

COURT RESUMES ON 14 DECEMBER 2016 (at 10:31)

COURT: Yes?

MR VAN DER VIJVER: Thank you, M'Lady, Learned Assessor.
I don't intend to be ...(intervention)

5 MR BOOTH: M'Lady, sorry, before my colleague proceeds,
may I just hand up a bundle of the defence's heads. I know
everything has been e-mailed, but just maybe for
completeness, could I hand up the defence's heads of
argument? Thank you. Sorry, Mr Van der Vijver.

10 MR VAN DER VIJVER: For a moment there I thought there
was an application for reopening! (Laughter).

COURT: I will cancel our Christmas celebration if that be the
case!

MR VAN DER VIJVER ADDRESSES COURT: M'Lady and
15 Learned Assessor, I don't intend to be very long. The Court
has been in possession of my heads for exactly one month
now, and I just wish to highlight certain of the aspects that I've
touched on in my heads of argument. May I just say right in
the beginning that I'm not going to talk about the credibility of
20 the State witnesses, because my submission is that with the
exception of Ms Pietersen, no criticism can be levelled against
the other State witnesses as far as their credibility are
concerned. And if there is one specific person or persons that
the Court would like to hear me on, I'm more than welcome
25 then to discuss it, but at this stage I'll leave it at that, I'm not

going to take the evidence of Ms Pietersen any further, I will concede that she was an exceptionally poor witness as far as her evidence is concerned.

Now I've started off in my heads of argument by referring
5 to the relevant case law, which I think is of interest and of aid
to the Court in coming to a conclusion in this matter. I'm not
going to report all the (indistinct), but what I would like to say
in essence is that the evidence must not be broken up in little
body parts so to speak, and having looked at my learned
10 friend's heads of argument, I think that's exactly what the
defence is doing on most of the issues. If one breaks it up in
little body parts and you view it in isolation and you level
criticism, that is not the test. We are dealing here with
circumstantial evidence and I would like and urge the Court,
15 with respect, to have an holistic view of the evidence in this
matter. That is the first point I want to make as far as the
case law is concerned. And I will point out, as I discuss the
various issues in that evidence, as to how one can fall into
that trap, and I specifically want to refer to the vehicle later
20 one, where one looks at evidence in isolation and not
holistically.

The other important fact that I want to stress as far as
the case law is concerned, is that when we talk about beyond
reasonable doubt, I mean we talk about it every day, and it's
25 mentioned every day in court, and sometimes one forgets that

it's not an impossible onus that's on the State of beyond all doubt, it's beyond reasonable doubt. The criminal justice system will fall into disrespect if a court should adopt an approach of beyond all doubt. And as I mentioned on page 3,
5 paragraph 8 of my heads of argument, there is no obligation upon the prosecution to close every avenue of escape that might be said to be open to an accused. That is something which becomes very relevant if one considers the evidence of, in particular, Mr Atkinson, as to all the possibilities that he has
10 proposed is possible in this matter.

Then another important aspect as far as the case law is concerned, is the right to remain silent. Now I'm with my learned friend, with his interpretation of the case law. The fact that an accused does not testify, does not equal guilt, that's
15 not the test. All I'm saying and what the Constitutional Court has confirmed in the Boesak matter and in the Thebus matter, is that you make informed decisions during the presentation of your case, and if you then make a decision not to testify, it could have certain consequences for an accused. No negative
20 inference is drawn from the fact that an accused is not testifying, nor, as I said, does it mean that because he is not saying anything, it will now mean that he must be found guilty. But if there is evidence, like in this particular matter, when we had a 174 application and the Court said well the Court is of
25 the view there is a case to answer, and the case is not

answered, or not sufficiently answered, it may have certain consequences.

May I start off with what I think is the departure point in this whole matter and it's obviously EXHIBIT 2, the video
5 footage. Now the Court has invited me the day before yesterday, to say well see if there's perhaps more case law on this point as to the trustworthiness of the video. I've done that, unfortunately I was not able to find anything other than what was already said in the Mdlongwa case, the Supreme
10 Court of Appeal case, and the case that the State is relying on in this particular instance. May I perhaps just at this point also just tell the Court that incorporated in my argument must be everything that was said up until now, all the applications for the authenticity, reopening of the case etcetera, I'm not - I
15 didn't repeat it in my heads of argument, so I would request the Court to read that in conjunction with my main heads of argument.

If one looks at the Mdlongwa case, to which I have referred previously, it is absolutely to the point as far as the
20 authenticity and the originality of the video footage is concerned. The Court is aware that one of the attacks in that case was the fact that it was said that the video footage of the robbery was not the original, and we all know that the court referred to (indistinct) was a witness in that particular matter,
25 where the court says at paragraph 16:

“He downloaded the information which he was solely authorised to do...”

The same as De Wet:

“... for the police to print video stills...”

5 Which Basson later on did:

“... of what occurred in the bank robbery and handed the footage over to Inspector Ahmed.”

Then later on, paragraph 22, the court then deals with the challenge and the court says that:

10 “Viljoen testified that each branch had its own hard drive.”

From which the video footage images on which the appellant and his co-accused were captured, were downloaded:

15 “There can, therefore, be no question that the video footage was original and, therefore, constituted real evidence.”

There is no suggestion whatsoever by the SCA that because the hard drive was not secured, because the footage was downloaded from the hard drive, that it compromises the originality and the authenticity of the video footage. But then the court further - it goes further, where the court says in paragraph 23, he dealt with the evidence and he says:

25 “In my view no tampering took place with the video footage, consequently there appears to be no reason to reject the authenticity and the originality of the video

footage downloaded by Viljoen from the surveillance cameras installed at the bank.”

In other words if we want to get to the matter under discussion. The first leg is that the fact that the hard drive
5 was not secured, is no stumbling block in the Court finding that the material is original and authentic. Secondly, obviously the Court will have to look at the evidence, how it was done, look at the evidence of particularly Basson, De Wet and Warrant Office Smith, to determine the second leg whether there was
10 any tampering. But, M'Lady, Learned Assessor, the State even went a bit further in this matter and we secured the expert opinion of Warrant Officer Zimmerman, where he actually performed an authenticity test on the video footage. So it went beyond what was required by the SCA in this particular matter.
15 And even though Zimmerman made a few concessions, the one thing of his evidence that he was adamant, was that he could not find any, any evidence that there was any tampering or altering of the video footage.

But let's now look at the evidence of the persons that
20 were involved in securing the video footage. We know from - and the Court will see from my learned friend's heads of argument, that mention is made that Maureen de Wet, that her memory is not very good. M'Lady, Learned Assessor, I've said this before and I want to repeat myself, you really don't need
25 to be a rocket scientist to remember what you saw in this

particular clip, if I can call it that. A vehicle pulled up. A person got out of the vehicle and walked across the street, off screen for 23 seconds, then the assault started. Two bodyguards appear in the background, not bodyguards, 5 security guards appeared in the background. The person walked back to the car and drove off. That is all. This is not a long dragged out scene with different role players etcetera, it's a very, very simple and uncomplicated scene.

So if Maureen de Wet says that what she saw that 10 morning, remember a report was made to her that an incident took place, so she played the footage, she rewind (sic) and then she saw, she actually came across what was reported to her. And the fact that she could rewind, we will remember from the gentleman, I can't remember his name now, who said 15 the fact that he could rewind, is also an indication that it was still on the hard drive and it was the original footage. So she came across and she saw what this whole fuss was all about in the report that was made to her, and that's what she pointed out to Basson. And Basson didn't stop downloading the 20 moment the person got back into the car, it continued well after that. So in total we had video footage, although the incident itself is only about six minutes long, we have a total period of video footage of approximately two hours.

The fact that Basson kept the master copy for 25 approximately, I think, three or four days in his office before it

was put in to the SAP13, the fact that Warrant Officer Smith kept it in his office for well over a year in his docket, before it was handed in when the matter was going on trial, there may be criticism. In hindsight one might say well in future don't do
5 it like that, you know, I mean you could compromise the material. But there's no evidence that it was compromised. And I said in my heads of argument, referring to the Sauls matter, that it has been said more than once that the exercise of caution must not be allowed to displace the exercise of
10 common sense. And that's exactly my point. The point is being made that the fact that it was now for a couple of days in Basson's office, which he shared with colleagues, why would they go and tamper, what did they do, did they include somebody, did they exclude somebody, did they delete
15 somebody, why would Basson do anything in that manner, why would Smith. In any event, I mean the evidence is clear that the forensic bag was opened here in court when the footage was sent to the laboratory for Zimmerman to perform his test.

There's no evidence whatsoever that the police or
20 anybody else had any interest in this matter. They didn't even know at that stage as to who this car belongs to. It's only when they went to Porsche, that things started to fall into place. And again I come back to the credibility, I mean it cannot be said that Basson and Smith, in particular, and then
25 perhaps Maureen de Wet, who also worked with this, that they

- they were not telling the truth as to how they went about in securing and downloading the video footage. The point is also made in my learned friend's heads of argument that but there were other files, it's an abbreviation, I can't quite remember
5 what, JPEG files or something, that was added and that compromises the originality and the authenticity, but those are the files, I mean Basson explained, that he makes little files to produce his still photos. So there was an explanation for that.

But the point I want to make, M'Lady, Learned Assessor,
10 is that Basson said that what was downloaded on his laptop, because remember there was also this discussion as to how dates have changed, and Basson said well what is on my laptop is exactly still the same of what was downloaded at Stockyard and Tollgate in terms of dates, everything. It's true,
15 he couldn't give an explanation, he said well that is quite peculiar that the dates, every time it downloads, it seems the dates start to change. And it's not surprising that both De Wet and Basson said that what they saw herein, what was shown to them when EXHIBIT 2 was viewed here in court, that that is
20 exactly what they saw and that they could still remember.

It is, therefore, my submission, as far as EXHIBIT 2 is concerned, that there's nothing in the State's evidence that can cast doubt on the authenticity. And I want to again emphasise, having regard to what the SCA has said, the State
25 has even gone beyond that, walked the extra mile, by having

the material tested by a laboratory. Now we know from Atkinson's evidence that he hasn't tested the material and he has confirmed that was not his mandate. He said he was here to look after procedures that were followed. So the criticism in
5 paragraph 30 of page 10 of my learned friend's heads of argument, where he says that the State provided defence with a disk that was not a true copy of the master disk, and this heeded the evaluation thereof by the defence as the date and time and information was incorrect. The point I want to make
10 is that according to Atkinson's evidence, that was never - ja, I'm referring now to my learned friend's heads of argument page 10, paragraph 30.

COURT: Right.

MR VAN DER VIJVER: That was never Atkinson's mandate in
15 any event. The Court has made an interim ruling as to the admissibility of EXHIBIT 2, at the end of a trial-within-a-trial, as well as at the end of the State's case. It is correct that a court may, and I refer to a very old case, but it's a case that is still being referred to even by the Constitutional Court as
20 recently as 2010, Meyer v Meyer 1948 (1) SA 484 and it was a Transvaal decision as it was called then, and which says that:

“The interlocutory order can be amended in the course of the trial, if the facts upon which it was based change, or are seen in a different light.”

25 My submission with respect, M'Lady, Learned Assessor, is that

can one really say that the facts upon which it was based have changed. Remember the defence did not, in their case, present any evidence whatsoever on the authenticity or originality of the video footage. Again, the closest it came was perhaps with De Swardt, but again referring to procedures, but there was no expert evidence led by the defence, the State submits with respect, that one could possibly consider having an influence or change the facts upon which this Court has made, on two occasions during the course of this trial, interlocutory orders that the EXHIBIT 2 is allowed.

The second leg, can one say that the Court can now see it in a different light? My submission in that regard is exactly the same as on the first leg, with respect. So there's absolutely nothing which I can even suggest that the Court can now, at the end, say well things have now changed in my interlocutory order, there's no reason why the Court cannot make the interlocutory order a final order and submit EXHIBIT 2 in to the pool of evidence.

If one then accepts that the EXHIBIT 2 is now before the Court to consider, what flows from EXHIBIT 2, what inferences can be drawn from EXHIBIT 2. The first point I make in my heads of argument, is the question is whether the driver and the kicker is the same person. Now I'm not going to repeat everything that Mr Atkinson has said in this regard, the fact that the driver appears off screen and you cannot say that the

person that comes back is then the driver. This is now, let's called it an unknown third person. Even Mr Atkinson had to concede that the fact that the vehicle stopped almost in the middle of the street, the fact the person purposefully walked
5 across the street, could be construed as a person that has now, first of all, found what he was looking for and secondly, it could also be indicative of a person that is cross, that is angry.

I make the point that although we have video footage of two hours, there are only six persons, and I know the
10 argument, ja, but there were other cameras etcetera, etcetera, but again one must look at the probabilities. There were in total only six persons visible on the footage, of which the guards can be ruled out. In the end we are left with the unknown female, the deceased and the accused, which the
15 State alleges is the accused. It's clear from the footage who the aggressor was. The proposal by Mr Atkinson that other people could have been involved that were off screen, the proposal that the kicker, let's call him now for the sake of argument the kicker, was running away from people, so was
20 the deceased, I make the point in my heads of argument, I think it's highly, highly, highly improbable and actually farfetched that none of those people, one or two or how many there might have been, that they never appear on camera.

And everybody that was there, incidentally, and I'm not
25 referring to the two security guards, they all left in the same

direction walking down to, I don't know whether that's Searle Street, but they all walked past the Tollgate gate, this unknown female, the other unknown gentleman, who, in any event left the scene about three minutes before the vehicle actually
5 stopped in Ravenscraig Road, they all left in that direction. That might be a coincidence, but the fact remains that what happened to all these other people that we are now - are asking to consider as possibilities, none of those people. And even if the accused, or the kicker then, was running away from
10 some unknown assailants off screen, it just doesn't make sense that the moment he managed to stop, he turned around and immediately started his attack on the deceased. Hardly what you would expect from somebody that has now just ran (sic) for his life. So it's clear that the person that came on
15 screen was going for the deceased, that's the person that he wanted to assault and, in fact, then assaulted.

This driver, kicker, it's also significant that if one looks at the video footage, that the moment you see the two security guards enter the screen at the gate, that's when this person is
20 walking back to his car, because it's clear that he then becomes aware of the presence of other people. Right at that point you see the two guards appearing and then the person walked back to his car. If the kicker was a different person, what happened to the kicker? The interaction between this
25 unknown female is, funny enough, with the driver of the car.

She walks up to the driver of the car when he got into his vehicle, lost all interest in her partner in crime if the kicker was somebody else. This is the person that she walked up to, brief discussion and then she left. She even went back and
5 she pulled the deceased a bit further up the pavement. This unknown kicker is nowhere to be seen, because there is no such a person. The driver and the kicker is the same person. In other words, M'Lady, Learned Assessor, it's so improbable that the cameras would not have picked up, again at any
10 stage, the missing person, then it really deserves no further discussion. So the driver goes off screen, he stays off screen, we see an assault, the deceased is, by all accounts, dead. The two security guards appear. The driver walked back to his car. He now suddenly appears and he goes back to his car.

15 The car, now we know that there was no - it was never put to any witness that the car in the footage is not that of the accused. The evidence in that regard, as the defence rightfully entitled to, was tested, but it was never put to a witness that that is not the car of the accused. And
20 surprisingly Atkinson, on a question by myself in cross-examination, said well I never - we never disputed the fact that that was the car of the accused, that was Atkinson's evidence. Now we know what was said about the criticism, about Steynfaardt's identification of the vehicle, and as I said at the
25 stage when we dealt with the 174 application, one can even

take Steynfaardt's evidence out of the equation. The fact remains is that, Smith went to Porsche, because they then realised in discussion between him and Miles, that this is a Porsche, that's why they went to Porsche. And we know that
5 they must have been given information at Porsche, because then they immediately approached a magistrate and a prosecutor to get a Section 205 subpoena, to get the details of the vehicle, the invoice etcetera from Porsche, because Porsche said they would not give that without a subpoena.

10 So Smith got the information. Somebody must have given him the information, and Smith's evidence and Steynfaardt's evidence is very clear in this instance that they gave him the information. But that's not the only point that the State is relying on to say well the car in EXHIBIT 2 is that of
15 the accused. We've got the Tracker records. And we know from, EXHIBIT, I think it's CC, where a minute between the parties were drafted and entered in to evidence, is that the reliability of the Tracker records were admitted by the defence in terms of time and position. Now we know that there were
20 later on a bit of confusion and back paddling so to speak, as to the accuracy, I'm not going to deal with Speed's evidence and Roux's evidence in this regard, I mean Roux has placed - Roux has worked with equipment that is accurate to two centimetres and he has even placed the car and the deceased's body
25 closer than what Speed did.

Now we know from Pretorius, who was called by the defence, we know at least from his evidence, that it was, in fact, the Porsche that was parked in that street. He said when the car pulled up, all he could say it's a sports car, but he said
5 when the car pulled away he could see it's a Porsche and he went as far as to say you could then see it's a 911 ... (intervention)

COURT: Who is this?

MR VAN DER VIJVER: Pretorius, who was called by the
10 defence.

COURT: Yes.

MR VAN DER VIJVER: So it seems everybody is on the same page as to it was a Porsche in Ravenscraig Road. So now we have a Porsche which the defence's witness has conceded and
15 agreed with. We have a number that was given to the police by the one security guard, and although there is now this dispute as to whether what was - everything that was written on that note, the fact remains that he was given a number 911 and the security guard says "2", and then I don't know whether
20 it was MP or WP. But we also know from Smith's evidence there is not a 9112, but there's a 911Z and that is the vehicle of the accused, which happens to be a Porsche and then we have the additional information and evidence of the Tracker records. Can there be any doubt, M'Lady, Learned Assessor,
25 that the vehicle that was in Ravenscraig Road at the relevant
14.12.2016/10:31-11:45/BW /...

time, is that of the accused? And remember with the request for further particulars, the State is relying on the time of the Tracker records.

Briefly Dr Liebenberg, the criticism against (sic), and I'm
5 sure my learned friend will elaborate on that, he makes the point somewhere in his notes that, he refers to an extract in her evidence where she has conceded that the deceased could have been dead or dying when she stumbled on screen, but that's not entirely true, or that's half of the story, let me rather
10 put it like that. I just want to get to the - if the Court will just bear with me, ja, it's on page 22, paragraph 74 of my learned friend's heads of argument, where he says that:

“Dr Liebenberg confirmed this during testimony by conceding that the deceased could have been already
15 dead.”

And then he refers to page 269, line 5 and line 15. But that's only half of the story. The Court will recall that in re-examination she was shown the footage again. She was initially reluctant to look at the footage, because of the
20 gruesome attack. And then after she had viewed it, on page 276, line 24 and further, she said well she forgot that for a moment, and she said it's clear that the movement by the deceased trying to get up in a crouching position, it's clear that the deceased was not dead when she stumbled on to the
25 screen.

Dr Liebenberg, what is important of her evidence, is that everything that is seen on screen, is compatible with her finding and with her - the finding in her report in terms of the cause of death, as well as the injuries sustained. The fact that
5 the deceased might have been attacked off screen, again the State submits it's highly improbable for the following reasons, it's clear that the deceased was running away, she was either flung or she was trying to run away from the accused when she came on screen, that's why she fell down. So she seemed to
10 be very much alive at that stage. The fact that the point is also made in my learned friend's argument, that the fact that Liebenberg says that there are no defensive injuries, well it's clear why there are no defensive injuries, the Court could see that, just looking at the video one could see why there are no
15 defensive injuries. The moment she fell to the ground, she tried to come up in a crouching position and then the accused immediately gave her the first kick and that's when she fell down. She was never in a position, even to attempt, to defend herself. She had no opportunity.

20 The second point as far as the possible inflicting of injuries off screen. The unknown female, it's correct on screen one sees that she gives, what I would call, like three silly blows, it almost seems like she's trying to tell her, you know, come on work with us, something to that effect. The aggressor
25 throughout was the kicker, which the State alleges is the

accused. The absence of DNA, the point the State is making that even Mrs Van der Westhuizen who was called on behalf of the accused, could not take this matter any further. She said there's a range of possibility why one would not find DNA, time lapse etcetera, etcetera. And I refer to page 2060, line 5 and line 20 of her evidence, where she made a similar concession, namely that the absence of any DNA traces of the deceased in the vehicle of the accused, does not mean it's the only reasonable inference that the perpetrator did not leave the scene in the car of the accused, that's the concession that she made. She further testified on page 2065, line 12, that not in all instances would there be a transfer of DNA and then she concluded, that's the end of her report, she concluded that the DNA, the gradation(?) of the DNA would have occurred due to the time lapse. It's not the State that says this, this is the defence witness.

Now the question remains, is the driver/kicker, the accused? Again I say that there was no evidence whatsoever that the vehicle in the footage is not that of the accused. I've made my submissions as to why I say the Court can find beyond reasonable doubt that the car in the footage is that of the accused. We also have no evidence whatsoever as to the whereabouts of the accused at the relevant time. There's no alibi or anything. It's correct that the accused says in EXHIBIT KK, when questioned by the investigating officer as to his

whereabouts between the hours of two and three on the morning of 14 April, they say that he cannot remember. But as I've said in earlier heads of argument, one cannot necessarily (indistinct) that as proof that the accused did not know or
5 couldn't remember. That could be a very convenient answer to a very sticky question.

Now if that is the fact that the Court is satisfied that's his vehicle, there's no explanation as to his whereabouts, the point and the submission that the States wants to make is that
10 - or ask the question, is it an unreasonable inference to draw that the owner of a car would have been the driver? And now we got where there was the evidence of - to reopen the defence's case, and let me first deal with the vehicle and the evidence of Landman. I've compiled supplementary heads of
15 argument, very short on Dr Zabow' and Mr Landman's evidence. I'm not going to repeat myself as to my submissions, as to the inadmissibility of Landman's evidence. I make the point, when I considered the position again, when I drafted these supplementary heads, I make the point that
20 Landman's evidence, one can actually view it as to purport to be similar facts, and I will explain to the Court why I say purports to be similar facts.

We have no evidence whatsoever as to who drove the vehicle of the accused on the morning of 14 April. If there was
25 evidence that the vehicle was driven by somebody else and

Landman was called to say that because the vehicle was driven in 2012 by myself, although not the Porsche, a Volvo, and early in 2013 by Sheldon, as proof that the vehicle was then driven by somebody else in April 2013, that would have
5 amounted to similar fact evidence, which is inadmissible for obvious reasons. The fact that the vehicle was driven by someone else at some other time, cannot ever prove that the vehicle was driven on that fateful morning. But we have no evidence whatsoever that the vehicle was, in fact, driven by
10 somebody else on 14 April. So what is the evidence of Landman? It's absolutely in a vacuum, that's all it is. Totally, totally, totally, and I cannot stress this more, irrelevant. Totally irrelevant.

But if the Court might perhaps consider Landman's
15 evidence, let me make the following submissions. We have evidence that there was, it looks like a particular arrangement at Shimmy's Beach Club and the Grand, where clients are sometimes driven home when they're intoxicated. We know from the Tracker records, we know from the bank statements
20 of the accused, which he is also relying on to prove that a lot of money was spent at The Lounge in Guguletu, that he was there on the evening from about eight o'clock on 13 April till after twelve o'clock on the morning of the 14th. That's where his credit card was used, that's where the Tracker show that
25 the vehicle was - the ignition was off for about four hours. So

we have no evidence that there was a similar arrangement at The Lounge. What's the use of coming to tell us what the Shimmy's and the Grand are doing for their clients. That's the one point.

5 The second point, if one looks at the Tracker records, EXHIBIT BB, when the vehicle left the lounge, it drove first to Woodstock. Interesting enough it stops at two places in Woodstock briefly, two minutes and three minutes in Woodstock, one can only imagine why. Then it drove off
10 through Rugby, Milnerton, coming back and it goes up to Vredehoek, where Landman has also confirmed where the accused stays. Then it's stationary for an hour and nine minutes. Then it drove down to Ravenscraig Road where the incident took place. Hardly what you would expect from
15 somebody taking the accused home, if he was, in fact, taken home. There's no such evidence. But I'm just surmising, I'm just playing along to all this possibilities that was now - seem to be introduced through Landman's evidence. There is absolutely no evidence whatsoever to even begin to consider,
20 because what the Court is now being asked, is that the fact that Landman and Sheldon has driven him at some occasions, the Court cannot rule out the possibility that he was driven by somebody else on the morning of the 14th.

25 If that was, in fact, the case, what would one have expected from the accused, if this whole thing was brought to

his attention that your car was seen in Ravenscraig Road where a woman was murdered, and you know I have this propensity to get intoxicated and then people must drive me home, I would have turned this whole Peninsula upside down
5 to find out who the heck was driving my vehicle on that particular morning. It's only after the case was closed that Landman was coming forward and giving this absolutely irrelevant, irrelevant evidence.

Dr Zabow. M'Lady, with respect, the Court has made a
10 remark when I objected to say that the fact that the Law of Evidence says well, as a general rule an expert cannot refer to testimony of other people that has not testified, except when you refer to textbook, and the Court says well the fact that it says general, means there is a lot of - or there may be
15 exceptions. That's the point, M'Lady, with respect, there's only this one exception. There's only this one exception. You can never ever - Zabow cannot base his evidence on what he was told by a witness who hasn't testified. And I mean Dr Zabow has rightfully conceded that, when I asked him that -
20 he mentioned that he couldn't jog his memory, and I said but if he has taken an informed decision, well I will stick to my story, I cannot remember, nobody will move me on that view, you must concede that that is also possible, and then he answered on page 2169, on top:

25 "I'd be completely inappropriate not to suggest that isn't

possible.”

That's Dr Zabow's evidence. And again if the Court should consider Dr Zabow's evidence as to the reason why the accused was not called as a witness to say well he simply cannot recall, the accused got a lot - there's a lot that he could have testified about. He could have told us I cannot recall. That would have put the evidence of Dr Zabow in context. One mustn't forget that the accused, and that's what we heard, maintained throughout that he did not commit the murder, that's one thing that he could remember, the rest he cannot remember, but that he could remember.

My submission, M'Lady, Learned Assessor, is that the evidence of Professor Zabow and Mr Landman, did not take the matter any further whatsoever. So we still sit with the vehicle of the accused, we don't know his whereabouts, we have no evidence to that effect and we know from Dr Tam's evidence that he says well he is not in a position, because of the poor quality of the video footage, to come to a scientific conclusion. The best he could do is to say well I cannot rule out the accused, but I also cannot include him. I make the point in my heads of argument that in the end, experts are there to assist the Court, but in the end it's for the Court to determine, and if one looks at the videos that Tam was referring to, that he based his report on, that's the video footage, as well as the footage at the court, ja, it's EXHIBIT W, 14.12.2016/10:31-11:45/BW /...

Disk 1 and Disk 2. Are we all afraid to say that you cannot see the similarity, that the person getting out of that car and the person that is walking here in Town, and we've all seen the accused here for 18 months, can anyone today say they cannot
5 see the similarity? I make that point, and I'm not making it because it's expected of me as the representative of the State, I'm making it because source tells me caution must never displaces (sic) common sense.

In the absence of any - well not even any credible
10 evidence, in the absence of any evidence whatsoever, my submission, M'Lady, is that it's a reasonable, and the only reasonable inference to draw that the driver of that vehicle at that particular point in time, is the owner of the vehicle, which is Mr Mthethwa. And one can look at the video, it's not like
15 there's a midget walking across the street, it's so, so similar, and I can understand why Dr Tam says well you cannot make a scientific - come to a scientific conclusion. Even he said that there are similarities.

Under the circumstances, M'Lady, Learned Assessor, it's
20 my submission that the State has proved beyond a reasonable doubt that the accused is the person that has murdered the deceased, that he is responsible for her murder. I've made the point in my heads of argument and I think that if the Court should come to the same conclusion, that I think the intention
25 that was proven, if one looks at the manner, I've referred the

Court to a case in this regard, ja, the Dlodlo case on page 5, paragraph 11 of my heads of argument, where I made the point that if one looks at the video footage, the manner in which the deceased was attacked, the continuous attack, turn around, come back again, that one can only infer from that, that the accused had intention in the form of *dolus directus*, and I will, therefore, request the Court to convict the accused as charged. As the Court pleases.

COURT: Mr Booth, thank you.

10 MR BOOTH: Thank you, M'Lady, may I proceed?

COURT: Yes.

MR BOOTH ADDRESSES COURT: Thank you. As I have stated in my heads, obviously the defence's heads submitted during the Section 174 discharge must also be looked at, and if there hasn't been a repeat of aspects there, then obviously it must all be read in conjunction. M'Lady, the prosecutor has indicated that with regard the interlocutory aspect, the trial-within-a-trial, you made your finding then, and subsequent to that, evidence was presented by Basson and Smith, amongst others, which I believe should move this Court to, in fact, revisiting that particular decision. My colleague has said, well the defence hasn't called an expert during its case dealing with the reliability, the authenticity of the footage. However, what is important is that at the time you made your ruling to allow that exhibit to be part of the proceedings, the Court was

not aware of evidence which came out later, specifically the evidence of Basson, and I will deal with that shortly.

The prosecution has, with dealing with the issue of EXHIBIT 2, referred the Court to the Mdlongwa decision and
5 we have also made reference to that. But with respect, I would submit that that differs somewhat to the present case. If one looks at paragraphs 6 and 7, we actually have in that decision identification from certain witnesses. So have an actual eyewitness as it were, identifying an alleged perpetrator. So
10 that is somewhat different to this particular case of Mr Mthethwa, there is absolutely no identification whatsoever. And my colleague, either by way of the, I would submit, video footage, but certainly there was no eyewitness identification. We know Morgan Ndaba was essentially the only eyewitness,
15 he could not make any identification. So that case is somewhat different to the present case.

If one then looks at what this particular case is about, and that is circumstantial evidence, and whether in the particular, and looking at the particular facts of this case, this
20 Court can, as the only reasonable inference, excluding all other reasonable inferences, come to the determination that it was, in fact, the accused, one, who exited the vehicle and returned to the vehicle, and two, that he was the person who was assaulting the deceased. Now I don't need to remind the
25 Court on the aspects of the onus of proof, that has been dealt

with in our heads of argument. The issue with regard to the right of silence is also dealt with in our heads of argument. And every case has to be determined on its own particular, unique circumstances.

5 If I may just for a moment return to the SCA decision, Mdlongwa decision, in that decision the court referred to the case of Ramgobin and I've already dealt with the differences between Mr Mthethwa's matter and that particular case, but it is quite clear that the court, when it refers to S v Ramgobin in
10 paragraph 23, repeats what we've already submitted during this case, and obviously we've argued at the time of the admissibility of the video recording, and obviously all of those arguments are apposite again at this time and again at the Section 174, where it is held that:

15 "The video tape recordings to be admissible in evidence, must be proved that the exhibits are the original recordings and that there exists no reasonable possibility of some interference with the recordings."

So that case is, it would seem, Ramgobin is, in fact, referred
20 to with approval. And one must then see the findings based in that decision, with relevance with those unique circumstances that you had eyewitness identification.

Now my colleague has argued that one mustn't look at this matter piecemeal, one must take an holistic approach, one
25 mustn't regard the onus as an impossible hurdle to overcome.

That is indeed so. However, what we are dealing with here, has created, I would respectfully submit, so much doubt with regard to so many aspects of this matter. Just to refer again to the video recording, the CCTV video evidence. What has
5 come out subsequent to the Court allowing that evidence, is that after the exhibit was bagged and tagged, there has been added files, which cannot be explained by Basson. And that was quite clear when he came back to testify during the main trial. So during the trial-within-a-trial, we had the issue with
10 regard to the security guards suddenly arriving in the middle of the screen, missing files, but later now we have additional files. And over and above those, missing an additional files (sic), none of which can be explained, not even by Zimmerman and not even by Basson.

15 We have that those additional files arrived, as it were, at a time when the exhibit was supposedly safely in custody, bagged and tagged. And Mr Basson cannot explain how that happened. So if one then looks at the issue that is raised in Ramgobin and is referred to by the SCA decision, that there
20 exists no reasonable possibility of some interference with the recordings. How does one explain this? No explanation, reasonable or otherwise, has been presented insofar as any State witness is concerned. But more importantly, we have Basson who comes and testifies as to when he arrives on the
25 scene and the time lapse from him going from his office to go

and do his downloading and what happens at Tollgate and Stockyard.

On page 11 of my heads I deal with this in paragraph 35:

5 “By his own admission Basson testified that he did not have enough time to have downloaded the original footage. He further conceded that he would not have had time to view the original footage on the DVR nor did he watch and compare the footage on the DVR with that on the USB after downloading the footage from the DVR.”

10 Then I refer to the apposite pages at the bottom of my argument:

“No Mr Basson sorry, the question is simple you said you didn’t as I understand your evidence you didn’t view the full two hours. --- That’s correct.

15 So how much of the - that is now of stockyard, how much of that footage did you view? --- Not the whole two hours. I am submitting that because of what I have now dealt with this evidence is seriously compromised.

COURT: I think the witness conceded that.”

20 This is now on page 695 line of the record.

“COURT: If the time is correct there, then one can draw the conclusion or the inference can be made that you did not download it, you didn’t view it, you did not have sufficient time wise and consequently. I don’t know.”

25 That’s on page 12. So all having been said about Basson

coming and viewing the footage and having enough time and being able to compare what was on the footage, that is the footage when he arrived at the scene to what was on the footage later, my colleague says well look it is a simple
5 picture. But on the crux, and this was after the trial-within-a-trial, the crux of it he didn't have sufficient time to do all of it and this is highlighted on page 11 and 12.

Then paragraph 36 where we make the submission that Basson's memory is unreliable. He cannot remember the
10 transport arrangements on the day, he cannot remember when he left his office, how long he took to get the site. He insisted that he downloaded first at Tollgate and then at Stockyard. The electronic evidence proves otherwise. He cannot remember if he used one USB stick for both Stockyard and
15 Tollgate or whether he used two separate USB sticks. These are important because we do not have the original footage.

So to go back and try and resolve all of these problems that I would submit emanated from Basson and the footage that has been admitted by the Court as an interlocutory
20 arrangement as it were, we don't want, you cannot go back to the original footage to go and determine what are these problems, why do they arise and how is it that we have these strange phenomena in the footage. There may be very well be explanations for that but nobody can give those explanations
25 and it is incumbent on the State to do so.

So under paragraph 37, tampering can be defined as something that was there and has been removed, something that was not there and has been added. The contents or part of all the evidence has been changed and I refer in paragraph
5 37 to the various lines and pages where that is dealt with.

So it is not just a simple well the original footage is missing, we now have an alleged true copy of that in the master copy, that is now sufficient. That is not, it is not as easy as that. Then we have the compromise with regard to the
10 chain of evidence, I dealt with that in my heads, I referred the Court to a particular article and in fact I have referred to another article or two particular articles where the Court has to be very cautious with regard to the chain of evidence.

Where it happens that for more than a year that Smith
15 has this, the master copy in his office before it is handed into the SAP13, we've got the evidence of Wouter de Swardt, he deals and his evidence is important, De Swardt's evidence is important because it does deal with procedural aspects that cannot just be ignored. So, and particular how, who got into
20 that exhibit? Who took it out of the bag? Who was responsible for the added files? Nobody can answer that and certainly least of all Basson.

I also deal in my heads with Maureen de Wet and that her memory is I would respectfully submit unreliable because
25 the State is saying well they viewed the original that she and

Basson, but we know Basson couldn't have viewed it, he has already conceded, she viewed it but her memory is so unreliable. So what stock can be taken from that evidence that beyond a reasonable doubt it has been established that them
5 viewing the evidence in respect of the video recording and coming to court and saying well that is the same as what I saw when I came to the scene as what I am seeing in court, there has to be doubt whether that is in fact correct for the reasons I have already mentioned.

10 So I am submitting with regard to the video evidence that you have admitted that you, my colleague says that you've admitted it seemingly twice, I beg to differ, you admitted after the trial-within-a-trial. So I am not sure where that argument arises. You've admitted it as an interlocutory and you have to
15 revisit that at the end of the whole case, now we are end of the whole case and I am submitting for the reasons that I have not mentioned and the other reasons in the heads that you in fact, that you in fact re-look at the situation, that there has been new evidence, that that evidence has come out during the
20 cross-examination of the State witnesses and that you then make the ruling that that exhibit be disallowed and not be taken into consideration in your determination.

If I may then move over to the medical evidence and the cause of death. M'Lady I am not going to repeat the law, it is
25 all set out in the heads and the issue of identification I will

come back to but I am not going to, the law is there and it is very clear what it is.

COURT: Yes.

MR BOOTH: As far as the cause of death, now I may have
5 been so that Dr Liebenberg comes back after viewing the
footage and seems to indicate well initially I conceded that the
deathblow could have been off screen and that cannot be ruled
out as the cause of death. Then she re-looks at the video
footage and then she says well there was a movement.
10 Because there is a movement the person had to already be,
sorry the person was still alive. Now that has to aspects to it.
Because the death blow if it cannot be ruled out that it was
caused off screen, that is what is crucial the blow that caused
the death however it was, whether it was a punch or whether it
15 was a kick or whether it was a knock or whatever, that is what
is crucial.

The fact that somebody moves after the death blow is administered that does not mean that one must now ignore that the death blow may have been caused off screen and there
20 may have been a movement but that death blow equals the
death, it is the cause of the death, nothing else. She is then
questioned and we had a lot of time spent on the various
articles, the various journals with regard to *commotio cordis*.

Initially she in her first report comes to one conclusion.
25 In her supplementary report some months later after concerns

as I understand it with Liebenberg. She then reviews the situation and says the cause of death is the result of *commotio cordis*. Now in the literature and this is referred to ... (intervention)

5 COURT: Can you hold on Mr Booth? I just lost you there for a moment, was there a review of the first report is that the correct term to use?

MR BOOTH: Well she went back, she seemed to have some doubts as to her first finding. She then goes and I use the
10 word review, she goes and reconsiders her position with vis-à-vis the cause of death. Then we have the second report and her determination that the death was caused by the phenomena described as *commotio cordis*.

Now one must also remember and I deal with this on
15 page 23 where she says, that is paragraph 75, the person is motionless. Well on the footage it would seem that the person is in fact lifeless, as if just a sack of potatoes or a bag, a rag doll and motionless, that in fact the person was indeed dead. It is probable. So that is her evidence. One can't just ignore
20 that. She is saying the death blow could have been caused off screen. The person is motionless like a rag doll, that the person was already indeed dead. Then the issue of the movement of the slightest, slightest degree and then we deal with it at the bottom of page 23.

25 Could thereby, on page 144 line 2 of the record, could

thereby some voluntary movement after the collapse?

According to what I have read in the literature it is 50/50, 50

drop immediately, 50 can have a few seconds of light-

headedness before they collapse. So in other words you have

5 a blow or a light, well we know it is a light blow, it can be

caused by a very light blow or knock, I think that is what I

conveyed and what I have read. One of the researchers and

world experts on the condition says it appears to be a 50/50,

half collapse immediately, the other half have a few seconds.

10 It doesn't stipulate exactly how much, page 24.

A few seconds between, a few seconds, the blow and the

collapse and the collapse. Correct. So now she explains why

there, if there was indeed any movement why one could expect

the slightest of movement when the death blow has been

15 caused which results in *commotio cordis*. We know it can be a

slight knock to the chest for example bringing on an electric

shock which leads to cardiac arrest.

So it is I am submitting on the footage, looking at the

footage if it is indeed ruled to be part of the evidence and

20 looking at her, Dr Liebenberg's testimony there has to be

doubt at the very least whether the person who, the deceased

was still alive and don't forget M'Lady that before the first kick

on the video the person collapses. So you have a movement,

collapse and then the kick. So even saying well there may

25 have been a movement, death blow off screen, a movement

can be explained in terms of the phenomena of *commotio cordis* that do you have this movement but that is before the first kick. So that person, the deceased we are submitting was already dead before the first kick.

5 Now I want to take you to Mr Atkinson's testimony which is the bundle containing documents and discs. That is under, that is EXHIBIT 4. bundle containing documents and discs. There we have the karate video. Now that indicates even a much longer period from the knock to the actual collapse. IN
10 other words the knock that causes the death during that fight and then the collapse. So you don't have an instantaneous immediate collapse. There was literature which said, referring to American cases where a baseball player was knocked on the chest and he ran from where he was where he had hit the
15 baseball to first base which is if one watches American baseball or any baseball is some distance and then at first base that person collapses.

So quite clearly the movement does not indicate that or assist the State in any way to determine that this, the kicking
20 caused the death. And if the person was already dead and I refer the Court to R v Davies and what is said on page 24 of my heads as well as, and the Ndlovu decision, the attempted murder of a corpse and S v W attempted rape of a corpse, Davies case dealt with the foetus and then Jonathan Burchell,
25 South African Criminal Law and Procedure where he refers to
14.12.2016/10:31-12:49/AVE /...

all of this, and if as it said in Ndlovu “*Dat daar twyfel bestaan of die oorledene toe reeds dood was of nie.*”

So at most then looking at whoever was doing the kicking on the screen and I would concede obviously that the kicking
5 there was more than just a common assault or an assault with intent, that at most would be an attempt at murder because the deceased was already dead.

But may I add to that with Liebenberg’s testimony with regard to, we also make the point with reference to the liver
10 injury that she has in fact conceded and that is in our heads that the liver, the injury to the liver was in fact not the cause of death and played no role in that regard. So in finality dealing with her evidence and the video footage and the concessions she’s made it is our respectful submission M’Lady that at most
15 whoever was doing the kicking or the stomping can be convicted of attempted murder, no more.

The issue of identification. Now if one has an instance where let’s say somebody goes and actually does an identification, it is an eye witness and says look he identifies
20 so and so as the perpetrator, that person’s evidence must be determined in terms of the criteria as particularly set out in the Mthethwa decision, no reference to the present Mthethwa, as to be reliable and trustworthy in every material respect. But we don’t have that here. We don’t even have that. We do not
25 have an eye witness. The only potential one was Morgan and

he clearly cannot identify, well he can't identify the car and he can't identify any of the people that were there at the particular time.

So it is not a question of being reliable and trustworthy,
5 it is a question that there is absolutely not identifying evidence, not at all. My colleague says well look at the accused, look at, you've seen him for 18 months, you can draw your conclusion from looking at the video. The video is poor, poor quality evidence in the sense of the quality of the video,
10 what you see on the screen is of a very poor nature. That is conceded by the State's own witness Zimmerman. It is conceded by the State's other witness Dr Tam.

Dr Tam cannot take it any further than that this is a man of colour, Indian, coloured, black, and the number and he said
15 that could be amongst millions of people. So where he says I can't exclude but I can't include, you can't with respect use that to say that is now some form of corroboration that the person on the video footage is in actual fact the accused, some little corroboration. In other words there is nothing
20 there, there is no eye witness but let's use that little bit by saying he cannot be excluded. How many millions of people fit the picture of the person in the video and that is what Tam says.

So and he says again the video footage is so poor, that
25 is why he can't make any determination. I am submitting my

colleague is incorrect to say well you must look at the video and draw your own inferences, well at most you can say this is a person of colour, short hair by the way, I forgot that is also what he said, short hair, Indian, coloured or black. And we
5 know that Morgan Ndaba indicated this was seemingly a person of Nigerian origin, let's add that also to the confusion.

So there is no evidence of any identification insofar as Mr Mthethwa is concerned. We've made the point that there is not continuous evidence of the person getting out of the car
10 and where he goes. We've got Mr Atkinson and he has given his evidence, I don't need to repeat that, it is fresh in your memory, we have the record. He, the person walks across and out of screen. 23, 24 seconds later we see a person running onto screen sort of pulling up and then coming back and
15 starting kicking.

That person disappears again off screen. Then we've got a person coming on screen walking to the car and the car drives to the car drives away. Why if it is the driver as the kicker from the last kick doesn't he cross the road from where
20 the body is lying on screen directly to the vehicle? At no stage does he make any movement towards the vehicle at all. If it is indeed the driver of the vehicle, why doesn't he, this is a question I've also, what would one have expected? Why go back up the road? And the whole issue of the video footage
25 M'Lady has to be stressed this is only, this is only a very

minute view of what was happening. It was a top corner, left-hand corner of the footage, not the whole. My colleague says well one would have, if there was another person one would have expected that person let's say to also be, in other words
5 that you would be seeing two male, well more than two male people on the screen and whatever. But it doesn't show, we don't have a complete and utter picture of what was happening. Up the road towards the mountain we've got a lot of houses. A man three minutes before walks down the road,
10 who knows to where? Whether he came back up the road again two minutes later one doesn't know. In fact he walks down the road towards the Main Road, it doesn't mean to say he actually ended up there and didn't go in one of the side roads and go, and come back again.

15 So it is very dangerous to say as my colleague has indicated well you would have expected there were more people, you would have expected that to be shown on the screen and that is exactly why Atkinson's evidence is of importance. Not only when he took you through step by step
20 what is seen on the video, one has to have seen this video hundreds of times, sometimes when you look at a video you think something, you draw a conclusion. You look at it again and again and again and then you think well that conclusion was wrong because it is a quick instance and it is of such
25 poor, poor quality.

So that is important. You've got to preface if this video is allowed, preface all of it by what was happening slightly off screen. This is not in the middle of the desert. There are houses just up the road, there are people just the road. So I
5 would submit because there is no continuous link between the person getting out and in the car and as it were the kicker and you don't have a holistic picture, a holistic picture of what has happened, therefore you can't draw as the only inference excluding every other reasonable inference, that the driver
10 equals the kicker.

Insofar as the vehicle, now it is not quite correct so say we agreed that it was the vehicle of the accused on the scene, I had cross-examined Steynfaardt and various other people in this respect. The point of the matter is Steynfaardt's
15 evidence cannot be relied upon, it is in trite direct contradiction to Pretorius and in any event he could never have seen the tyres, the wheels or the rims of the vehicle on the video footage, that is an impossible, impossible observation.

20 My colleague said well let's even forget them, let's forget the evidence relating to Steynfaardt saying that that is indeed the accused's vehicle because in fact he cannot say that relying on the tracker. But one mustn't forget as the point we made in our heads on 174 that there are discrepancies
25 between the time, Searle Street vis-à-vis the tracker time and
14.12.2016/10:31-12:49/AVE /...

the footage time, there are discrepancies and that point was made in our heads of argument on 174. So that has not been explained.

The whole issue of the synchronization of the cameras,
5 nobody has come and told you well you know one can expect that there could be a time difference, one can't just speculate and guess these aspects. So that is an important aspect to be considered as to whether in fact one can and yes there was the memo made but the point is the witnesses themselves also
10 conceded that there could be differences and that is again something we've dealt with in our 174 application.

The vehicle, there is no onus as we know on any the accused as to coming to have to come and explain what his vehicle was doing there and whether he is, because he is the
15 registered owner of a particular vehicle therefore he must explain you know who else could have been driving vehicle, we are not dealing with the road traffic here ...(intervention)

COURT: We are dealing with a murder, isn't it a bit more serious, should there not be more reason to come and explain
20 so that the perpetrator could be apprehended or assist with that fact?

MR BOOTH: M'Lady we've got the evidence right from the onset of what Mr Mthethwa told the police that he cannot remember and that is the reason we presented the evidence of
25 Professor Zabow ...(intervention)

COURT: He could have told the police many things but he chose not to take the Court in his confidence to come and tell the Court what his vehicle was doing there.

MR BOOTH: Well M'Lady he says he can't remember
5 ...(intervention)

COURT: Did you say, did I hear you say correctly now there is no onus on him, it is not necessary for him to explain...(intervention)

MR BOOTH: Yes precisely.

10 COURT: Did you say that in the face of a murder that was perpetrator allegedly with someone driving his vehicle because I mean surely that is the allegation here.

MR BOOTH: But the allegation M'Lady is in fact it was the accused who committed the murder, not that, not that, that is
15 the charge murder, that he is the person who committed the murder so one mustn't lose, one mustn't lose track of that aspect.

COURT: Okay now in the face of that allegation, that serious allegation, are you saying that there is no onus on the accused
20 to come and explain to the Court who was driving this vehicle?

MR BOOTH: Well M'Lady there is in fact no onus at all on the accused ...(intervention)

COURT: He elected not to come and tell the Court who drove the vehicle, isn't that the position?

25 MR BOOTH: Yes he did so and he called particularly

Professor Zabow and Landman to testify.

COURT: Yes which he is entitled to do.

MR BOOTH: Correctly, he is quite entitled to. But can it be
at the end the only reasonable inference 1) that the accused
5 was the driver of that vehicle and 2) as the only reasonable
inference excluding all other reasonable inferences that he
was the person perpetrating, well it is the murder caused by
commotio cordis or the attempted murder as I have argued
earlier depicted on the screen if that there is serious doubt as
10 to whether the deceased was in fact alive at the time and we
are submitting quite clearly the deceased was dead. That is
what has to be looked at. So the fact that he doesn't testify
and if the Court finds well that is his vehicle, can it be held as
the only reasonable inference that he committed the murder?

15 If this was a road, I mean the Road Traffic
...(intervention)

COURT: Just hold on one moment, why do you say if the
Court finds it is his vehicle, was the tracker evidence not
uncontested that it was in fact Mr Mthethwa's Porsche?

20 MR BOOTH: No the evidence was that the Porsche, the
vehicle, that the tracking, the tracking records is indeed the
accused's vehicle. That was not disputed.

COURT: So what does that mean Mr Booth? What does that
admission mean that the tracking records referred to of a
25 vehicle moving alongside Ravenscraig Road is indeed what?

MR BOOTH: No the tracking records, we never disputed that the records of the tracker as handed into court refers to the vehicle registered in the accused's name.

COURT: I see.

5 MR BOOTH: I think that is putting it in its correct context.

COURT: Just hold on one moment. The tracking records referred to the, the tracking records referred to as handed in in Court referred to the vehicle registered ...(intervention)

MR BOOTH: In the name of Mr Mthethwa.

10 COURT: But the vehicle captured in the footage is not that of Mr Mthethwa, is that what is being said?

MR BOOTH: Well we were saying, we are submitting that in fact there has to be doubt at the time of the perpetration of this crime that in fact that vehicle was at the scene because of
15 the contradiction on the time between the video or CCTV footage if and I stress again if it is allowed and the tracker time. And that is an aspect I did deal with in my heads of argument at 174. So that is the point I wish to make. But the aspect still relates to can it as the only reasonable inference
20 1) be drawn that the driver of the person walking out from that vehicle was indeed as the only reasonable inference excluding all other reasonable inference 1) the accused and 2) that is obviously on the circumstantial evidence whether as the only reasonable inference excluding all other reasonable
25 inferences, the person responsible, well for the death of the

deceased was the accused Mr Mthethwa or the person responsible if she died off screen, hit by a person unknown in line with the *commotio cordis* concept or principle, that the person doing the kicking and stomping was the accused,
5 Because those, that is the charge, murder or obviously if there is a competent verdict, assault, common assault, assault with intent or attempted murder.

The issue with regard to the accused not testifying I am respectfully, sorry can I just go back to the Road Traffic Act, I
10 mentioned that M'Lady because in terms of the Act it is presumed that a person who is the registered owner of a vehicle is the driver of the vehicle. Now that's not, that has no applicability here whatsoever. If that was the case, well the matter may have been viewed in a different light. But the
15 accused's version that he cannot remember was given on the day of his arrest and he said there, he said he will talk in court, that is exhibit, the warning statement, that he will talk in court on every question except do you drink, are you aggressive? He said no. Do you drink? I am a social drinker.
20 And where were you at 02h00 to 04h00 on 14 April 2013, he says he cannot remember.

And that is why Zabow's evidence is important and that is why (indistinct) and Landman's evidence I believe is important. My colleague say well it is first of all with Zabow it is hearsay
25 evidence. I am submitting no expert can come to a conclusion

without in fact having hearsay evidence presented to him from an accused or let's say his patient because how else does he interview, how else does he determine the person is suffering from something, how else does he determine the person's version whether there is consistency in the person's version, how else does he determine anything? But he uses the information and he does so by obviously relying on his expertise and his experience and yes Professor Zabow did make certain concessions but if where we deal with what is important in his testimony and that is on page, give me a minute, we are submitting and that is paragraph 22 and 23, relating to 1) why he felt that, or on the aspect of why the accused did not testify and as to the aspect of the fact that the accused could not recall. Landman my colleague has argued is similar fact evidence but the point of the matter is we've got the version by Professor Zabow, we've got Landman which to an extent confirms that, that although he only drove the accused's Volvo, a convertible, expensive vehicle from the Grand on a number of occasions, he was a witness to the Porsche being driven from Shimmy's Beach Club as well not only arriving, somebody else driving it but also his colleague driving it off where he had to follow. So those I would respectfully submit do corroborate what Zabow is saying and Zabow's evidence is that the accused does drink considerably, the whole issue of social drinker he explained that, it is not

that you are not drinking a lot but you are drinking in a social scenario. In other words you don't sit at home day and night alone drinking and that is how Zabow explains it.

There is no evidence of, or in fact the evidence of
5 Morgan, let's get back to the vehicle, is he doesn't know who
else was in the vehicle. We have the fact that the vehicle
drives around, it goes for an hour, more than an hour to the,
where the accused's residence is, then later comes back again
and then goes back again. So if one looks at that I would
10 submit that if the accused is in fact not able to drive and
somebody else was driving the vehicle and he cannot recall,
that is the whole crux, he cannot recall, so he can't help the
police by saying so and so drove my vehicle, so and so helped
me get in the vehicle, get out of the vehicle on the other end,
15 he can't recall that. So how can he assist the police but he
does say right at the beginning when he is questioned I cannot
remember. So it is not saying well I will talk in court, he gives
a specific answer and that is evidence with respect M'Lady,
that is part of the evidence. It is a statement by the accused
20 to the investigating officer which is an exhibit in this matter
and which must be taken into consideration looking at the
evidence holistically and the reason why we are calling
Landman and the reason why we are calling Zabow I would
respectfully submit fits in with that and to answer the question
25 well why can the accused not come and jump in the witness
14.12.2016/10:31-12:49/AVE /...

stand and say look he gave the car to so and so or you know somebody is usually is his driver, but he cannot remember. So how can he come and say that? And he has been consistent with that. In the evidence of Zabow he's been consistent, 5 consistent throughout. He could have said somebody else drove my car, he could have said that. He could have made up any kind of nonsense story but he stuck to a consistent version and that is borne out by Zabow. Zabow M'Lady if one looks at his credentials we all know he is an eminent world top 10 psychiatrist who has examined and spoken to the accused, his expertise and he comes to his conclusion, his opinion, that is why that evidence is of importance.

The DNA, well one must remember that Van der Westhuizen indicated that certain factors would lead to the 15 diminishing of DNA. But there is no evidence that in fact those factors were applicable in this case. She states that she can get rid of DNA but it is a process involving expertise. You don't just wipe it off and even if you can't see it anymore it is still there. So she goes out and gets rid of DNA at various 20 places because she knows how to do it and she is an expert in that field but there is no evidence that the accused in any way attempted to wash the car, attempted to get rid of DNA and the crucial aspect in that regard is that DNA was found in the car by Ntombela. Ntombela does a very, very thorough search of 25 the vehicle and there is no DNA at all of the deceased in the

14.12.2016/10:31-12:49/AVE /...

vehicle.

There is also no DNA of the accused on the deceased or more particularly the clothing of the deceased. Because if there is a stomping and hitting one would have expected as
5 Liebenberg also indicated with regard to the Lochard principle, there would be a transfer. So you then have a transfer from the person you are hitting and kicking and assaulting. Then you have a secondary transfer and that is to another object, the vehicle.

10 So there is the keys of the vehicle, there is climbing into the vehicle, there is the mat of the vehicle, there is the steering wheel of the vehicle, there is the gear stick of the vehicle, there is the pedals of the vehicle. None, no DNA was found on that and there is no, one can't say oh well because
15 the vehicle was only checked approximately 22 days later, the accused we know was out of the country, that is the evidence of Smith that it was only checked 21 days later therefore he had enough chance to do all kinds of things but we can't speculate, there is no evidence of that. There is nobody who
20 had come and say here that there was an indication the vehicle had been cleaned or there were any factors there to indicate there was a diminishing of the quality or quantity of DNA that one would have reasonably expected to be somewhere in the vehicle of the deceased, on the shoes of the perpetrator, on
25 the hands of the perpetrator or wherever but it was, there was

DNA but it not linked to the deceased at all.

My colleague started off his submission by saying other than Petersen all the other witnesses were credible. Well I thank him for at least conceding that Petersen's evidence was
5 of such a nature that I don't think anybody can take stock of any word he uttered in this court but I beg to differ with regard to the others. I have already touched on Steynfaardt and I am submitting that his evidence cannot be accepted, it clashes with Pretorius and there is no way he could have recognised
10 the wheels, the trims, the size of the wheels etc which he then uses his observation in that regard to link the vehicle to the accused,

Then we've got all the problems with regard to Warrant Officer Smith and Miles and how that contradicts to Mr Ndaba
15 and Mr Mia with regard to whether black Porsche was written on the piece of paper. These are aspects that have to be of concern because one doesn't know, yes they may have ended up at the accused vehicle but the point is why is crucial evidence torn up? Why is there no reference to this piece of
20 paper and what it stated relating in the investigating diary? What happened there? There are these question marks and I've made the point very strongly in my Section 174 argument, I just want to stress that. And we've got the issues with Basson and one cannot rely on his evidence beyond a
25 reasonable doubt nor Maureen de Wet.

Then Mr Burman says the CCTV equipment was in working order but Ndaba testified that the monitor in the control room at Tollgate had not been working for some time. This is on page 28 of my heads. The whole investigating
5 methods used by the police, the whole forensic procedural methods used by the State, the investigating methods used by the State vis-à-vis particular Smith, you know keeping the exhibit in his office for a year, changing or destroying the evidence, making no mention of that. Then this issue of Mrs
10 Layman, he never even testified about all of that. Suddenly that comes out in the investigating diary that she had actually be arrested and kept in custody. There is no evidence again, so all of those factors have to be looked at. At the end of the day they can impact on the accused's right to a fair trial.

15 And a lot of that was dealt with I submit by Mr de Swardt because he came and testified about the procedures that were followed.

So in conclusion we are indeed submitting as I say on page 29 the State has failed to prove beyond a reasonable
20 doubt that the driver is the accused. The State too has failed to prove that the driver and the attacker is one and the same person beyond a reasonable doubt, that the deceased was still alive when the attack seen on the video footage started and the State has conceded there was no trace of the victim's DNA
25 in the vehicle and in the accused's home and on his clothing,

has conceded, the State has conceded there is no trace of the
accused DNA on the victim and we are submitting that the
State has failed to discharge its onus and that the accused has
no onus to prove his innocence even though he has not
5 testified and I respectfully submit you cannot draw from that,
that because he hasn't testified he had to have been the killer,
the person who caused the death blow or the person who was
seen attacking the victim.

May I just have on moment, I just want to check on other
10 aspects that my colleague may have touched on? Yes thank
you M'Lady just on the aspect that where my colleague
referred to the other files, the added files, that as I understand
him that he submitted that Basson could explain that but in
fact Basson couldn't. He was asked by me on a number of
15 occasions can you explain this? It should all be secure, it is in
custody, there shouldn't be any interference with what is on
the footage, it should be the same as when you put it in on the
video footage, the same as you put it in and now suddenly
these others pop up no explanation. So he could not have,
20 well he cannot explain that and as I have already said so. My
colleague... and just on the aspect of Zimmerman, I don't
believe and if there were these added, added files, I am not
sure why that was not then picked up by him, he merely said
there were missing files when he referred to the guard
25 suddenly arriving in the middle of the picture. So if there were

files added then when he got the evidence, the disc, he surely should have picked that up but he didn't. That arose after the trial when Basson came and testified. So I am questioning the whole issue of relying on Zimmerman insofar as the whole
5 issue of authenticity is concerned. There has to be some doubts now in that regard. One can't just say well we must accept that he is now, his evidence is sufficient to determine beyond a reasonable doubt that we are dealing with authenticity. But the point is still in Rambogen whether there
10 has been some interference and M'Lady it doesn't necessarily have to be that somebody went on purpose to do something, what is the whole issue? What does evidence have to be retained from A all the way to where it is eventually tested by the forensic expert? To avoid contamination. It doesn't
15 necessarily have to be that a deceitful corrupt police officer goes and on purpose contaminates the evidence but it is to avoid contamination. That is why you have to have a secure chain of evidence, a chain of custody and I am respectfully submitting that is not the case in this particular instance.

20 So I am respectfully submitting that the State has not proved its case beyond a reasonable doubt, that looking at the case in its entirety that 1) you reconsider the issue with regard to the admission of the footage, if the footage is excluded, if that footage is excluded then, and you then are left with the
25 tracker, then all one has is at a particular time that vehicle is

in some part of Ravenscraig Road but not at the time that any assault took place. In other words the event seen on the video footage, if that is excluded, that is no longer evidence, it is regarded as inadmissible evidence, then you are left with a
5 vehicle at a time in Ravenscraig road but no evidence as to what took place when that vehicle was in some part of Ravenscraig Road because you cannot link the vehicle or the person, well I suppose one can't link the vehicle to the murder but, well I suppose in some instances one can if people are
10 driven to a murder scene but that is not the issue here but that one cannot then link anything in regard to the vehicle or any person getting in or out of the vehicle with any event because the event is on the video footage because Ndaba didn't see anything, he heard people shouting as if there was a fight
15 going on. And why didn't he hear a woman screaming? Another aspect that one must take to supplement the argument that the deceased was already dead. One would have expected if she was still alive she would have been screaming. But the point is then you don't have any evidence of an assault
20 taking place at all and I am submitting that because of the reasons I have mentioned earlier you should exclude the evidence of the video footage and then there is with respect even less of a case against the accused and even less of a reason as my colleague argues that the accused should have
25 gone into the witness stand and testified, there would be

absolutely, absolutely no reason for him to have done so whatsoever. And I stress again he cannot remember. So it is not as if he can go and tell a whole version of somebody else using the car and somebody else driving or giving an alibi, all
5 of which he could have done if he wanted to mislead the Court.

I would ask that you acquit the accused on the charge or murder, thank you.

COURT: Reply?

MR VAN DER VIJVER ADDRESSES THE COURT: Yes may I
10 just start with the last comment by Mr Booth where he says he wants to stress that the accused cannot remember, we have no evidence to that effect. There is no evidence to that effect that he cannot remember, that is the first point.

The Mdlongwa case, I am not, I know there was an eye
15 witness, I am not using the Mdlongwa case to say because bank robbers were found guilty because of CCTV footage it must now happen in this instance. The point of Mdlongwa which is important is the aspect as to the procedure that was followed with the CCTV footage and the downloading and that
20 the Court was satisfied that that amounts to originality and authenticity, that is all. That is the point I want to make about the procedure that were followed.

The additional files, Mr Basson did explain it, he said those are the folders that he created for his still photos. He
25 couldn't explain why dates were changed. He says every time

you download the date seems to change. The Court can go
and read at the Court's leisure the evidence of Basson on that
point. He even said there was a folder that was now all of a
sudden February 2015 but he did explain the extra folders. He
5 says that is what I do because that is where I make my still
photos. So it is not correct to say that he couldn't explain,
there were no footage added.

Now let's just deal with the probability of if one now
accepts that, if I understand Mr Booth he says well at best the
10 tracker records will show that the vehicle of Mr Mthethwa was
in Woodstock at that time at one point, one cannot say it was
at that particular point where the offence was committed
because of the discrepancy with the time with the video
footage. I come back to the probabilities. It is the early hours
15 of a Sunday morning. Now we have two very expensive both
dark coloured Porsches in the same vicinity. One happens to
be parked in Ravenscraig Road where a woman is murdered
and Mr Mthethwa's vehicle is there in close proximity
according to its tracker records. He wasn't in Ravenscraig
20 Road but we concede that because of the tracker records he is
in close proximity. What are the probabilities of such a
scenario? It is absurd to say the least M'Lady.

Professor Zabow, it is based on hearsay that, that is the
simple answer, it is based on hearsay his evidence. It is not
25 correct to say that the accused he had nothing to come and

testify about. We are not blaming him that he is not testifying,
that is his right. I want to stress that but he cannot hide
behind the excuse that I cannot recall. If one looks at
EXHIBIT KK, his warning statement, 95 percent if not 99
5 percent of that questioning revolved around his vehicle. Does
other people drive your vehicle? It all revolves around the
vehicle. So there is a lot that the accused could have said if he
had elected to come and testify as to the whole arrangement
around his vehicle if he is intoxicated etc. That is apart from
10 the fact that I would have expected the normal person to go
and investigate what happened to my vehicle if people say this
vehicle is linked to a murder. That is the normal thing to do.
You don't sit in a court case for 18 months at very high costs
and there is no reflection on Mr Booth, I take it in general.

15 COURT: What were you saying you don't sit in court for 18
months and what?

MR VAN DER VIJVER: At a very high cost.

COURT: Yes?

MR VAN DER VIJVER: It is no reflection on Mr Booth
20 ...(intervention)

COURT: What about that?

MR VAN DER VIJVER: His fees.

COURT: Oh I see yes.

MR VAN DER VIJVER: I am just talking in general.

25 COURT: Oh, I thought you were referring to the silence

...(intervention)

MR VAN DER VIJVER: No, no I am talking about

...(intervention)

MR BOOTH: I won't lodge a formal objection M'Lady (laugh).

5 MR VAN DER VIJVER: Much is made of the fact that DNA
was not found ...(intervention)

COURT: I think I missed the point, that is why I am saying
you say people say a vehicle is linked to murder hence what?
Was something expected of the accused or what and then you
10 said something about sitting through a trial for 18 months, I am
just trying to get the picture what were you saying?

MR VAN DER VIJVER: I am just saying that if one, I would
expect the normal person if he is confronted that his vehicle is
linked to a murder that I would have as I said earlier in my
15 main argument would have turned this place upside down to
find out how this happened and who is responsible. It is not
correct, I think Mr Booth is wrong if he says that the clothing
of the accused was also tested. There is no such evidence,
only his vehicle, only his vehicle was tested for DNA, not his
20 clothing.

COURT: Well they couldn't find the clothes, they didn't
actually confiscate the actual shoes or he had luggage and
stuff but nothing was examined, I think it was an oversight by
the police not to examine clothing.

25 MR VAN DER VIJVER: That was exactly the, it is in Mr

Booth's, that is why I was surprised in his heads of argument he says Van der Westhuizen criticised the police that they did not search or seize the clothing.

COURT: That's right.

5 MR BOOTH: Sorry I don't want to interrupt ...(intervention)

COURT: No you are welcome to assist, we just need to clear this, clarify this point here.

MR BOOTH: Yes I had argued that in fact, my argument now that there was no DNA of the accused on the clothing of the
10 deceased but in my heads I did make reference to the search, the accused had consented to the search and they didn't, they went through the house, they didn't take any clothing which they should have because that could have even excluded the, excluding somebody is also an important aspect with regard to
15 DNA.

MR VAN DER VIJVER: Yes my last point on the DNA, it is in fact so that only the DNA of the accused was found in his vehicle. So the same argument that Mr Booth is putting forward can we then assume that nobody else was driving his
20 vehicle because nobody else's DNA was found in the vehicle except that of the accused? Yes that is my reply.

COURT: Right thank you very much. Well it has been a marathon trial, the Court is going to need time to deliberate. We are going to roll over to next year Mr Mthethwa, we will be
25 moving over to next year. Can we just confer with regard to a

date the end of Feb or March what would suit the parties?

MR BOOTH: That is fine, can we just ...(intervention)

COURT: Yes perhaps you can confer here in court then we don't have to an adjournment.

5 MR BOOTH: No that is fine.

MR VAN DER VIJVER: Can the Court just give an indication towards the end of February?

COURT: The end of Feb or early March.

MR BOOTH: M'Lady sorry I am going to ask because I am
10 sorry I didn't bring my diary with me, just two minutes, I just want to call my office quickly.

COURT: Sure.

MR BOOTH: The day, you are saying somewhere in March
M'Lady?

15 COURT: Ja the end of February, look we are officially starting in Feb next year ...(intervention)

MR BOOTH: That is correct yes.

COURT: Then we have full benches and it is busy in Feb, so if it goes to February it must be the end of February otherwise
20 beginning in March, just check your diary. We will take a brief adjournment, we will await further instructions.

MR BOOTH: Thank you.

COURT ADJOURNS (at 12:49)

COURT RESUMES (at 12:53)

25 COURT: Right do we have a date?

MR BOOTH: We do M'Lady, the Thursday the 9th of March but before we do that I will just ask my colleague, his last comment may not have been accurate that only the accused's DNA was found in the vehicle. We know as a fact that the
5 deceased's DNA was not found in the vehicle at all but there was DNA found but I don't think that it was only the accused's DNA, let me put it that way, there is no evidence to that effect. So I have just asked him to just rectify that, thank you. But the 9th of March ...(intervention)

10 COURT: That's a Thursday?

MR BOOTH: That's a Thursday, it is in order, thank you.

COURT: Mr van der Vijver yes?

MR VAN DER VIJVER: As I understand there was no other DNA found except I think there was a hair found and they
15 couldn't extract DNA from the hair but I mean the Court can look at the ...(intervention)

COURT: Look my understanding is that no other DNA, there was no evidence of DNA belonging to another person in the vehicle but then again we don't know were they looking for
20 other strange DNA? Were they not focusing on the accused and the deceased? But the evidence is very clear no DNA, the only DNA found in the vehicle was that belonging to the deceased, there was no evidence of any should I say unusual or unknown persons DNA that was, where the quality was
25 sufficient to be analysed or anything.

MR VAN DER VIJVER: Ja they were tested, I mean the (indistinct) evidence swabbed with (indistinct) and that was with Mr Mthethwa and then it says the DNA results from evidence swabbed C and evidence swabbed D.

5 COURT: Which area was it taken from the vehicle? I know they took swabs and it was linked to Mr Mthethwa, your statement is correct that no other DNA was found, it does not mean there was no other DNA but that is what their examination revealed and obviously they only took swabs at
10 certain sections of the vehicle, isn't it?

MR BOOTH: Sorry I know Mr van der Vijver is looking, the evidence is that there was no DNA of the deceased found in the motor vehicle ...(intervention)

COURT: Yes that is correct.

15 MR BOOTH: The other evidence as I understand it was that there was indeed DNA, I think it was hair and potential ...(intervention)

MR VAN DER VIJVER: One hair.

MR BOOTH: One hair and potential or possible blood but not
20 that it was the accused's DNA. In other words DNA is found but not that it is the accused's DNA and as a fact no DNA of the deceased was found.

COURT: Shall we leave it at that Mr van der Vijver, do you have anything?

25 MR VAN DER VIJVER: The hair was on the mat and all it

says that a possible hair, no DNA could be ...(intervention)

COURT: Could be linked to the deceased.

MR VAN DER VIJVER: No there is nothing of the deceased in the vehicle.

5 COURT: Yes that is common cause.

MR BOOTH: If necessary M'Lady we can go back to that but I think ...(intervention)

COURT: No we don't need to, no we don't want to get back on that, we need to conclude now.

10 MR BOOTH: Yes well I am submitting that there was DNA, there was DNA found amongst other that there was a hair or hairs and that none of the, there was no evidence that that belonged to the accused and definitely no evidence that there was any DNA of the deceased. Ntombela is the person who
15 went to uplift the DNA and then there is a DNA report which is attached to the proceedings.

COURT: The evidence is clear, the evidence is clear that the accused is not linked, there is no DNA evidence linking the accused to the commission of this offence. Is that not what it
20 is all about?

MR BOOTH: That is, yes there is absolutely no DNA linking him and that could include DNA from the deceased in the car or on shoes or in the house or whatever and there is no DNA of the accused on the deceased or her clothing.

25 COURT: Exactly, would you like to add something?

MR VAN DER VIJVER: The point I was making is that there was no other DNA found ...(intervention)

COURT: Yes.

MR VAN DER VIJVER: Coming back to the point whether
5 somebody else was driving the car but the fact remains the two swabs that were tested was only the DNA of, matches the DNA of the accused.

MR BOOTH: No I am sorry I don't agree ...(intervention)

COURT: Yes. I think Mr Booth's objection is it does not
10 mean if the two swabs only linked, I think what Mr Booth is saying it does not mean the two swabs only links Mr Mthethwa that there were no other DNA of other person in the vehicle.

MR VAN DER VIJVER: No but Mr Booth seems to suggest
15 that other DNA were found and they couldn't establish whose DNA it is, I think that is his point, that is his point and all I am saying on that point is there was a hair which is now still nor here nor there ...(intervention)

COURT: Do you say alleged hair or as a hair?

MR VAN DER VIJVER: No, no there was a hair found but they
20 couldn't extract DNA from it. No there was definitely a hair was found, that is in the report, it was on the mat.

MR BOOTH: But that hair is not DNA linked to the accused.

MR VAN DER VIJVER: Yes it is not DNA linked to anybody.

MR BOOTH: Well but definitely not the accused.

25 COURT: Yes we are in agreement with that. Let's roll over to

the 9th of March Mr Mthethwa, the Court will consider the matter, you know this matter has been running for a long time, we do have a court recess now and the Court will resume officially next year February. So this matter is postponed until 5 9 March 2017, your bail is extended until then and you are warned to be back on 9 March 2017 9:30. The Court will then adjourn, thank you.

COURT ADJOURNS AT 13:00 UNTIL 9 MARCH 2017