THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 20508/2014

Reportable

In the matter between:

JIMMY SEBONE SEEMELA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Jimmy Sebone Seemela v The State* (20508/14) [2015] ZASCA 41 (26 March 2015)

Bench: Ponnan, Maya, Mhlantla and Zondi JJA and Meyer AJA

Heard: **16 March 2015**

Delivered: **26 March 2015**

Summary: Evidence – s 3(1)*(c)* – Law of Evidence Act 45 of 1988 – admissibility of hearsay evidence – murder – legal causation.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Claassen J, sitting as court of first instance):

The appeal succeeds in part and the order of the court below is set aside and replaced with the following:

'(a) The appeal is upheld to the following extent:

(i) The conviction of the appellant on count 1, the murder of Jabu Heckson Mathebe, and the sentence of life imprisonment imposed pursuant to that conviction are set aside.

(ii) The conviction of the appellant on count 2, the murder of Maggie Rapao, and the sentence of life imprisonment imposed pursuant to that conviction are set aside and replaced with the following:

'On count 2, the accused is convicted of attempted murder and sentenced to imprisonment for a term of twelve years'.

(iii) The appeal in respect of count 3, the unlawful possession of a firearm, and count 4, the unlawful possession of ammunition, in each instance in contravention of the Arms and Ammunition Act 75 of 1969, and the sentences of imprisonment for terms of 5 and 3 years imposed respectively pursuant to those convictions, is dismissed.

(iv) The sentences imposed on counts 3 and 4 are ordered to run concurrently with that imposed on count 2.'

JUDGMENT

Ponnan JA (Maya, Mhlantla and Zondi JJA and Meyer AJA concurring):

[1] The appellant, Jimmy Sebone Seemela, was indicted before the North Gauteng High Court (Claassen J, sitting on circuit at Polokwane), on two charges of murder, one of assault with intent to do grievous bodily harm and one each of being in unlawful possession of a firearm and ammunition in contravention of the Arms and Ammunition Act 75 of 1969. He was acquitted on the assault and, despite his denial that he was the perpetrator, convicted on the remaining charges. He was sentenced on each of the murder charges to life imprisonment and to imprisonment for terms of five and three years respectively in respect of the unlawful possession of a firearm and ammunition. His appeal to the North Gauteng High Court, Pretoria (per Ledwaba J, Makgoba J and Bam AJ concurring) against both conviction and sentence having failed, the further appeal is with the special leave of this court.

[2] Much in this matter remains unexplained and this is perhaps an object lesson in how litigation, in particular criminal trials, should not be conducted. All of the offences were alleged by the State to have been committed on 24 February 1998 in Makgofe Village in the district of Seshego. However, the record is silent as to why the trial only commenced some 12 years later on 26 May 2010. In the interim, several crucial state witnesses died.

[3] It is undisputed that the appellant, and Ms Maggie Rapao, the deceased on count 2, who was approximately 20 years his junior, had been involved in a relationship. According to the State, that relationship ended in 1997 when the appellant stabbed Ms Rapao with an okapi knife after learning that she had become involved in a relationship with Mr Jabu Heckson Mathebe (the deceased on count 1). As a result of that stabbing,

the appellant was charged with the assault of Ms Rapao. On 24 February 1998 Ms Rapao testified against the appellant at the Seshego Magistrates' Court in support of that charge. At approximately 6 pm that very evening, so the State alleges, Mr Mathebe, a taxi driver, was busy offloading passengers when he was approached by the appellant, who shot him once in his back whilst he was seated in the driver's seat of his taxi. After the shooting of Mr Mathebe the appellant called on the home of Ms Rapao. In that regard the indictment reads:

'2.2 The deceased was standing in front of her house and when he approached her, she ran into the house. He shot at her, but missed. He succeeded in forcing open the door which she had closed. When she fled he followed her and shot at her again and succeeded in shooting her in the back.

3.1 The accused also went into the room where the latter deceased's father, the complainant in count 3, was and hit him with the firearm on his head and hand.

3.2 The complainant grabbed an ashtray and assaulted the accused therewith. The firearm fell down and the accused ran away.'

[4] After having been shot, Mr Mathebe was admitted to the Seshego Hospital. He was later transferred to the Pietersburg Provincial Hospital. On 12 March 1998 Mr Mathebe was discharged from the latter hospital and admitted to the Baragwanath Hospital, where he died on 16 May 1998. The medical records of Ms Rapao reveal that she was admitted to the Pietersburg Provincial Hospital after the shooting, where she was initially treated as an in-patient until her discharge on the 1st June of that year. She thereafter continued to visit the hospital until 4 August, which is her last documented treatment as an out-patient. She was re-admitted on 10 November 1998 and died some 10 months after the shooting on the 17th of that month.

[5] The only witness called by the State in respect of count 1, the murder of Mr Mathebe, was Mr Lediwana Shadung. He testified:

'Even though it is quite a long time ago I will start on that day, the date mentioned on 24 February 1998 I was on the day in question from town on my way to Motuong. I arrived in Bloodriver and found Sebone there as a person who was waiting for a taxi.

Sebone you are referring to the accused? --- Yes.

. . .

I then picked him up, up until Motuong, that is where our routes end.

Did you talk to one another the minute he boarded into your taxi? --- He greeted me and sat down.

. . .

'He alighted from the taxi at Motuong and then what happened? --- Yes, that is the spot where . . . the taxis ends, everybody alights there. I then made a U-turn. I came back to town. As I was busy leaving after having made a U-turn there was another vehicle which was approaching coming to drop people . . . (intervenes)

You are referring to another taxi? --- Yes.

Who was the driver? --- Jabu.

That would be the deceased, the Jabu Mathebe, the deceased in count 1? --- Yes.

Yes. --- After having left the spot having driven or travelled for quite some time, a number of metres I heard a gunshot.

Yes. --- I looked into my rear view mirror, I saw Jabu's vehicle crossing the road slowly. I stopped.

Did you drive back? --- Yes, I stopped and made a U-turn, I went back.

You arrived there, what happened? --- I found Jabu seated between the two seats.

Yes. --- Busy screaming.

Did you talk to him? --- I was trying to talk to him, but he was not talking, he was just screaming.

Yes okay, then what happened? --- Somebody else, another guy came running.

Who is that? --- I have forgotten his name.

Okay. --- It is a long time ago. The person arrived there and said lets take him to the hospital, he had been shot at.

Yes. --- I just got into Jabu's motor vehicle, reversed and rushed him to the hospital.

COURT: Ja.

MR MUDAU: Did you see the accused when you drove back to the scene? --- No.'

[6] Mr Kleinboy Rapao, the brother of Ms Rapao, was the only eye witness in respect of the remaining counts. Although aged 27 at the time of the trial, he was only 15 when his sister was shot. He testified:

'Who were you with on that day at the particular time? --- I was in the company of my mother, Mmalehu Sarah Rapao who unfortunately passed away in the meantime as well as the deceased. One Mogale David was also present, but he also unfortunately passed away.

Do you perhaps still remember around what time of the day did the incident took place? If you do not, it is okay. --- It was, it happened at night, but I cannot recall the time.

. . .

On the night in question we were seated outside. It was just after we had our supper. As we were seated there I heard a gunshot. Immediately after hearing that gunshot we all jumped and ran into the house. I then saw the accused coming into the house shooting my sister three times. (INTERPRETER: the witness is showing on her body).

COURT: On the right chest. When he came into the house you say you saw the accused shooting your sister? --- Three times on her body as indicated.

Right side of torso. Ja? --- I succeeded in pushing the door open, got out of the house and started shouting for help, calling for help.

People came to the scene and helped. That is what happened.

Can I just understand, you first heard a shot, you all jumped up and went inside and then you saw the accused shooting your sister three times, is that correct? --- Yes.

. . .

After the arrival of the community they were the ones who came to help, that is the community, my mother also succeeded in coming out of the house. She had a struggle with the accused, that is my mother up until she succeeded in taking the firearm from him.

Okay. --- Mr Mogale also tried to help. During that he hit the accused with an ashtray.

COURT: Ja.

MR MUDAU: Where was the accused at that time? --- If I remember well he tried to get into the house in which Mr Mogale was, that is at that stage where Mr Mogale hit him with that ashtray.

How did this accused leave the scene of the crime? --- In an ambulance.

What was wrong with him? --- Because the community arrived after having been called and they were the ones who assaulted him, injured him that is why he was removed in an ambulance.'

[7] For the rest, the State case rested on hearsay evidence adduced in terms of s 3 (1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 (the Act). Counsel for the State had applied, during the course of the evidence of the investigating officer, Warrant Officer Matlala, for various statements to be received into evidence in terms of that section. In that regard the record reads:

'MR MUDAU: Perhaps before he, before he even takes the oath there will be an application by the state during the testimony of this witness to bring an application for acceptance of hearsay evidence.

COURT: To tender hearsay evidence?

MR MUDAU: Yes, with regard to the statement that he took from the deceased in count 1 and the deceased in count 2 and with regard to the statement that he also took from the mother to the deceased in count 2 and also with regard to the statement that he took from Mr David Mogale, he is the initial investigator and he is the one who collected all these four statements from these four people who have since died. So I think it will be best M'Lord, for me to first deal with that formal application.'

[8] Warrant Officer Matlala's evidence then ran thus:

'There is a statement before you there, can you quickly go to the last page. Who is the commissioner in that statement? --- Myself.

Was it signed by . . . (intervenes)

COURT: Anyone.

MR MUDAU: The deponent. --- That is so.

This honourable court has ruled that the reading of this statement will be accepted as evidence for these proceedings. Can you then go to the statement and read it for the record of these proceedings?'

Warrant Officer Matlala then read the statement of Ms Rapao into the record. The same course followed in respect of the statement of Mr Jabu Mathebe, Mr David Mogale and Ms Sarah Rapao – the latter two being respectively the stepfather and mother of Ms Rapao.

In respect of the statement of Ms Sarah Rapao, Warrant Officer Matlala added:

'Ja, I see the handwriting of EXHIBIT L is different to that of H, J and K. Can you explain that? --- That is true, it differs.

Why would that be? --- Ja, the one handwriting which differs with the others is that of Warrant Officer Galane.

Ja. --- The reason why I was the one who commissioned that statement is because I am the one who had send him to take down that statement.

So you did not take it yourself? --- That is quite so.

Ja, Mr Mudau, what do I make of that statement? It was not taken by him. It was . . . (intervenes)

MR MUDAU: M'Lord . . . (intervenes)

COURT: It was presented as if it was his statement, but it is not.

MR MUDAU: The state is well aware of that and we are still in the, in the state case and a gap to have that covered is not closed, M'Lord. I interviewed him with respect to that. Perhaps my omission was not to make it clear to this court that he was the commissioning officer and the court can decide once the state has closed its case as to whether to take the statement as of any value or not, because Warrant Officer Galane is still a police officer in the police service and at any time he can clear that up for the purpose of these proceedings.'

[9] The appellant testified in his defence and was rightly found by the trial court to be an unimpressive witness. The high court accepted that the appellant was in fact the perpetrator in both instances. It held:

'From their statements it is very clear that it was the accused who came and shot them. Mr Mathebe says he was sitting in his taxi and the accused came up, pulled out a gun and shot him. The other statements referred to the incident at Maggie's place. They were all sitting inside just after dark. They heard a shot. Maggie and her brother Kleinboy ran into the house and the accused came in and shot the deceased 3 times. He was assaulted and the accused lost consciousness on the scene. Both were eventually taken to hospital. Mr Mathebe never left the hospital and he died there. Maggie Rapao was discharged at some stage but had to go back to hospital and died of septicaemia and bedsores, as [Dr D'Souza] testified in his report, due to the gunshot wounds. . . '

. . .

'The state witnesses all made a good impression on the court and especially so, Kleinboy Rapao. It is so that he was 15 years at the time of the incident. His statement for purposes of prosecution was only obtained a year ago. That apparently is because so many of the state witnesses died that the evidence of a young boy had to be relied on to get the prosecution going. He was very forthright in his evidence. He was well cross-examined and he answered these questions clearly and forthrightly. The other witnesses gave more neutral evidence and their evidence was not really challenged in any way. There is no reason not to accept their evidence.'

[10] As I understood the case sought to be advanced on appeal it was that the trial court erred in: first, admitting and thereafter founding its conviction on inadmissible hearsay evidence; and, second, concluding on the facts that the wounding could be regarded as the juridical cause in each instance of such deceased's death for the purposes of a charge of murder.

[11] In dismissing the appellant's appeal the full court stated:

'[13] The legal position regarding the admissibility of hearsay evidence was articulated in *S v Ndhlovu 2002 (2) SACR 325 SCA* and *S v Molimi 2008 (2) SACR 76 CC.* The Constitutional Court said hearsay evidence in terms of the Law of Evidence Amendment Act 45 of 1988 (the Act), may be received only if interest of justice so require, (sec 3(d)). In considering the admission of such evidence the court must have regard to all the factors mentioned in sec 3(1)(c) and must also ensure respect for fair trial rights set out in sec 35(3) of the Constitution. The safeguards serve to ensure that the appellant experiences a fair trial in accordance with section 35 (3) of the Constitution See *Molimi* case at 95 par [36] And *Ndhlovu* case at 335 par [13] to par [17].'

The full court added:

'[20] The admissibility of the hearsay statements *in casu* was considered by the Hono[u]rable trial Judge in accordance with the provisions of section 3(c) of the Act. The main consideration, whether the admission of the hearsay evidence was in the interest of justice, was also, in my view, properly addressed by the trial court.'

That conclusion, with respect to the full court, is not supported by the record. After hearing argument, and despite the obvious complexities of the matter, the trial judge ruled all too briefly I might add:

'Taking the arguments of both sides into consideration and having said already that there is corroborating evidence of the evidence to be led by way of hearsay evidence. I am inclined to allow the statements to be introduced into evidence. It may then be given.'

[12] For many years our law knew a rigid exclusionary rule which allowed specific exceptions but no relaxation. Now there is no exclusion as such. Hearsay evidence may now be accepted subject to the broad, almost limitless criteria set out in s 3(1). Of that section, Schutz JA (*S v Ramavhale* 1996 (1) SACR 639 (A) at 647*d*) had this to say:

'. . . it is necessary to emphasise . . . that s 3(1) is an exclusionary subsection and that the touchstone of admissibility is the interest of justice, as is made clear by the words: ". . . hearsay evidence shall not be admitted as evidence . . . unless - . . . the court, having regard to (the considerations in ss (*c*)) is of the opinion that such evidence should be admitted in the interests of justice."'

The trial court did not consider any of the matters listed in s 3(1)*(c)*, namely:

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account.

[13] Hearsay evidence has long been recognised to tend to be unreliable. It has thus been said that a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so. To once again borrow from Schutz JA 'an accused person usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness' (*Ramavhale* at 648*a*). Hence the Court's intuitive reluctance to permit untested evidence to be used against an accused in a criminal case (*Metadad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W)).

[14] In respect of count 1, the murder of Mr Mathebe, the evidence of Mr Shadung plainly did not incriminate the appellant. For a conviction one had to thus rely solely on the statement of Mr Mathebe. Given the absence of any other incriminatory evidence, I instinctively baulk at founding a conviction solely on that statement. I consider that the trial judge seriously underestimated this factor and was too easily persuaded to place weight on this evidence for the purpose of convicting the appellant. It seems to me that the trial judge did not manifest a sufficient awareness of the perils of relying solely on

that evidence to found a conviction. It follows, in my view, that the conviction on count 1, namely the murder of Mr Mathebe, as also the sentence imposed pursuant thereto cannot stand and accordingly falls to be set aside.

[15] In as far as the remaining counts are concerned, the hearsay evidence took the form of statements by Ms Rapao and her parents. Ms Rapao's statement reads:

'2. I was in love with Jimmy Seemela of Makgofe. I separate[d] with him during 1996. The suspect Jimmy Seemela stabbed me with a knife during 1997. I opened the case against him.

3. On the 24.02.1998 the case was heard at Seshego Magistrate [Court]. I testified. The case was further remanded to the 13.03.98. After the court I went home being with my uncle and mother.

4. At home I cooked and there later stood outside with my mother. It was at about something passed 19:00. I saw the suspect Jimmy Seemela at my place. I then stood up and ran away into the house.

5. The suspect shot one bullet which missed me. I got into the house and closed the door. The suspect pushed the door and g[o]t inside. I managed to get out of the house aiming to get into another one.

6. The suspect followed me up. He shot me twice on the back and I fell down. I was unable to stand up. My mother got hold of the suspect. More people gathered and the ambulance arrived and ferried me to the hospital.

7. The suspect did not say anything to me. He just fired at random. I suspect that the cause might be that of the court. I do not know what transpired there later. My witness is Sarah Rapao, Mokgadi Rapao and David Mogale.'

[16] Despite counsel for the State intimating that Warrant Officer Galane would testify in respect of Exhibit L, the statement of Sarah Rapao, that did not happen. In those circumstances that statement ought not to have been admitted into evidence. Mr David Mogale deposed to three statements - the first on 17 April 1998, the second on 23 October 2003 and the third on 26 July 2005. And whilst those statements may have contained certain minor contradictions, they were consistent in identifying the appellant as the perpetrator. In his first statement Mr Mogale stated:

'4. Then the suspect Jimmy Seemela burst into my room. He was having a gun in his hands. The suspect assaulted me with the firearm on my face and on the right hand.

5. I grabbed an ashtray and assaulted him with it. The firearm fell down and he ran away. I instructed Johannes Mogale to pick up the firearm. The complainant was lying down being unconscious. We called for assistance from the community. All the people came and arrested the suspect. He was beaten and the police arrived. The ambulance also arrived and took the complainant and the suspect to the hospital.'

Mr Mogale's version finds corroboration in the evidence of: (a) the police who attended on the scene – in that regard Warrant Officer Galane testified:

'After both the deceased and the accused were removed in ambulances one Mr Mogale approached me, gave me a firearm and said that that was the firearm used by the accused to shoot the deceased. . . .'; and

(b) the evidence of the appellant himself, who testified:

'I was still walking, approaching her parental home, it was starting to be dark. I cannot tell in metres as to how far I was at that stage from her parental home when I heard a gunshot. I then took out my cell phone, started phoning my girlfriend, the deceased, still approaching her gate that is the stage where I heard the gunshot. I saw a certain young man coming out, running out of that premises. . . .

. . .

MR NONYANE: Where was he running from? --- Out of the girlfriend's premises. Mr Mogale was chasing him.

Yes, proceed sir. --- After he ran past Mr Mogale said here he is, he then hit me with a stick . . .

On the left jaw.

. . .

I fell to the ground as a result of the blow and everything was mixed up, I could not understand what was going on. I became unconscious as a result.'

[17] Ms Rapao and her parents knew the appellant well. That being so, the possibility of a mistaken identification hardly enters into the reckoning. In any event on the appellant's own version, he was at their home that evening, where he was arrested, albeit in an unconscious state. The trial court rightly rejected his explanation for his presence there. No motive was advanced and none suggests itself as to why each of those persons would want to falsely implicate him at the expense of the real perpetrator. Whilst each of their statements, when taken individually may not have been sufficiently weighty, cumulatively they are decisive. To that must be added the testimony of

Kleinbooy Rapao, who also identified the appellant. The trial court found him to be a good witness and that finding has not been assailed. It must follow that the trial court's conclusion that the appellant was the perpetrator of counts 2, 4 and 5 cannot be faulted.

[18] There remains the question of causation in so far as the murder of Ms Rapao is concerned. The question, in essence, being whether Ms Rapao's shooting and subsequent death has been proven to be causally tied. As it was put in *Blaikie and Others v The British Transport Commission* 1961 SC 44 at 49:

'The law has always had to come to some kind of compromise with the doctrine of causation. The problem is a practical rather than an intellectual one. It is easy and usual to bedevil it with subtleties, but the attitude of the law is that expediency and good sense dictate that for practical purposes a line has to be drawn somewhere, and that, in drawing it, the court is to be guided by the practical experience of the reasonable man rather than by the theoretical speculations of the philosopher.'

[19] It is well established that a two-stage process is employed in our law to determine whether a preceding act gives rise to criminal responsibility for a subsequent condition (*S v Tembani* 2007 (1) SACR 355 para 10). In *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-G, albeit in the somewhat different context of delict, Corbett JA had this to say:

'Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to . . . the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem, in which considerations of legal policy may play a part.'

So, in respect of the second of the two considerations alluded to by Corbett JA, which presents as an issue of some complexity in this case, 'the inquiry must go on to determine whether the act is linked to the death sufficiently closely for it to be right to impose legal liability' (per Cameron JA, *Tembani* (para 10)).

[20] Neither Dr D'Souza, the state pathologist, who performed the post mortem examination on Ms Rapao, nor Professor G Saayman, on whom the trial court and full court placed great store, were called as witnesses. The medico-legal post mortem report completed by Dr D'Souza, which was admitted by the defence in terms of s 220 of the Criminal Procedure Act 51 of 1977, recorded the cause of her death as 'septicaemia, disseminated intravascular coagulopathy'. It added:

'According to hospital records, deceased was discharged on 01/06/1998 and died on 1998, November 17th. She was earlier admitted on 24\02\98 with alleged gunshot. She became paraplegic after the said incident. This information is based on hospital records. Cause of death given on the basis of history hospital records and external examination of body.'

Prof Saayman's conclusion was: 'Neither patient at any stage recuperated from the initial injuries and their eventual demise represented the terminal outcome of a progressive clinical decline.'

Prof Saayman, a Professor in Forensic Pathology at the University of Pretoria, had prepared a report at the request of the Director of Public Prosecutions. When it was intimated by counsel for the State that he will be called to testify, the trial judge made plain that as he had 'said even in chambers', 'it is not important for Professor Saayman to come and testify'. The trial judge also swept aside protestations by counsel for the appellant, who wanted him to be called, because as counsel put it 'we have got so many questions arising from that report'. In the event the report was, without more, admitted into evidence.

[21] To the extent here relevant, Prof Saayman's report reads:

'a. . . . It appears that she may have improved initially and that she was discharged on 01/06/1998. It is however not clear from the available documentation whether she had already developed bedsores at that stage (although none such appear to be specifically reported in the clinical / nursing notes).

b. She was followed up on an outpatient basis, but still had faecal and urinary incontinence. Several outpatient visits between 01/06/1998 and 04/08/1998 are documented in this docket, but no bedsores are recorded during these visits. It appears as if she had recurrent/constant urinary tract infection.

c. No further notes are available for August and July 1998, until she was re-admitted on 10/11/1998 with the diagnosis of septicaemia due to septic wounds. She was severely ill at the time of this last admission and blood tests showed features consistent with septicaemia (systemic spread of the infection) and diffuse intravascular coagulation – a clotting abnormality sometimes seen as a complication associated with (amongst others) severe infection. At this stage she had severe bedsores, but the onset of the latter cannot be ascertained from the available documentation. The patient passed away on 17/11/1998.

d. It is clear that a medico-legal autopsy should have been conducted on the deceased, in view of the medical history that she had sustained a gunshot wound. However, it appears that only an external viewing / examination (i.e. without formal dissection) of the body of the deceased was performed by dr MSR D/Souza, on 27/11/1998. Extensive decubitus ulcers (bedsores) were recorded, together with petechial haemorrhages all over the body. The cause of death was stated as septicaemia and disseminated intravascular coagulation.

. . .

f. It is indeed unfortunate, that a medico-legal post mortem examination was not conducted in this particular instance. If dr MSR D'Souza can still be traced at this stage, it may be appropriate to obtain a statement as to why a full dissection of this body was not undertaken. Enquiries may be made with the Health Professions Council of South Africa, to establish the current whereabouts of dr D'Souza. It is however, unlikely, that dr D'Souza will retain (at this late stage), individual or specific recollection of this matter.

g. The formulation of the cause of death, as supplied by dr D'Souza (under Seshego Medico-legal post mortem report no 521/98), should be critically reviewed. Although the terminal *mechanism of death* was that of septicaemia with disseminated intravascular coagulopathy, due to underlying infection (pressure sores and/or renal tract infection), there is little doubt that the primary medical cause of death (being the gunshot injury), should also be incorporated in the final formulation of the cause of death. Unfortunately, the autopsy report makes no specific mention of external injuries or scars, suggestive of prior gunshot injury. It is therefore essential, that due cognizance be taken of the clinical history pertaining to this patient – the latter having been reasonably well documented.'

[22] Precisely, on what basis, Prof Saayman's report (which he described as a 'review . . . based on the available clinical documentation') was admitted into evidence does not emerge from the record. But, whether it was indeed admissible need not detain me because even if it was admissible it hardly assists the State in discharging the onus

resting on it. Despite Prof Saayman's assertion that the clinical history of Ms Rapao was well documented, there was, as reflected in his report, a significant lacuna in respect of a critical period, namely 4 August to 10 November 1998. What is more is that he was sharply critical of Dr D'Souza for not having conducted a proper post mortem examination. In his report, Dr D'Souza records 'not opened due to lack of electric saw'. He thus contented himself with an external examination of Ms Rapao's body. In that, it would seem, that Prof Saayman's criticism is justified. In those circumstances, why it was thought by the trial judge that it was not necessary for him to testify is lost on me. For, in applying the applicable principles that I have set out earlier in this judgment to the evidence as it stands, it seems to me, that the learned trial judge ought to have entertained grave doubt as to whether the wounding of Ms Rapao by the appellant could have been regarded as the juridical cause of her death.

[23] In *S v Mokgethi en Andere* 1990 (1) SA 32 (A), a gunshot rendered the deceased a paraplegic. Despite the injury he recovered well, and received instruction on the dangers of pressure sores and their prevention. But he unreasonably failed to apply proper self-care, and pressure sores developed that led to septicaemia from which he died six months later. The court held that his assailants could not be held responsible for his death. Although the wound was initially mortally dangerous in that without medical intervention the deceased would probably have died as a result of it, the threat to his life was eliminated by the proper medical care and instruction he received. The eventually fatal septicaemia was caused not by the original wound, but by the deceased's own unreasonable failure to follow medical instructions. Thus, although the gunshot wound was an indispensable precondition of the death, the trial court's conviction of murder was changed to attempted murder. A conclusion, I daresay, that one is inexorably driven to here as well. In the light of this conclusion the appellant's conviction on count 2, the murder of Ms Rapao, must be set aside and replaced with one of attempted murder. The sentence of life imprisonment imposed by the trial court pursuant to the conviction of murder must likewise be set aside.

[24] As to sentence: There appears to be little to be said in favour of the appellant. He was 35 years old at the time of the commission of the offences in question with two minor children who were dependent on him. The appellant has an impressive array of previous convictions,[1] many of which evidence a marked propensity to violence. His propensity for violence appears to have characterised his relationship with Ms Rapao as well. By stabbing and thereafter shooting her, because she dared to terminate their relationship, he acted in a manner that is unacceptable in any civilised society that ought to be committed to the protection of the rights of all persons including women. Intimate partner violence (IPV) is a serious social problem about which, fortunately, we are at last becoming concerned. This form of violence against women is generally understood to include physical, sexual, and psychological abuse by intimate male partners and in the last decade, IPV against women has finally come to be recognized as an important public health problem.[2] IPV usually occurs within a broader context of relationships marked by controlling behaviours by men and a pervasive sense of fear in women. More women are killed by their current or ex-intimate male partner in South Africa than in any other country, with a rate of 8.8 per 100 000 women.[3] In 1999 alone it is conservatively estimated that 1349 women died from IPV in South Africa, which is generally regarded as a leading cause of morbidity and mortality for South African women.[4] In a nationally representative study of 1 229 married and cohabiting women, a

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[1] On 16 February 1987 he was convicted of assault with intent to do grievous bodily harm and sentenced to 7 cuts with a light cane. On 8 April 1987 he was convicted of robbery and sentenced to 6 cuts with a light cane. On 21 August 1987 he was convicted of theft and sentenced to 6 cuts with a light cane. On 3 May 1988 he was convicted of escaping or attempting to escape from custody and sentenced to 12 months' imprisonment. On 17 May 1988 he was convicted of assault with intent to do grievous bodily harm and sentenced to R180 or 5 months' imprisonment. On 22 August 1988 he was convicted of 2 counts of assault and sentenced on each count to 90 days' imprisonment. On 16 September 1988 he was convicted of 2 counts of theft and sentenced to 4 years' imprisonment on each count which was ordered to run concurrently. On 11 October 1988 he was convicted of robbery and sentenced to 8 months' imprisonment. On 7 September 1989 he was convicted of theft and sentenced to 4 years' imprisonment, 3 of which was suspended. On 16 February 1990 he was convicted of possession of dagga in contravention of the Drugs and Drug Trafficking Act and sentenced to 60 days' imprisonment. On 11 February 1991 he was convicted of 3 counts of theft and sentenced to an effective 4 years' imprisonment. On 10 August 1999 he was convicted of assault with intent to do grievous bodily harm and sentenced to 12 months' imprisonment.

[2] N Abrahams et al 'Intimate Partner Violence: Prevalence and Risk Factors for Men in Cape Town, South Africa' (2006) *Violence and Victims Journal* Vol. 21, No. 2 at 247.

[3] N Abrahams et al 'Mortality of women from intimate partner violence in South Africa: A National Epidemiological Study' (2009) *Violence and Victims Journal* Vol. 24, No. 4 at 549.

[4] J D Gass et al 'Intimate partner violence, health behaviours, and chronic physical illness among South

prevalence of 31 per cent IPV was found, and a study on physical violence among South African men found that 27.5 per cent reported perpetration of violence in their current or most recent partnership.[5] In some South African studies, more than 40 per cent of men have disclosed having been physically violent to a partner and between 40 to 50 per cent of women have also reported experiencing such violence.[6] For the victim, it is a violation that is invasive and dehumanising. For some the consequences are severe and can, as many of the studies have shown, be permanent. And given its alarming prevalence, such mitigating factors as may exist in this case, pale into insignificance when viewed against the objective gravity of the offence. Plainly, for an offence such as this a long custodial sentence is imperatively called for. I consider that a period of 12 years will be appropriate for the attempted murder. As all of the offences were part of the same criminal transaction, the sentences of imprisonment for terms of 5 and 3 years imposed by the trial court on counts 3 (possession of a firearm) and 4 (possession of ammunition) respectively, should be ordered to run concurrently with that imposed on count 2.

[25] In the result:

(1) The appeal succeeds in part and the order of the court below is set aside and replaced with the following:

'(a) The appeal is upheld to the following extent:

(j) The conviction of the appellant on count 1, the murder of Jabu Heckson Mathebe, and the sentence of life imprisonment imposed pursuant to that conviction are set aside.

African women' (2010) *South African Medical Journal* Vol. 100, No. 9 at 582.

[5] K Peltzer and S Pengpid "The severity of violence against women by intimate partners and associations with perpetrator alcohol and drug use in the Vhembe district, South Africa' (2013) *African Safety Promotion Journal* Vol. 11, No. 1 at 13.

[6] Dr L Langa-Mlambo and Dr P Soma-Pillay 'Violence against women in South Africa' (2014) *Obstetrics & Gynaecology Forum* at 18. See also World Health Organization *Understanding and addressing violence against women: Intimate partner violence* (2012) and World Health Organization *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (2013).

(ii) The conviction of the appellant on count 2, the murder of Maggie Rapao, and the sentence of life imprisonment imposed pursuant to that conviction are set aside and replaced with the following:

'On count 2, the accused is convicted of attempted murder and sentenced to imprisonment for a term of twelve years'.

(iii) The appeal in respect of count 3, the unlawful possession of a firearm, and count 4, the unlawful possession of ammunition, in each instance in contravention of the Arms and Ammunition Act 75 of 1969, and the sentences of imprisonment for terms of 5 and 3 years imposed respectively pursuant to those convictions, is dismissed.

(iv) The sentences imposed on counts 3 and 4 are ordered to run concurrently with that imposed on count 2.'

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V M Ponnan

Judge of Appeal

APPEARANCES:

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For Respondent:	M P Mudau Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein