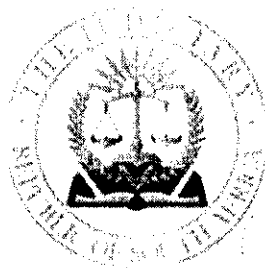


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

26/2/16

CASE NO: A545/2015

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

26 FEBRUARY 2016

FHD VAN OOSTEN

In the matter between

PRINCE BUDA THOBEJANE

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

VAN OOSTEN J:

[1] The appellant was arraigned for trial, as accused 4, on the following four charges: murder (count 1); robbery with aggravating circumstances (count 2) and unlawful possession of unknown firearms and an unknown number of rounds of ammunition (counts 3 and 4). He pleaded not guilty to all charges, but at the conclusion of the trial, convicted by Ismail J on all counts as charged. He was sentenced to life imprisonment on count 1, 15 years' imprisonment on count 2, and 5 years' and 1

year imprisonment on counts 4 and 5 respectively. The first and third accused were likewise convicted on all counts and the same sentences as in the case of the appellant imposed. Accused 2 was convicted on counts 1 and 2 and sentenced to life imprisonment and 15 years' imprisonment respectively. Some measure of concurrency was ordered which for present purposes I need not repeat. The appeal before this court is against conviction and sentence and is with leave of the Supreme Court of Appeal.

[2] The charges arose from an incident that occurred on 23 December 2006, at Tjetje Bar Lounge, in Martisi, in the district of Rietfontein. The deceased was the owner of the Bar, which consisted of a bar lounge facility and a shop housed in one building. In the early hours of the morning the deceased was shot outside the building and a till machine, which was in use inside the building, was unplugged and removed. The deceased died instantly on the scene from a single gunshot wound of the neck.

[3] The crucial issue before the court a quo and on appeal concerns the identity of the perpetrators of the offences. In this regard the evidence of three of the five state witnesses, who were called to testify at the trial, is pertinent. The first is Mr Mohlala, the son of the deceased, who was present at the scene of the incident but unable to identify any of the perpetrators. The second witness is Ms Makgatla, who was employed at Tjetji and serving customers at the bar when the incident occurred. In her evidence she described the events and she identified the appellant as one of the perpetrators albeit only during her evidence in court. The third witness, Mr Shongwe, was an accomplice and he was duly warned in terms of the relevant provisions of the Criminal Procedure Act by the learned judge. Shongwe implicated the appellant as well as his co-accused in the commission of the offences. The appellant and his co-accused testified and they all relied on an alibi defence.

[4] The learned judge a quo summarised and reviewed the circumstances in which Makgatla's identification of the appellant was made, which he accepted as both honest and reliable, in view of corroboration found to have existed in the version of Shongwe. The 'few differences' that their evidence revealed, the learned judge reasoned, were not material and did not impact on their credibility. The alibi defences of the appellant and his co-accused, on the other hand, were rejected as false. For the reasons that follow I am unable to agree with the court a quo that the appellant's

identity was proved beyond all reasonable doubt.

[5] Makgatla's identification of the appellant was substantially based on one of his upper front teeth having a gold filling, which she testified was pertinently perceptible. At the trial, more than 4 years after the incident, the appellant appeared with two front teeth missing and of course no gold filling. He testified that he had lost his front teeth in accident in 2005. Whether his front teeth were still intact at the time of the incident is crucial to Makgatla's identification of the appellant. Shongwe's evidence on this aspect is significant and cannot be ignored. He testified that the appellant was well known to him from early stages when they attended school together and later when they stayed in the same area. In cross-examination Shongwe was asked to look at the appellant, with a specific reference to the gap in his teeth, and he was asked whether he knew the appellant 'like that'. Shongwe's immediate response was 'Even now when he is having a gap I know him by that'. He was then specifically referred to the date of the incident in respect of which he initially vaguely sought to pretend that he had not taken notice of the teeth, but immediately followed that up in conceding that *some teeth* in fact were missing, albeit stating that he was not sure how many. His evidence accordingly does not corroborate the version of Makgatla on this aspect.

[6] The only further identifying feature mentioned by Makgatla was that the appellant was wearing a black Lacoste t-shirt. No attempt was made to obtain corroboration on this aspect from Shongwe. I should add in passing that the learned judge a quo incorrectly in his judgment referred to Makgatla also having described a woollen cap the appellant was wearing.

[7] But it goes further: Makgatla based her ability to recall the identifying facial and general appearance features of the appellant on the fact that he had arrived at the bar where she was on duty, early in the morning from around 10h00, and that for 18 hours thereafter, until the occurrence of the incident, she had served him intermittently with soft drinks. Shongwe directly contradicted her on this point: he testified that he had been with the appellant and his co-accused earlier that day and that they had only arrived at the scene between 21h00 and 22h00.

[8] On the evidence as whole I am not satisfied that the identity of appellant was

proved beyond all reasonable doubt. Makgatla, who was the main identifying witness in regard to the appellant, was not asked to attend an identification parade. The circumstances in which she made the identification, if Shongwe is to be believed concerning the time of their arrival, were less than optimal. There were hordes of people in and around the building and the scene was volatile and moving. She was behind the counter in the bar section of the building while the deceased and this assailants were outside the building, at the spot depicted on the photograph of the scene which, significantly, is some distance away from the building. Her evidence concerning the vantage points from which she made observations is seemingly unsatisfactory and in certain respects, plainly improbable. At some point she indicated that she was outside the building 'guarding the deceased' which she later retracted. When she realised that danger was looming she hastened to the pool table area where she hid lying flat on her stomach between pool tables. In that position she persistently maintained that she was still able to observe the events as they occurred outside. I am hesitant to make any positive findings concerning the events based on her evidence. The sequence of events described by her is difficult to follow. On material aspects her evidence is at variance with the events described by Mohlala and Shongwe. For all these reasons I am not inclined to afford sufficient weight and credence to her version.

[9] A person featuring prominently in the evidence of Mokgatla and Mohlala is a one Mahlamola. A summary of Mohlala's testimony is the following. 'Some male persons' inside the bar lounge 'were fighting amongst themselves over a woman'. The deceased was called and promptly arrived on the scene. Mahlamola arrived in the lounge, said 'the fight was against him' and took Mohlala's cell phone. He requested the deceased to follow him outside for him to explain why he had taken the cell phone. As they were talking outside two men arrived, they 'sandwiched' the deceased, Mahlamola retreated and a shot was fired. Mohlala fled the scene.

[10] Mahlamola, as is apparent from his version, was a vital witness but he was not called to testify and no explanation for his absence was tendered. A further insurmountable difficulty comes to the fore: Makgatla's version of the events prior to the shooting, differ materially from that of Mohlala. According to Makgatla it was between 03h00 and 03h30 when the incident occurred. A fight ensued between 'a young man' and 'a young girl'. He was pulling her and she was holding onto the

burglar door frame which caused damage to it. Makgatla reprimanded the young man and he promised to have the burglar frame repaired. An argument then ensued between the employees pertaining to their safety. The deceased arrived. She explained to him what had happened. The deceased was talking to Mahlamola outside the building. Two men entered and 'they arrived' at the place where the deceased and Mahlamola were standing. She heard a shot being fired. In cross-examination she said she saw both men, who later entered the lounge, shooting at the deceased. She proceeded to the café section where it was dark and hid lying on the floor between two pool tables next to a window 'straight from up there down to the bottom'. I interpose to remark that her evidence concerning the size of the window, from top to bottom, which enabled her to see the events happening outside, is in stark contrast with what is depicted on the photograph of the building which was taken on the day of the incident. With reference to the photograph, she pointed the particular window out as being the one behind a pillar in front of the building. It was correctly put to her in cross-examination that the window was at least a metre above ground level and in any event much smaller as she had indicated. In addition there appears to be veranda in front of the entrance to the building as well as possibly obscuring the view from that particular window. Faced with this difficulty when the photograph was shown to her she even went as far as to state that the 'windows were taller than what they are today'. I am satisfied that Makgatla, had she been lying on the floor between two pool tables, at this window, would not have been able to see the events occurring on the outside of the building. Her evidence on this aspect, accordingly, must be rejected.

[11] The further events she described are the following: One 'of these boys' came into the store, picked up a crate, 'fired some shots' and ordered all to lie down. The other person whom she said was the appellant, was standing outside and 'was shooting from the outside'. She realised it was the appellant because she saw the legs and the body of the person who was firing the shots, but added that she could not see his face. They both were in possession of firearms. At some stage she said that the appellant was handling the crate and that he was shooting. One of the patrons refused to lie down and the intruder hit him on the head with the firearm. He then proceeded to the till and in vain tried to open it. He unplugged the till, removed it and handed it to another man whom she stated was the appellant. The 'other man'

later returned with a bucket which he filled with 'strong liquor' and left. He ran to a white car that looked like a Venture, which had in the meanwhile showed up, got into it and the vehicle drove off.

[12] Lastly, the evidence of Shongwe. In my view he was an unsatisfactory witness. In summary he denied that he was friends with any of the accused, although he knew each one of them. For some unknown reason he lent his vehicle, a charcoal coloured Ford Laser, to accused 2, who went on a mission of his own. Upon his return they then planned a robbery in his presence and he decided to accompany them in his vehicle, without becoming involved. He testified that the appellant was given a firearm by accused 1. Having arrived at the scene the appellant and the others went to the shop. He stayed behind in the vehicle at or near a bush but made certain that he was able to see what was happening at the building. Accused 1 and 3 entered the shop and the appellant started firing random shots and chasing people around insulting them. Accused 3 returned to the vehicle in which he was waiting and told him that he had shot 'somebody in there and the person is dead'. Accused 3 was carrying a bucket and container with cigarettes. Accused 1 and the appellant arrived and wanted to know if they had any money. Accused 3 said they didn't have any. Accused 1 and the appellant returned to the shop and came back with a till machine in their possession. They all got into the vehicle. Accused 3 once again confirmed that he had shot a person. They proceeded to the appellant's home where the spoils were shared.

[13] No corroboration for Shongwe's version is to be found in the evidence of the other witnesses. Indeed his evidence cannot be reconciled with objective facts, for example, that the body of the deceased was found on the ground outside the building. A reasonable doubt as to the guilt of the appellant accordingly exists.

[14] For all these reasons the appeal must succeed.

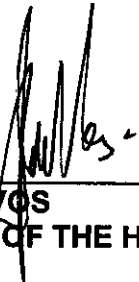
[15] In the result the following order is made:

1. The appeal is upheld.

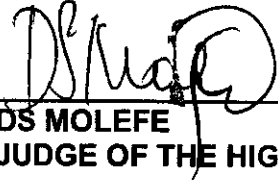
- 2 The appellant's convictions and sentences are set aside.


 FHD VAN OOSTEN
 JUDGE OF THE HIGH COURT

I agree.


 HJ DE VOS
 JUDGE OF THE HIGH COURT

I agree.


 DS MOLEFE
 JUDGE OF THE HIGH COURT

ATTORNEY FOR APPELLANT
(PRETORIA JUSTICE CENTRE)

COUNSEL FOR RESPONDENT

DATE OF HEARING
DATE OF JUDGMENT

MR S MOENG

ADV AJ FOURIE

26 FEBRUARY 2016
26 FEBRUARY 2016