture.

[89] A crucial time during the attack occurred at approximately 02:52. The footage shows that there is clearly a continuation of the attack off screen. The aggressive limbs of the kicker was partially within range of the camera and can be seen popping intermittently on screen. The body of the deceased can be seen moving during this phase of the attack. The kicker aggressively continues with the attack until the security guards approach the Tollgate gates to investigate. What is significant is that after the two security guards arrived the kicker immediately terminated the attack. Barely a few seconds later the driver emerges from the direction of the deceased's body and walks to the

vehicle. I have no hesitation to conclude that the kicker was disturbed by the security guards which resulted in the termination of the attack. The kicker displayed a great degree of anger towards the victim during the attack. The manner in which the driver initially stopped in the middle of the street, and walked purposefully across the street was the demeanour of an angry person. The conduct of the kicker and the driver is therefore congruent in this regard.

[90] The unknown woman in the footage joined the kicker by executing light blows to the victim, searched the victim, and also interacted with the driver of the vehicle before he left the scene. The woman clearly aligned herself with the conduct of the kicker, and thereafter approached the driver and engaged with him. It is highly improbable that the driver was completely isolated and oblivious to the attack, taking into account that he walked to his vehicle barely a few seconds after the attack was terminated. He walked calmly back to his vehicle and must have been fully aware of the body lying on the pavement, as he crossed the body to get to the vehicle.

[91] During the entire duration of the footage that was downloaded (approximately 2 hours) there were in total 6 persons visible on the footage. The two security guards can safely be ruled out as possible perpetrators, as well as the male person that walked down Ravenscraig Road minutes before the attack. The remaining actors left are the unknown female, the deceased and the driver/kicker. The footage was downloaded up until the police arrived and even thereafter and nowhere did any other person feature. The attempt by Atkinson to show that there were also other people off-screen is therefore

not convincing. I am satisfied that there were no other *dramatis personae* on the scene. This hypothesis proposed by Atkinson is highly improbable and far-fetched. In **S v Sauls and Others**[28] "*it has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense*". An analysis of the footage based on common sense and logic justify, as the only reasonable inference, that the driver and kicker was the same person.

[92] The DNA evidence does not take the matter any further since no DNA was found at the scene linking the accused to the crime. The vehicle was examined approximately 21 days after the incident and the defence witness conceded that degrading of evidence could have occurred during this period. Gulam Petersen also did not take the matter any further since no weight could be attached to her belated inadequate identification of the accused.

[93] Dr Liebenberg confirmed that the injuries sustained by the deceased are compatible with everything that happened on screen. The defence introduced the phenomena of *commotio cordis* or cardiac concussion which can be described in medical terms as "*a primary arrhythmic event that occurs when the mechanical energy generated by a blow is confined to a small area of the precordium and profoundly alters the electrical stability of the myocardium, resulting in ventricular fibrillation*."[29] Academic literature "*often*

[28] 1981 (3) SA 172 (A) at 180G.
[29] Maron B.J. & Mark Estes N.A. *Medical Progress- Commotio Cordis* The New England Journal of Medicine (March 11, 2010) 917-927 at 917.

associates commotio cordis with competitive sport, but the dangers implicit in such blows can extend into many other life activities."[30]

[94] The defence did not produce any expert medical evidence to justify this hypothesis but merely attempted to get Dr Liebenberg to concede to this possibility. A striking feature of *commotio cordis* is the fact that it is generally a light to moderate blow by blunt force which activates this phenomenon. It is usually unforeseeable, accidental and not caused by severe force. Dr Liebenberg did not exclude the possibility that the victim may have developed cardiac arrest due to *commotio cordis,* but this concession remains consistent with the blunt force applied to the body. The defence attempted to show that such fatal blow was inflicted off-screen, but failed to justify this conclusion by expert evidence. It is clear from the footage that the kicker was the aggressor and it is highly improbable that any other person inflicted those injuries that led to the death of the deceased.

[95] Dr Liebenberg testified that *commotio cordis* is not a post-mortem finding since it is not a macroscopic diagnosis. She stands by her macroscopic postmortem findings and conceded that a blunt force injury to the chest wall could have stopped the heart. However, her evidence is clear that the deceased was dying of a liver injury, then something else happened which hastened the death. Dr Liebenberg stated that there must have been cardiac circulation for blood to be pushed through the liver, consequently the

[30] Maron B.J. et al *Clinical Profile and Spectrum of Commotio Cordis* JAMA (March 6, 2002) Vol 287 No. 9 1142-1146 at 1142. See also *Medical Progress- Commotio Cordis* n 26 at 918; Geddes L.A. & Roeder R.A. *Evolution of our knowledge of sudden death due to commotion cordis* The American Journal of Emergency Medicine (2005) 23 67-75 at 67

liver injury occurred first, then the cardiac event. According to Liebenberg, the liver injury was compatible with the blunt force trauma visible in the footage, therefore the intervening event must have happened on screen. The court is satisfied with the evidence of Dr Liebenberg in all respects and her conclusion as to the cause of death.

[96] The accused did not testify in his defence and called Dr Zabow to justify his decision not to testify, citing his apparent lack of recall. Zabow assessed the accused more than three years after the incident. It is trite that a court is not bound by expert evidence. The cogency of the expert's evidence must ultimately be assessed in the context of the factual matrix of the case. It is for the court to assess the inferential force or weight of all the evidence before it. Dr Zabow conceded that his psychiatric opinion is largely informed by facts related to him by Mr Mthethwa. The general rule is that an expert witness may not base his opinions on statements made by a person not called as a witness. The only exception is where the expert refers to textbooks.[31]

[97] In **R v Abbey**[32] the court held that a psychiatric opinion and its basis are not admissible as proof of the truth or its content. The reliance on the facts related to by the subject of evaluation is a weakness of psychiatric evidence alluded to in **Singh v Parkfield Group Plc**[33] where the following was stated:

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[31] Schwikkard PJ & Van der Merwe SE *Principles of Evidence* 3rd ed (2009) Wetton: Juta at 100.
[32] [1982] 2 S.C.R. 24 at 43-45.
[33] (1996) PIQR Q 110.

> "*It is common sense and both the psychiatrists before me agree, that particularly in matters of psychiatry the accuracy and honesty of the patient is all important.*
>
> *Clearly in this case, my own assessment of the plaintiff is, therefore crucial."*

[98] The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value. Dr Zabow could not justify any psychiatric basis for the lack of recall. More particularly, in view of Zabow's evidence that there is no pathological reason for the lack of recall, an assessment of the account of the accused is crucial. In **R v Möhr**,[34] the Court held that:

> "[…] where a question of the state of mind of an accused person is in issue, it is not easy for a Court to come to a conclusion favourable to the accused as to his state of mind unless he has himself given evidence on the subject."

[99] In **S v Shivute** (supra) it was noted that "[t]he accused failure to testify stripped the opinion evidence of the expert witness of almost all relevance and weight."[35] In these circumstances the court is constrained in accepting the opinion of the expert witness.[36] Consequently the accused's silence and the inability of the court to determine the truthfulness of his account render Zabow's evidence of no value.

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[34] 1944 TPD 105 at 108.
[35] *S v Shivute* 1991 (1) SACR 656 (NM) at 661H. See also *S v Mngomezulu* 1972 (1) SA 797 (A) at 798F-H.
[36] *Ibid.*

[100] Defence witness Landman could not provide any details as to who drove the vehicle of the accused on 14 April 2013. Landman was belatedly called after the close of the defence case to present evidence not connected to the case, and to support Zabow's evidence on lack of recall. The vehicle was not near the clubs that Landman referred to in order to support a possible alternate driver arrangement. He did not take the defence case any further.

[101] The accused elected not to testify. All the State's evidence, cumulatively, established that the vehicle of the accused was at the scene of the crime beyond reasonable doubt. In **S v Chabalala**[37] (supra), the court quoted with approval what was pointed out in **S v Mthetwa**[38]:

> *"Where, however, there is direct* prima facie *evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general* ipso facto *tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability".*

[102] In **S v Francis**,[39] the following was stated:

> *"While an accused person's failure to testify may in appropriate circumstances be a factor in deciding whether his guilt has been proved beyond all reasonable doubt, this is only so where the State has* prima facie *discharged the* onus *upon it."*

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[37] *Chabalala* n 5 para 20.
[38] 1972 (3) SA 766 (A) at 769D.
[39] 1991 (1) SACR 198 (A) at 203H-I.

[103] In **Osman and Another v Attorney-General, Transvaal**,[40] the court held that:

> *"Once the prosecution has produced evidence sufficient to establish a* prima facie *case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that the accused has to make such an election is not a breach of the right to silence."*[41]

[104] The legal position is eloquently summarized in **S v Boesak** as follows:[42]

> *"The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence."*

[105] At the time of his arrest the accused indicated in his warning statement that he will "speak in court". However when the opportunity presented itself, he failed to do so. The accused was not prepared to take the Court into his confidence to explain the circumstances which led to his vehicle's presence in Ravenscraig Road at the time of the attack. The accused elected not to give

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[40] 1998 (4) SA 1224 (CC).
[41] Also see *S v Thebus and Another* 2003 (2) SACR 319 (CC) paras 58-59.
[42] 2001 (1) SA 912 (CC) para 24.

an account of his movements on the morning in question, or to relate to the court any circumstances to justify an inference that someone else was driving his vehicle at the time of the incident. He was not prepared to furnish an account of how someone else could possibly have obtained possession of his vehicle.

[106] He was at a Tavern in Gugulethu the evening before the incident and his vehicle eventually ended up at his residence in Vredehoek, where it remained for one hour and nine minutes. The accused elected not to subject him to cross-examination to clarify whether he did in fact return home after his visit at the Corner Lounge in Gugulethu. The accused could easily have explained his movements at the Corner Lounge. He could have clarified whether he was alone or in the company of others, where he had parked his vehicle and who had possession of his keys. If alcohol played any role he could have testified as to whether at any stage he was deprived of his vehicle, whether it was driven by someone else, whether it was returned to him by someone else, or whether the vehicle was under his control at all times. The accused could also have explained his social habits and alcohol usage at the time to corroborate Landman's version, that when he had too much to drink someone else would drive his vehicle and which was conveyed to Dr Zabow. One would reasonably have expected the accused to have taken exceptional measures to assist the police and court in determining his movements at the time of the attack on the deceased. As a result of his failure to testify there is accordingly no evidence as to the whereabouts of the accused at the relevant time.

[107] The lack of recall does not justify a decision not to testify. Even if he cannot recall events surrounding the period of the incident, he could have assisted the court to explain various instances of memory relapses, how it manifests itself, how he discovered it, managed it and when it started. In doing so he could have corroborated Zabow's version. Significantly the memory relapse was never disclosed to the police at the time of arrest, nor did the accused seek professional intervention until late during the trial proceedings. The court is bound to draw a negative inference from the manner in which this evidence was introduced belatedly after the closure of the defence case. The only reasonable inference to be drawn is that the accused's version conveyed to Zabow is untruthful and fabricated. The accused's version of lack of recall is therefore rejected.

[108] There are consequences and risks associated with an election not to testify. The CCTV footage and Tracker report is of great evidential value in the case and establishes a strong prima facie case against the accused. There is direct evidence implicating the presence of the accused's vehicle at the scene, as well as the presence of a male with similar features as the accused. The prosecution's case is strengthened when such evidence is uncontroverted due to the failure of the accused to testify.

[109] The Court made its own assessment of the CCTV footage and concludes that the similarities between the assailant and the accused are remarkable. Considering the similarities between the two, on the probabilities,

the only reasonable inference to draw is that the accused was the driver of his vehicle at the time of the incident. The court is satisfied that the footage is a true reflection of the events which led to the death of the deceased. The CCTV footage is unimpeachable. The Court is satisfied that the accused was the person who drove his Porsche vehicle from Gugulethu to Woodstock, where he briefly stopped at two places, firstly in Milnerton, and then in Vredehoek where Landman stated he lived. There the vehicle was stationery for one hour and nine minutes before departing to Ravenscraig Road.

[110] The Court is convinced that the driver of the vehicle walked purposefully on a mission and executed his mission by launching this attack on the deceased. The version that the kicker and the driver are different persons is rejected. The conduct of the unknown female accomplice, who participated in the attack and thereafter engaged the driver, justifies the inference that she acted as an accomplice to both the kicker and the driver. The cumulative effect of all proven facts, including the accused's failure to testify must lead to the inference of guilt being the only reasonable one. The Court is accordingly satisfied that the State has proved the guilt of the accused beyond reasonable doubt.

[111] The accused executed a vicious attack on the deceased. In **S v Dlodlo**[43] the following was stated:

> *"The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and*

[43] 1966 (2) SA 401 (A) at 405G-H.

can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury. Where, however, the accused person's subjective state of mind at the relevant time is sought to be proved by inference, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every other reasonable inference save the one sought to be drawn".

[112] In **Director of Public Prosecutions, Gauteng v Pistorius**[44] it was stated as follows:

"[…] 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."*

[113] In **S v Humphreys**[45]**,** the Court stated that "*like any other fact, subjective foresight can be proved by inference*" and to constitute prove beyond reasonable doubt that inference is the only one, which can reasonably be drawn.

[114] The silent witness observed a continuous horrific attack on the victim who was lying motionless during most of the attack. The victim was a petite young lady weighing merely 46kg. There was no resistance and the accused

[44] 2016 (2) SA 317 (SCA) para 26.
[45] 2013 (2) SACR 1 (SCA) para 13.

could have terminated the attack at any time. Yet, the visuals clearly show that the accused continued to aggressively inflict excessive blunt force trauma to a lifeless body. The intermittent pauses between the phases of the attack and the attacker's handling of the body create a strong suspicion that the accused had the direct intention to kill the victim. However, the Court is mindful that intention must not be inferred by hindsight after the fact of death.

[115] The Court is satisfied beyond reasonable doubt that the only inference to be drawn from the established facts is that the accused subjectively foresaw, as a consequence of his conduct that the death of the deceased would ensue. The accused continued with the violent act, and clearly reconciled himself with this possibility.

[116] The accused is accordingly found guilty of murder with intent in the form of *dolus eventualis.*

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DEPUTY JUDGE PRESIDENT GOLIATH