

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, PALM RIDGE)**

CASE NO: SS071/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

9 DECEMBER 2015

FHD VAN OOSTEN

In the matter between

THE STATE

And

JOHANNES MOLEFE KHAILE

ACCUSED

J U D G M E N T

VAN OOSTEN J:

[1] The accused is charged on five counts, comprising murder (count 1), attempted murder (count 2), attempted robbery with aggravating circumstances (count 3) and two charges of unlawful possession of a firearm and ammunition (counts 4 and 5).

[2] The accused pleaded not guilty to all counts and counsel for the defence informed the court that the accused elected to exercise his right not to disclose a defence.

[3] The charges arise from an incident that occurred in the late evening on 13 March 2015, at the corner of Zwelisha and Immink street, Diepkloof, Soweto. The facts that the deceased was shot and killed by two shots that were fired from the firearm which was subsequently handed to the police by one of the state witnesses, have formally been admitted. The usual admissions concerning the identity of the deceased and the cause of death were recorded in terms of s 220 of the Criminal Procedure Act 51 of 1977. In addition, a medical report in respect of injuries sustained by the brother of the deceased, Bafana Mbatha, at the scene, as well as a ballistic report containing the results of the testing of the firearm and a bullet retrieved from the body of the deceased, were admitted and handed in by consent. The test result revealed that the retrieved bullet was fired by the firearm.

[4] The State called four witnesses to testify. Three of the state witnesses, Bafana Mbatha, Siphon Ngwangwa and his friend, Andile Shange, testified that they were present at or near the scene where the incident had occurred. Bafana Mbatha testified, in summary, that the accused approached him and the deceased on their way, walking in the street, in search of their uncle. The accused was unknown to them. The deceased was talking on his cell phone and Bafana was answering a call of nature. The accused asked the deceased to hand the cell phone to him. Bafana intervened and told the accused to 'Voetsek, do not play like that'. He said to the deceased 'Let's go' and they continued on their journey towards Zone 1. The accused remarked that the deceased had called his friends to 'come and stand up for you' and promised to return to get their cell phones. *En route* they passed Siphon Ngwangwa and Andile Shange, who were at an intersection. Shortly thereafter the accused turned up again, on this occasion from behind. The deceased remarked 'Here he comes again'. The accused produced a firearm and fired two shots at the deceased. Bafana tried to grab the accused but the accused pointed the firearm at him, pulled the trigger but it jammed and wouldn't fire. The accused pulled the trigger a second time but nothing happened. Bafana wrestled with the accused and shouted for help. Siphon and Andile arrived. They disarmed the accused and Siphon took possession of the firearm. The accused attempted to run away but came up against a closed gate at a yard. Members of the community arrived on the scene and they assaulted the accused. He was held until the police arrived and arrested him. Siphon and the deceased's sister assisted in obtaining transport of the deceased to the

hospital. Sipho succeeded in arranging transport and the deceased was taken to hospital but died shortly thereafter. The cause of death is recorded in the post-mortem report as 'gunshot wounds of the abdomen and right arm'.

[5] Sipho, in the meanwhile, still carrying the firearm, went home. A little while later Bafana, after having made a witness statement, took Warrant Officer Ratchikombo, who is stationed at Diepkloof police station, to Sipho's home. Warrant Officer Ratchikombo testified and confirmed that the firearm with 5 rounds live ammunition was handed to him by Sipho at his home.

[6] Both Sipho and Andile testified that shortly after Bafana and the deceased had passed and greeted them at the intersection, they heard two shots being fired. On their approach to the scene Bafana was shouting for help. They both assisted in pinning down the accused and disarming him.

[7] The accused testified as the only witness in his own defence. His version is a mirror image of the state version. He testified that it was after 23h00 and he was on his way home having seen off his girlfriend at her home. He was followed by two men. One of them (Bafana Mbatha) turned around, faced him and accused him of trying to rob them. This person came up closer to him and slapped him in the face. The accused noted that he had a firearm in his hand. The other person (the deceased) was a distance of approximately 10 to 12 meters away from them. The accused grabbed the hand with a firearm and a scuffle for possession thereof ensued. He had both his hands on the hand with a firearm. Two shots went off. He did not touch the firearm nor did he pull the trigger. The trigger, he said, was pulled by Bafana Mbatha. He shouted for help and two men (Sipho and Andile) arrived but instead of helping him, they assaulted him.

[8] The state witnesses corroborated each other in all material respects. Counsel for the defence submitted that the state case was 'riddled' with improbabilities. In particular, so the argument went, the first incident is a telling example of improbability as it cannot be accepted that a would-be robber would simply, unarmed, 'risk his life' in requesting the hand-over of a cell phone. There is no merit in the argument. The accused was clearly aware of only the deceased who was talking on his cell phone. The appearance of his brother after the demand for the

handing over of the cell phone and his reaction prompted the accused to remark that the deceased was calling back-up from his friends, which seems to have annoyed the accused. I am unable to find any improbability in the events as described by Bafana Mbatha.

[9] Counsel further made much of the fact that Sipho had kept the firearm in his possession instead of waiting for the police to arrive on the scene and then to hand it over to them. Sipho, it must be remembered, was concerned about the welfare of the deceased. The police arrived when he was still attempting to arrange transport at a nearby house. It was around midnight. A crowd was gathering and they were aggressive. With the benefit of hindsight Sipho probably would have significantly strengthened the state's case had he waited for the police to arrive for the hand-over of the firearm. But his decision to take it home, in my view, does not open the door for an inference that it was sinister in any way. Having considered the evidence as a whole, I am not satisfied that any valid reason exists for doubting the credibility and honesty of the state witnesses.

[10] The accused was an unsatisfactory witness. The crux of his version is that *he* was the victim of an attempted robbery. He disingenuously sought to shift the attempted robbery and shooting on Bafana Mbatha. His evidence that the two shots went off during the scuffle with Bafana Mbatha and that both shots miraculously happened to strike the deceased, who was some distance away from them, and then in the forearm and abdomen, is not only far-fetched but also so improbable that it cannot be accepted as reasonably possibly true.

[11] Warrant Officer Ratchikombo testified that he approached the accused in the Diepkloof police cells, shortly after the incident and that the accused was uncooperative. His evidence in this regard was not challenged in cross-examination. The accused however, testified that he had told Ratchikombo his full version of the events. I accept the evidence of Ratchikombo. The accused, had he been a victim of an attempted robbery, would have told Ratchikombo thereof and his failure to do so justifies the inference that his evidence is nothing but an afterthought. On the probabilities there is moreover nothing to support the accused's version and it is rejected as false. I accept the evidence of the state witnesses that the accused was the initial aggressor and that he soon thereafter returned and shot the deceased.

(see *S v Van der Meyden* 1999 (2) SA 79 (W)).

[12] I accordingly find that it has been proved beyond any reasonable doubt:

- that the accused at the first incident intended to deprive the deceased and his brother of their cell phones;
- that he shortly thereafter returned, now armed with a firearm;
- that he fired two shots at the deceased, with the direct intention to kill him;
- that the two shots in fact struck and killed the deceased;
- that he thereafter twice attempted to shoot Bafana Mbatha but that the firearm failed;
- that the accused was disarmed by the state witnesses Sipho and Andile: and
- that Sipho, at the scene, took possession of the firearm which he later handed to the police.

[13] Concerning count 3, I am not satisfied that the state has succeeded in proving all the requisite elements of an attempted robbery. The accused, on the accepted evidence, merely asked the deceased for his cell phone. Although he promised to come back 'to get the cell phones' there is nothing to be found in his conduct at the second incident where the shooting occurred, to justify an inference of robbery. In this regard at least a reasonable doubt exists and the accused, accordingly, is entitled to the benefit thereof. In regard to the remaining counts I am satisfied that the state has proved the guilt of the accused beyond all reasonable doubt.

[14] In the result the accused is found guilty on counts 1, 2, 4 and 5, as charged, and not guilty on count 3.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE STATE

ADV TP MPEKANA

COUNSEL FOR THE ACCUSED

ADV JL KGOKANE

DATES OF HEARING

4, 8 & 9 DECEMBER 2015

DATE OF JUDGMENT

9 DECEMBER 2015