

IN THE HIGH COURT OF SOUTH AFRICA  
BOPHUTHATSWANA PROVINCIAL DIVISION

**CASE NO. 33/07**

In the matter between:

**MICHAEL MAKGALE**

**APPELLANT**

**AND**

**THE STATE**

**RESPONDENT**

**CRIMINAL APPEAL**

**MMABATHO**

**GURA J, LEVER AJ.**

**DATE OF HEARING : 14 March 2008**

**DATE OF JUDGMENT : 29 May 2008**

**FOR THE APPELLANT : Adv. S.S. Maakane**

**FOR THE RESPONDENT : Adv. N.G. Munyai**

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**JUDGMENT**

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## **Introduction**

[1] The appellant was tried jointly with Thabiso Moloi (Accused 2) in the magistrates court. The latter was found not guilty and discharged. The appellant was convicted of house breaking with intent to steal and theft and sentenced to undergo a term of three years imprisonment. With leave of the trial court, he now appeals against both the conviction and the resultant sentence.

[2] After listening to arguments on appeal, the following order was made:-

“1. The appeal is upheld. The conviction and sentence are set aside.

2. Reasons for judgment are reserved.”

Here then are the reasons for judgment.

## **Factual background**

[3] The complainant's bottle store was broken into during the night. In the morning, he followed four different shoe-prints from his business which led him to Accused 2's parental home. One of these shoe-prints resembled that of boots which are normally used by soccer players. He asked Accused 2 whose shoe-print was that. Accused 2 said it belonged to Appellant's shoe. Accused 2 as well as the complainant then followed the print until at Appellant's home. They found Appellant having shoes on with similar prints. He was taken to the scene of crime. His shoe-print was then compared with the shoe-print which was on the bottle store counter and the one which was outside, just in front of the stoep. These two shoe-prints were similar. He was then arrested.

[4] Inspector Moeti uplifted the soccer shoe print at the scene of crime with a plaster cast. She compared it with the appellant's shoe print. They were the same. The distinctive mark was that the heel of the shoe was wearing off due to normal use.

[5] Both the Appellant and Accused 2 denied any participation in the commission of the offence.

Accused 2, however, admitted that appellant was at his (Accused 2) place on the night in question.

### **Basis for conviction in the court *a quo***

- [6] The trial court was satisfied that “there is not question that another shoe would have resembled the tracks which were found on the scene.” The conviction was therefore based solely on the evidence relating to shoe-prints. The only issue is whether such evidence was sufficient, beyond a reasonable doubt, to warrant a conviction.

### **Evidence of Shoe-prints**

- [7] The admissibility of evidence of footprints is governed by the same principles as that of finger prints (**S v Limekayo 1969 (1) SA 540 (E)** ). In relation to evidence of finger prints, courts have always insisted on at least seven points of identity (**S v Kimimbi 1963 (3) SA 250 (C)**; **S v Nala 1965 (4) SA 360 (A)** ). Before a court may convict on the evidence of shoe-prints, the state must prove that there are sufficient points of identity or similarity between the two shoe-prints. It should be clear, beyond reasonable doubt, that the shoe-prints bear a unique resemblance. In my view therefore, if the identifying feature relied upon by the state is common to almost all the shoes, there is danger in convicting on such evidence standing alone (**S v Debati 1951 (1) SA 4 21 (T)**; **S v Mkhabela 1984 (1) SA 556 (A) at 563**).

- [8] In **Mkhabela’s** case, no plaster cast of the shoe-print was made. The evidence about the reputed shoe-print was given by Jobe, a state witness. He had stated, before the trial court, that the appellant once visited his home and he had a shoe on with similar prints. On the day of this incident, he had followed the shoe-print from the scene of crime, next to the body of the deceased, up to the appellant’s home. During his testimony, he was asked to draw a similar shoe-print. Semi – illiterate though he was, he made such a drawing, outside the court room, on the sand. The drawing was photographed and the trial judge had the advantage of looking at it. According to Jobe, the appellant was still wearing the same shoes at his trial. The court then had a look at the actual shoes. It found a distinctive pattern between the two shoe-prints.

- [9] The Appellate Division (as it then was), dismissed the appellant’s appeal and confirmed his conviction. In so doing, it took into account the following circumstances:-

1. It was common cause that the shoe which were produced to court, and being worn by the appellant at the time of the trial, were worn by him as at the date of the commission of the offence. He (Appellant) had only one pair of shoes which he had been using since 1981, up to the date of trial, 19 May 1982.
2. The shoes had a very distinctive pattern.
3. The locality in question was a sparsely populated rural area where many people did not wear shoes and where, one did not find people wearing shoes of a peculiar print.
4. When Jobe saw the shoe-prints next to the body of the deceased, not only did he recognise them as being the same as the prints which he had seen left by appellant's shoes at the deceased's home, (Jobe and the deceased stayed in the same homestead) but he also traced them back to the deceased's home and satisfied himself that they were the same, and, in addition, traced them to the appellant's home; and
5. Jobe, although somewhat youthful, was found by the trial court to be extremely observant and an extremely impressive witness.

The Appellate Division accordingly held that under the circumstances, the trial Court was justified in attaching "a great deal of weight" to the evidence relating to shoe-prints. I am now directing my attention to the present appeal (before this Court).

### **Analysis of evidence**

- [10] The shoes which the appellant had on when he was arrested are canvas shoes which are popularly known as "All Stars". They may be used by males and females. The prints of these shoes are similar to that of soccer boots. This offence was committed at Chaneng village. Although this is a rural area, it is densely populated, with mines mushrooming on its periphery. The majority of the people in this area, if not all, wear shoes. It is therefore common cause between the parties that the appellant is not the only person who wears this type of shoes and that a lot of other people do. In any case, the shoe-prints at the scene of crime could have been that of a soccer boot. I have to

admit, that the fact that the shoe-print which was found at the scene of crime led the complainant to accused 2's home and to appellant's place, points a finger of suspicion at appellant or one of the family members at his place. However, the ultimate test is proof beyond reasonable doubt. Most of the facts which enhanced the weight of the evidence of shoe-prints in **Mkhabela's** case are lacking in the present case.

[11] The plaster cast as well as a photograph of the appellant's shoe-prints were handed in at the trial, so the trial Court did make a comparison on its own, so did this Court. The problem which confronts this Court, and this appears to have slipped the attention of the trial court, is that the alleged distinctive mark on the two shoes-prints is common to all shoes. Almost every shoe starts to wear off at the heel. In my view therefore, this alleged unique feature (of wearing off) cannot assist the state in any manner whatsoever. It is worthy to note that in **Mkhabela's** case, the conviction was not based on the evidence of shoe-prints only.

## **Conclusion**

[12] This is a proper case where the court should have entertained a doubt about the guilt of the Appellant. His conviction cannot stand.

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**SAMKELO GURA**  
**JUDGE OF THE HIGH COURT**

I agree

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**L. LEVER**  
**ACTING JUDGE OF THE HIGH COURT**

