

SOUTH AFRICA / JUDGMENT

Links v S (CA&R 61/2022) [2023] ZANCHC 16 (14 April 2023)

[2023] ZANCHC 16

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane, Nxumalo

CASE / FILE NUMBER

CA&R 61/2022

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IN

THE HIGH COURT OF SOUTH AFRICA,

NORTHERN

CAPE DIVISION, KIMBERLEY

Not

Reportable

Case

No: CA&R 61/2022

In

the matter between:

RAYMOND

LINKS

APPELLANT

AND

THE

STATE

RESPONDENT

Neutral

citation: Links

v The State (Case no CA&R 61/2022)

(14 April 2023)

Heard:

13

March 2023

Delivered:

14

April 2023

JUDGMENT

Phatshoane DJP

Introduction

- [1] The 31-year-old Mr Raymond Links, the appellant, stood trial in the Regional Court, Northern Cape, Galeshewe, before Regional Magistrate LJ Roach on two counts. First, attempted murder. The State contended that on 15 March 2022, in Dikkop Street, Roodepan, Kimberley, he unlawfully and intentionally attempted to kill Ms Valerie Moima (the complainant) by assaulting her with a panga.[1] On count 2, he faced robbery with aggravating circumstances, in that, he allegedly assaulted Ms Ann Jooste and forcibly dispossessed her of R700. The appellant successfully applied for his discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the Act) on count 2. In respect of count 1, attempted murder, he was convicted on 14 July 2022 of assault with intent to do grievous bodily harm, a competent verdict in terms of s 258(b) of the Act. He was sentenced on 22 August 2022 to four years' imprisonment. He is before us on appeal against his conviction with leave of the trial court and is presently in custody.
- [2] Mr Steynberg, for the appellant, contended that the presiding magistrate infringed the appellant's fair trial rights in that he had not been impartial and failed to observe the well-known limitations on questioning as laid down in *S v Rall*. [2] On the merits, it was contended that the trial court erred on the following two bases. First, in not attaching sufficient weight to the contradictions in the evidence of the State witnesses and secondly, in finding that the State proved its case beyond reasonable doubt and rejecting the appellant's version.
- [3] The 62-year-old Ms Valerie Moima, the complainant, has two adult children, a daughter named Shavale Moima (Shavale) and a son called Shawn Moima (Shaun). Shavale's age does not appear on the record. However, she is older than Shaun who, when he testified, was 28 years old. Shavale has three children who are in the primary care of the complainant. Shavale is the appellant's girlfriend and the couple has been in a romantic relationship for some nine years, out of which a seven months' old child was born who, during the trial, was placed in the complainant's care by a social worker. It is common cause that the relationship between the appellant and Shavale has been marred by consistent physical violence, alcohol and drug abuse. The complainant and Shaun severed ties with Shavale due to her drug dependency. She confessed that she regularly stole items from the complainant's household and sold them in order to buy drugs (mandrax and tik) to feed her addiction. As a consequence of this, she was banished from home. At the time of the incidents relevant to this appeal, Shavale resided with the appellant at his parental home, situated across the street.

- [4] It is not in dispute that on 15 March 2020 the complainant was stabbed and sustained injuries to her head and her arm whereas Shavale was wounded on her arm following an attack at their home in Dikkop Street, Roodepan, Kimberley. The State argued before the trial court that the appellant was the perpetrator. In countering this accusation, the appellant contended that Shaun, the complainant's son, was the attacker.
- [5] At the heart of this appeal, as already alluded to, is the question whether the appellant was accorded a fair trial. It was submitted that the presiding magistrate was not open-minded, impartial and fair during the trial.

Fair trial rights

- [6] The right to a fair trial is entrenched in our Constitution. The impartial adjudication of disputes which come before the courts and tribunals is foundational to any fair and just legal system.[3] With regard to reasonable apprehension of bias the question is whether a reasonable, objective and informed person would on the

correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.[4] In *Bernert v Absa Bank Ltd* [5] Ngcobo CJ made this further important remark:

‘(I)t is fundamental to our judicial system that judicial officers are not only independent and impartial, but that they are also seen to be independent and impartial. Civility and courtesy should always prevail in our courts. Litigants should leave our courts with a sense that they were given a fair opportunity to present their case. This is crucial if public confidence in the judicial system is to be maintained. And public confidence in the judicial system is essential to the preservation of the rule of law, which is so vital to our constitutional democracy...’

- [7] It was argued for the appellant, that regard being had to the transcribed record of the proceedings and the manner in which the trial was conducted, the trial court had not been impartial. This is so apropos the manner in which the trial court questioned the appellant and his witness, its remarks in the course of this and the contents of its discussion with Shavale. The trial court, so it was contended, engaged witnesses in excessive examination so as to punch holes in the defence case. It was argued that the cross-examination by the State occupied 53 pages of the record whereas the trial court's questions ran into some 38 pages.
- [8] It is so that in the course of Shavale's testimony the presiding magistrate made some drawn-out remarks towards her to change her ways for the sake of her children. He went on to say: “I want to encourage you to say it is never too late”. It also holds true that during this exchange the magistrate also made some remarks, which in my view were discourteous. I illustrate below:

‘COURT: Now this happened in 2020 and now you have a child from the accused seven months old?’

MOIMA: Yes, your worship.

COURT: How does it help the court you need to help me understand, here is a person that you say there is a lot of domestic violence between yourself and the accused?

MOIMA: Yes, your worship

COURT: Here is a person that also now assaulted your mother to such a point where your mother could have died. Yet you are still in a relationship, and you fall pregnant. Is that correct?

MOIMA: Yes.

COURT: explain to me.

MOIMA:

COURT: Because you know when the court heard your testimony, I have to say that I am hearing just complete darkness and evil and gangster all because of this drug abuse. Your mother and brother are going through hell because of you. Not even [to] mention your children, and if I think about it carefully your choices of life partners led you to be here in the court of law. Has led your mother to be operated and having memory loss and stuff, because of you. So surely you have to see the light somewhere, you say without shame that you use tik, and you smoke dagga with Mandrax. You know what is happening you have lost respect for yourself. Because if you [had] an inkling of respect for yourself you would not have been seen as a drug addict...'

[9] Whilst the presiding magistrate was conversing with Shavale the appellant intervened. The Magistrate admonished him to keep quiet. Clearly, it was not the appellant's turn to address the Court. The remarks by the magistrate, although deserving of rebuke, are not of a degree that should vitiate his decision. The complaint does not end here. Much more on the tangential side, it was argued that the following interjection by the magistrate shows that he was not impartial. During the cross-examination of Shavale, the following exchanges were quoted to illustrate the point:

'MS OLIVIER: As the court pleases, Your Worship. My client will tell this Court that it was your brother who had a panga and your brother then hit him with the panga that is how he ended up in your yard because he retreated backward.

MS MOIMA: Yes.

COURT: The accused asked his mother for the panga, now it is being put that your brother had the panga and you said yes.

MS MOIMA: No, your Worship

COURT: then listen to the question.'

[10] The statement put to the complainant is two-layered. First, that her brother had a panga and secondly, that the appellant retreated into the yard. Her response may well have been directed to the latter part of the statement. Her response cannot be equated to a concession

detrimental to the State's case as counsel for the appellant sought to argue. This should also be considered against what the witness had testified before the exchange. Her evidence was to the effect that the appellant's mother, Ms Troy Links, brought the panga for the appellant. The magistrate's interjection as indicated above cannot be a sufficient indication that the appellant did not have a fair trial.

- [11] More significantly, it was submitted that the magistrate overstepped the line when posing questions to the appellant and his witness. With the benefit of perusal of the record, in respect of the appellant, the trial court made follow-up questions on how the fight between the appellant and Shaun was carried out. It also put questions to him on how he was injured and where he sustained the injuries. This took seven pages of the 29 pages of cross-examination at that stage. The court also, during cross-examination, sought clarification from the appellant on how the complainant intervened in the fight between the appellant and Shaun. The appellant responded that he could not explain in exact terms "the whole movement" / "die hele beweging". He claimed that his focus was not on the complainant but he saw Shaun stabbing her. Again, the court persisted with its questions, on this aspect. When the court had completed its questions on this issue, the prosecutor mentioned that her cross-examination had ended. The court remarked: "Het ek die wind uit jou seile gevat?" to which she responded in the negative and carried on with the cross-examination. At first blush, these questions were legitimately posed to clarify some uncertainties with regard to how the events at the scene unfolded.
- [12] In *S v Djuma and Others*[6] it was held that fairness requires a judge to be actively involved in the management of the trial, to control proceedings and to ensure the proper utilisation of resources. It goes without saying that this sometimes involves assertiveness and the adopting of robust stances. In *Take and Save Trading*[7] the SCA said that a balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration.[8]
- [13] At the end of the cross-examination and re-examination of the appellant the trial court posed further questions to him, which concerned his personal circumstances, education, family background, career, relationship with Shavale, their drug abuse and who between the two had introduced the other to the use of drugs. The questions also covered issues that emerged during his evidence with regard to, amongst others, the fight between him and Shaun. The trial court also lengthily questioned Ms Links. The questions to both the appellant and Ms Links were sometimes inappropriate. For example, it was injudicious for the presiding magistrate to put to Ms Links that she came to court to tell lies in order to rescue the appellant. The following excerpt from the record demonstrate the point:

'HOF: Hoeveel kinders het u [onduidelik] hoeveel kinders het u?

MEV LINKS: U Edele ek het net vir Raymond [the appellant].

....

HOF: Die is nou u enigste kind wat u nou oor het? Jy sal hom nie graag in die tronk wil sien nie?

MEV LINKS: Nee U Edele.

HOF: Gaan jy leuns vertel vir hom.

MEV LINKS: Ons kan nie vandag besluit U Edele, ek kan nie...[onduidelik] of ek soek nie my kind in die tronk nie U Edele. 'n mens moet net – moet jy net die waarheid praat U Edele. Al staan u kinders..[onduidelik] en ervaar ons kan nie sê Raymond maak reg hier, maak dit nie. Ek soek nie vir Raymond daar nie.'

[14] Both parties had been ably represented. Thus, the lengthy examination of the witnesses by the presiding magistrate was unwarranted and, in my view, came close to crossing the line. The magistrate had on occasion engaged robustly with the witnesses and his involvement was ill-advised and ought to be strongly deprecated as it created the impression that he descended into the arena of the combatants and may have been clouded by the dust of conflict. However, viewed holistically it is unpersuasive that he was not impartial and that his conduct produced an unfair trial. Put differently, the conduct of the proceedings would, in my view, never have engendered a well-informed or reasonable apprehension of bias.

The merits of the appeal.

[15] In proving its case the State relied on the evidence of the complainant, Shaun and Shavale. They presented three, almost completely different versions. It is important to set out the synopsis of their evidence and that of the defence because it is relevant to the principal question whether the conviction is sustainable on the merits.

The State's version

[16] The complainant testified that on Sunday 15 March 2020 at approximately 22:30 she was home when she heard her daughter Shavale loudly calling "mother, mother, I [am] injured". Shavale ran into her yard. Her arm was covered in blood. She reported that the appellant assaulted her with a panga and entered the house. Immediately thereafter the appellant arrived accompanied by his mother, Ms Links and his cousin, Brown. The complainant enquired from the appellant what was going on. The appellant lifted the panga and struck the complainant on her head. She lifted her hands to avert the blow and was struck on her left arm. She says that Brown was busy pulling the entrance door and calling out Shaun's name. He said that he wanted to shoot Shaun. An objection was raised that this constituted inadmissible hearsay. It is not. The complainant merely explained what she heard. In any event, the appellant confirmed that Brown made these utterances.

- [17] According to the complainant, following the departure of the feuding family, she summoned Shavale and Shaun. She was bleeding. Shaun immediately ferried her to Lenmed Private Hospital and Shavale to Robert Mangaliso Sobukwe Hospital for medical attention. The wound on the complainant's arm was sutured. A doctor that treated her informed her that the wound on her head was very deep. Had her hair not been thick, the laceration would have been even deeper. She says that she was referred to a specialist doctor to attend to her head injury. They sutured her head wound on Monday and was discharged on Tuesday. She experiences headaches and has become forgetful. The complainant at no point dithered that it was the appellant who inflicted the wounds on her and not her son as the defence had put to her.
- [18] Shaun lives in the same street as his parental home. It takes three minutes to walk between the two residences. Shaun was at his home when he heard Shavale calling for help. He peeped through a window and saw his sister and the appellant at his gate. He ordered them to leave. The appellant refused to comply. Shaun approached him and shoved him to the ground. The appellant pulled his leg. Shaun kicked him to let go of his leg.
- [19] Shaun saw the couple in front of the complainant's gate. The appellant ran to the corner of the same street while Shavale stood inside the yard at the complainant's residence. Shaun told his sister to stay away from the appellant as he and the complainant were tired of their shenanigans. Shortly thereafter, the appellant arrived accompanied by his mother, Ms Links and his cousin, Brown. Shaun picked up a brick and closed the gate. The three insulted the complainant's family. The complainant requested Shaun to go inside the house which he did. She locked the burglar door. Through the burglar bars, Shawn saw the complainant closing the gate but the appellant and Brown pushed it open. Shawn observed the appellant hit his sister with an object. She fell. The appellant approached the complainant and struck her with a pole-like black object. It was dark, therefore, he did not see properly what the object was and does not know where the appellant got this from. However, in his statement to the Police, he says he saw the appellant pull this weapon from behind his back. He hit the complainant first on her head. The complainant was able to avert the second blow with her hands.
- [20] Shaun further testified that Brown approached him. He pulled the burglar door and asked Shaun to leave the house, as he wanted "to show him something". The complainant yelled at the feuding family to leave her residence, which they did. The complainant picked up Shavale. She opened the burglar door and both fell inside the house bleeding. He saw his sister's deep wound. Her arm bone was exposed. He called the Police and later rushed the complainant and Shavale to the two mentioned hospitals. He denied that he accidentally stabbed his mother and sister with a weapon as put by the defense.
- [21] Shavale Moima described her relationship with the appellant as turbulent. At approximately 21:30 on that fateful day, the appellant threatened her with a knife and instructed her to enter their house. Shavale says that the appellant was quite aggressive and assaulted her. While the appellant was visiting a nearby café she tried to sneak out but the appellant saw

her and pursued her. She ran towards Shaun's house and entered his yard. The appellant stood outside swearing at Shaun. The appellant and Shaun met at the gate where he grabbed Shaun's chest; pushed and slapped him. Shaun retaliated. Shavale ran to her parental home situated near his brother's rental house. She called out the complainant. Shortly thereafter Shaun, his wife and their son arrived at the complainant's residence. As Shavale, Shaun, and his wife explained to the complainant what had transpired the appellant arrived and requested Ms Links to bring him a panga which she did. Shavale says as she tried to close the gate the appellant struck her with the panga on her ring finger. He entered the premises and struck her with the blunt "flat side" of the panga on her back. The appellant lifted the panga to hit Shaun but struck Shavale on her arm. The appellant also struck the complainant on her head and arm.

- [22] At the time, Shaun was inside the house looking for towels to staunch the blood and attempting to call the Police. The appellant and his gang tried to forcibly enter the house and stood outside for about 30 minutes threatening the family but later left. Shavale says on the day in question she was under the influence of drugs and so was the appellant. Drugs make her mind "work overtime" and at times she would hallucinate. She also said it was chaotic at the scene and that she was confused.

The appellant's version

- [23] The appellant testified that on 15 March 2020 he drank liquor and was "little bit" inebriated. He and Shavale had visited a club and returned home where he requested Shavale to remove the laundry from the washing line. He later realised that Shavale had furtively left. He, accompanied by his mother, went out in search of her. He saw her walking down the street. He followed her, shouting at her. He denied that he had any knife in his possession or called her names. She ran and he chased after her because there was laundry that she had to remove from the washing line and there had been no reason for her to leave. This angered him. Under cross-examination he said he was surprised and disavowed that he had said he was angry with her.
- [24] The appellant says that while he chased after Shavale she called Shaun and stopped at his gate. He waited for Shavale on the pavement. Shaun chased them away. He also accosted the appellant and they fought. He shoved the appellant to the ground and kicked him. The appellant stood up and picked up a stone which he threw at Shaun. The appellant followed his girlfriend. Shaun ran after them. Shavale called the complainant and opened the complainant's gate. Shaun produced a panga from his pocket. The appellant says he retreated and ended up inside the complainant's yard. A tussle then ensued between him and Shaun. Shaun hit him with the panga on his left arm. Shavale and the complainant intervened. He slipped while Shavale was between him and Shaun. Shaun hit Shavale with the panga. He accosted Shaun. The complainant tried to intervene. Shaun aimed a blow at the appellant, it missed him but struck the complainant. The second blow that Shaun executed also found its mark on the complainant.

- [25] The appellant disputed that he carried a weapon and struck Shavale and the complainant in the manner they both described. He does not know who informed Ms Links and Brown that there was a fight at the complainant's residence.
- [26] Ms Links testified that on the night in question the appellant called her from some street. She left to assist him. On her way she met Brown. Together they went to the scene and found the appellant at the gate bleeding from the head and at the back of his left shoulder. The injuries, she says, were of a serious nature. The appellant informed her that he fought with Shaun. They took him home. The appellant did not visit any hospital or clinic for his injury. They called an ambulance which did not arrive.
- [27] What is strange, in my view, is that Brown, according to Ms Links, was driving his vehicle. It is quite odd that he did not transport the appellant to a hospital. Ms Link's evidence that Brown was on his way elsewhere makes no sense in light of the emergency medical treatment that was purportedly required by her son.

The trial court's findings

- [28] The trial court noted that a conspectus of the evidence was required when determining the guilt or innocence of an accused person. It recorded the contradictions in the three State witnesses' versions and noted that contradictions per se did not lead to the rejection of the witnesses' evidence because they may simply be indicative of an error.[9] The court held that Shavale admitted using drugs on the date in issue and that this would affect her recollection, observation and reconstruction of the events. The court was also of the view, on the assessment of the evidence of the three State witnesses and the defence case, that there were serious inconsistencies on the material points which could not be ignored. It found that the appellant's version was a bare denial on the aspect whether he was the perpetrator. Equally true, there were also contradictions in the appellant's version and that of his witness. It noted the trite principle that there was no onus that reposes on the appellant to prove his innocence.
- [29] The trial court held that the manner in which the appellant gained entry into the complainant's residence was crucial to the determination of the question of who the aggressor was. It was further of the view that there were peripheral differences on the State witnesses' observation and reasoned that they did not differ on the crucial aspect that it was the appellant who was the attacker. It then concluded that the appellant had irrationally and without any provocation assaulted the complainant. It rejected the appellant's version that it was Shaun who inflicted the injuries on the complainant and said:

'The second wound clearly is reflective of the fact that it could not have been the complainant's son assaulting his mother by mistake.'

[30] In light that the State had failed to call the doctor that examined the complainant, the court stated that it was unable to find that the appellant had the intention to murder the complainant. At best for him, the trial court found, that the State proved its case beyond reasonable doubt that he was guilty on a competent verdict of assault with intent to do grievous bodily harm.

Discussion

[31] Principally, what arises for consideration is whether the appellant attacked the complainant as found by the trial court. As already alluded to, the appellant contended that the trial court erred in not attaching adequate weight to the contradictions prevalent in the State's case and in finding that the State proved its case beyond reasonable doubt.

[32] The burden of proof rest upon the State. It is trite that there is no obligation upon an accused person, where the State bears the onus, to convince the court otherwise. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable.[10]

[33] As already discussed the complainant, Shavale and Shaun gave different versions with regard to their observation the events at the scene. It is important to point to the significant discrepancies.

33.1 Shavale testified that when she and the appellant arrived at Shaun's residence on that fateful evening Shaun wanted to know what was going on between the couple. However, Shaun said he did not want the two at his house and ordered them to leave.

33.2 Shavale says that at Shaun's residence the appellant fought Shaun first whereas Shaun intimated having initiated the fight in that he pushed and shoved the appellant to the ground. Shavale also said in the course of the fray the appellant slapped Shaun in his face, an issue Shaun did not testify to.

33.3 On the complainant's version, Shaun arrived at her house few hours prior to the commencement of the fight at her residence. If that is true, it made no sense that when Shavale screamed for her help Shaun remained inside the house and did not react to his sister's melancholic plea. Her version was contradicted by Shaun who testified that he was not at the complainant's residence when Shavale reached home screaming. He arrived at the complainant's residence shortly after her sister and the appellant had arrived at the scene.

33.4 Shaun was certain that the complainant saw the appellant attack Shavale. However, the complainant's testimony was to the effect that when Shavale arrived at her house, she was already injured. Shavale confirmed Shaun's evidence that she was still uninjured when she arrived at the complainant's residence.

33.5 According to Shaun the appellant, Ms Links and Brown entered the complainant's residence. However, the complainant testified that Ms Links remained outside the yard. She also said that her entrance door was shut and so was the security/burglar door and thus Shaun, who was inside the house, could not have witnessed the brawl. Shaun, on the other hand, says he saw what the appellant did to the complainant.

33.6 There is also an inconsistency on whether upon arrival at the complainant's residence, Shaun fought with the appellant. He says he picked up a brick but did not throw it at the appellant. The complainant, says that she ordered Shaun to go inside the house which he did. However, Shavale says Shaun fought with the appellant.

33.7 The complainant said that the appellant had the weapon in his hands at all relevant times whereas Shaun vacillated on whether he pulled this from behind his back. Shavale says the appellant requested Ms Links to fetch the panga for him which she did and handed it over to the appellant.

33.8 The evidence by the complainant and Shawn is to the effect that Shavale was laying outside the yard after the appellant had struck her, whereas she says she ran into the house following her injury.

[34] Insofar as there were differences in the three witnesses account, it is important to remember that the scene was not static but moving where at different times witnesses may have observed the incidents from different vantage points. One witness may not be in a position to observe where another witness was at a particular time. Shaun explained that because the complainant was hit on her head, she could not remember everything. He said this to explain the discrepancies in the complainant's version and his. This is inadmissible opinion by a lay witness. However, Shavale testified that, since the day of the incident, the complainant is forgetful. When asked whether she did observe what had happened to the complainant when she was attacked, Shavale responded "not really". When the version of the appellant was put to Shavale that she and the complainant were mistakenly hit by Shaun with the panga, when they interceded in the fight between the appellant and Shaun, she said that she was unable to give a detailed account because she was under the influence of drugs and that her mother was better placed to explain the incident.

[35] The doctor who treated the complainant was not called to explain the nature and extent of her injuries. Neither did the State adduce any expert evidence of the impact of the assault on the complainant's general state of health. The J88 medical report was provisionally handed in evidence subject to Dr Gabin Kitenge testifying on the veracity of its contents. The doctor was not called and the trial court did not rule on the admissibility of the report at the end of the State's case. Much was made by the defence that the J88 did not bear the complainant's name. It was further contended, for the appellant, that the trial court's omission to rule on the admissibility of the medical report is an irregularity that vitiated the proceedings.

[36] As already stated, the J88 was provisionally admitted because the prosecutor had informed the court on numerous occasions during the proceedings that the State intended to call the doctor to testify. It is so that the trial court recorded, in its judgment, that the report was admitted in evidence by consent and went on to restate the clinical findings and conclusions. Needless to say, other than the stated recordal, the trial court made no further mention of the medical report in support of its conclusion. The trial court reasoned:

‘In deciding whether the accused indeed had the intention to murder the complainant the court is however of the opinion that a reasonable

doubt exists and this is created as a result of the State failing to call the medical doctor who examined the complainant. The

conclusion

reached by the medical doctor is however not clear and hence open [to] interpretation. It is therefore also not clear if the wound itself was life threatening or had the potential or being life threatening. The accused is afforded the benefit of the doubt in this respect.’

[37] On the foregoing exposition, I cannot discern how the provisional admission of the J88 report would have prejudiced the appellant. Reliance by counsel for the appellant in *S v Seboko*,^[11] as support for his argument that the trial court committed an irregularity which vitiates its decision, is misplaced. In the case before us the admission of J88 was in terms of s 3(3) of the Law of Evidence Amendment Act 45 of 1988. Which provides:

‘(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.’

Seboko concerned the admission of hearsay evidence in terms of s 3(1)(c) of the Law of Evidence Amendment Act. The Full Bench of this division held that the provisional admission of the evidence by the regional magistrate was a misdirection because s 3(3), ‘did not find application’ in that case.^[12] In *Seboko*, the person upon whose credibility the probative value of the hearsay evidence depended (the deceased) could not have testified later in the proceedings for obvious reasons. The Magistrate was obliged to make a ruling based on s 3(1)(c), which he did not do.

[38] It bears emphasis that the J88 in this case, as set out in the trial court’s judgment, was not considered in its final decision. Any analysis of the evidence should be considered against the backdrop of the following common cause facts: (a) the complainant was struck on her head and her arm with a weapon and (b) was admitted to the hospital for three consecutive days for the treatment of the injuries she sustained.

- [39] The appellant's version is not without blemishes. He was able to describe the panga that he says Shaun produced from his pocket, yet this was during the night and the scene was in motion. On one occasion he said he retreated when Shaun produced the panga and later said they confronted each other. It makes no sense that he would have accosted Shaun who, on his version, held a panga. He intimated that Shaun had an 'upper hand' because he had already struck him on his left arm, yet he tried to disarm him with an injured arm. He was not able to explain how the fight ensued and said: "Dit is wat ek gesê Meneer ek gaan nie alles kan verduidelik". He painted himself further into a corner when he said that Shaun continuously stabbed him with the panga. He did not disclose to his attorney that Shaun had already stabbed him at Shaun's residence; and neither was this statement put to Shaun; or that Shaun also stabbed him on the shoulder. It was also strange, as the trial court observed, that the appellant did not open a case against Shaun when he had attacked him with the panga.
- [40] The appellant places himself on the scene where he fought with Shaun. In the course of this, the complainant and Shavale were struck with a panga or similar object and sustained injuries. The appellant exculpates himself from the assault on the complainant and Shavale but attributes this to Shaun. The State witnesses did not differ on one crucial aspect, which is, their observation at the scene that the appellant was the perpetrator. More fundamentally, it is difficult to discern how Shaun could have accidentally executed three stab wounds, one on his sister and two on his mother. The probabilities point heavily towards the appellant being the perpetrator. On the foregoing exposition, the State proved its case beyond reasonable doubt against the appellant. The Regional Magistrate did not commit any material misdirection. The upshot of this is that the conviction must stand and the appeal must fail. I make the following order.

Order

1. The appeal is dismissed.

Phatshoane DJP

Nxumalo J

concur in the judgment of Phatshoane DJP

Appearances:

For the appellant: Mr H Steynberg

Instructed by: Legal

Aid, Kimberley.

For the respondent: Adv CG Jansen

Instructed by: Director of Public Prosecutions, Kimberley.

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- [1] A bladed African tool like a machete- Online Oxford Languages.
- [2] 1982
- (1) SA 828 (A).
- [3] President of the Republic of South Africa and Others v South African Rugby Football Union and Others
- [1999] ZACC 9; 1999 (4) SA 147 (CC) para 35.
- [4] Take and Save Trading CC and Others v Standard Bank of SA Ltd 2004
- (4) SA 1 (SCA); [2004] 1 All SA 597 (SCA) para 2.
- [5] 2011
- (3) SA 92 (CC); 2011 (4) BCLR 329; [2010] ZACC 28) para 98.
- [6] Unreported GP case No A 423/2015, 12 April 2017, para 14.
- [7] Ibid fn 4 at para 4.
- [8] Ibid.
- [9] S v Oosthuizen 1982(3) SA 571 (T) at 576B-C.
- [10] S v V 2000
- (1) SACR 453 (SCA).
- [11] 2009
- (2) SACR 573 (NCK).
- [12] Ibid at 581B-E.

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