

<i>Reportable:</i>	<i>YES/NO</i>
<i>Circulate to Judges:</i>	<i>YES/NO</i>
<i>Circulate to Magistrates:</i>	<i>YES/NO</i>
<i>Circulate to Regional Magistrates:</i>	<i>YES/NO</i>

IN THE HIGH COURT OF SOUTH-AFRICA (NORTHERN CAPE DIVISION)

KIMBERLEY
CASE NO.: CA&R68/07
DATE HEARD: 05-11-2007
DATE DELIVERED 16-11-2007

In the Appeal of:

MOKGETSENG KHATLI

APPELLANT

And

THE STATE

RESPONDENT

CORAM: WILLIAMS J et NDUNA AJ

JUDGMENT

WILLIAMS J:

1. The appellant was convicted on 7 June 2005 in the Regional Court, Kimberley, on a charge of murder and was sentenced to 15 years imprisonment.
He now appeals against both the conviction and the sentence

imposed.

2. It is common cause that on 20 October 2001, the deceased, one Lebolang Ramanyatsi was shot in a tavern in Kimberley and later died of the gunshot wound. The only real issue in dispute at the trial was whether it was the appellant who had shot the deceased. To this end three eye witnesses to the incident were called by the State.
3. Caswell Moleleki was with the deceased in a tavern where they were hiding from a group of men who were chasing them. At one point Moleleki decided to leave the tavern. His evidence was that as he opened the door to leave the tavern he saw the appellant in front of him at the door, holding a firearm in one hand and a knobkierie in the other. He ducked underneath the appellant's arm and ran away. Immediately afterwards he heard a shot go off. Moleleki's evidence is that the appellant wore a green blanket over the upper part of his body and had a cap on his head.
4. Ronald Modise was working at the tuck shop next to the tavern. At one point he went into the tavern to get some change. As he left the tavern he saw the appellant at the door with a firearm in his hand. He asked the appellant what he was up to, to which the appellant replied that he would stop. Just as he turned

around to go back into the tuck shop he heard a gunshot. The appellant and his mates, who had been standing some small distance away, then ran away. This witness knows Caswell Moleleki, but states that he did not see Moleleki at the scene. His evidence was further that the appellant wore a white t-shirt with black trousers and had a black hat on his head. According to this witness the appellant did not have a knobkierie.

5. Joseph Skinner was the barman at the tavern. He saw the appellant entering the doorway of the tavern and taking out a firearm. Appellant then fired a shot at the deceased who was sitting in the tavern whereafter he ran away. According to this witness the incident happened very quickly. He could not describe the clothing of the appellant since his view of the appellant was partially obscured by the other patrons in the tavern. He however did manage to see the appellant's face and the firearm. According to Skinnner, the appellant had nothing on his head and was in fact bald shaven.
6. The appellant also testified. He raised an alibi defence, claiming that he was not in Kimberley on the day of the shooting incident but in Bloemfontein, doing construction work.
7. The defence called Mr. Tladi Thulo to confirm the alibi. Thulo resided in Bloemfontein and his evidence was that on 20

October 2001, the day of the incident, he had visited the appellant at his place of residence in Bloemfontein where the two of them had passed the time listening to cassettes.

8. The trial magistrate in his judgment rejected the evidence of the appellant and his witness. He found that the three state witnesses *“have corroborated one another despite lengthy cross-examination by the defence. Contradiction on the dress worn and the weapons carried by the accused are neither material nor can they be described (sic) to proper dishonesty and untruthfulness.”*
9. However unlikely the appellant’s version may have been, I fail to understand how the trial magistrate could have come to this finding on the reliability of the state witnesses. The three state witnesses have each given a different description of the perpetrator. Moleki and Modise seem to have witnessed two completely different incidents. If one, by any stretch of the imagination, accepts the evidence of these two witnesses, then they would both have encountered the appellant at the same time at the door of the tavern on their way out. Yet neither saw the other and despite both of them claiming to have seen the appellant close up, they give completely different descriptions of the clothes worn by the appellant and the weapons he carried.

Skinner, on his own version did not have much opportunity to observe the perpetrator due to the mobility of the scene and the fact that the incident played itself out over a very short space of time. His observation, partially and briefly as it was, in no way corresponds with that of the other state witnesses.

10. Mr. Tshweu, who appeared for the State, conceded that the conviction cannot stand and I could not agree more. The state has failed to prove that the appellant was the perpetrator of this heinous crime and the conviction and sentence should therefore be set aside.

In the premises the following order is made;

- a) The appeal is upheld**
- b) The conviction and sentence are set aside.**

C C WILLIAMS

JUDGE

I Concur

N NDUNA
ACTING JUDGE

For Appellant:	Adv B Segone
For Respondent:	Adv Adv P M Tshweu