Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 24/2019

In the matter between:

TSHEPANG GIST MAGOPA **Appellant**

and

THE STATE **Respondent**

CORAM: HENDRICKS JP et MMOLAWA AJ

DATE OF HEARING : 28 NOVEMBER 2023
DATE OF JUDGMENT : 08 FEBRUARY 2024

FOR THE APPELLANT : MR. GONYANE
FOR THE RESPONDENT : ADV. CHULU

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00am on 08 February 2024.

ORDER

Resultantly, the following order is made:

(i) The appeal against conviction on counts one and two fails.

(ii) The conviction on counts one and two are confirmed.

(iii) The sentence on counts one and two are confirmed.

(iv) The appeal against conviction on counts three and four succeeds.

(v) The conviction and sentence on counts three and four are set aside.

(vi) The sentence with regard to these counts, seeing that they are taken as one for the purpose of sentence, remains the same.

JUDGMENT

HENDRICKS JP

Introduction

[1] The appellant, **Mr. Tshepang Gift Mogopa**, together with his co-accused **Mr. Obakeng Mosito**, stood trial in the Regional Court, Mogwase as accused 1 and accused 2 respectively, with four (4) counts proffered against them. On 24 June 2014, the appellant was convicted on all four (4) counts to wit; one (1) count of rape and three (3) counts of robbery with aggravating circumstances. His co-accused (accused 2) was acquitted on the rape charge (count 1), but convicted on the three (3) counts of robbery with aggravating circumstances (counts 2, 3, 4). The appellant was sentenced to twelve (12) years imprisonment for the rape (count 1) and three (3) years imprisonment on counts 2, 3, 4 taken as one for the purpose of sentence. Effectively, an imprisonment term of fifteen (15) years was imposed on the appellant, because it was not ordered that the two sentences should run concurrently. The co-accused (accused 2) was, in respect of counts 2, 3, 4 sentenced to five (5) years imprisonment, which is wholly suspended for a period of five (5) years, on condition that he is not convicted of robbery during the period of suspension.

[2] Accused 2 did not lodged any appeal, whilst the appellant launched an application for leave to appeal against both conviction and sentence on 14 November 2018, more than four (4) years after being convicted. Leave to appeal to this Court was granted, albeit by Mr. Pako who was not the Regional Magistrate who convicted and sentenced the appellant. Regional Magistrate Motsomane was the presiding officer in this case, but had resigned when the application for leave to appeal was brought. On the

allocated date for hearing of the appeal before this Court, the appellant proceeded with the appeal against conviction only.

[3] A brief synopsis of the evidence presented is that on the 25th August 2011, (although the charge sheet referred to 2013, which was duly amended), **S[…] M[…]** (the complainant in counts 1 [rape] and 2 [robbery with aggravating circumstances], were in the company of **K[…] M[…]** (the complainant in count 3) and **D[…] M[…]** (the complainant in count 4) on their way home from church, at about 19H00 after choir practice. Solomon Monantlana and Kgomotso Moshewshwe accompanied them. They were accosted by the appellant and accused 2. The appellant and accused 2 were respectively armed with a firearm and a knife. The appellant grabbed hold of S[…], while accused 2 grabbed K[…] and D[…]. The fire-arm was bridged and they were ordered to hand over their cellular phones. They complied. They were taken at gunpoint to a nearby river area. Both the appellant and accused 2 took their waste belts and shoelaces and that of Solomon and Kgomotso and used it to fastened them (Solomon and Kgomotso). The appellant took S[…] away from the others, whilst accused 2 took K[…] aside.

[4] The appellant threw S[…] onto the ground and forcefully undressed her of her tracksuit pants, which got torn in the process, as well as her panty. He then had sexual intercourse with her without her consent. She screamed. He threatened to kill her with the knife which he had in his possession. She then heard the sound of a gunshot being discharged coming from the direction to which accused 2 took K[…]. After the departure of the appellant,

S[…] called K[…], who then came to her. They untied Solomon and Kgomotso and they all fled from that river area. Upon their arrival at home, they reported the incident to their parents. S[…] and K[…] reported the incident to the police and also received medical treatment and underwent medical examinations. The doctor compiled medical reports. They knew accused 2 very well as he used to sell firewood. The appellant was unknown to her.

[5] K[…] corroborate the evidence of S[…] in all material respects, except about the actual rape, although she could hear the screams of S[…]. She testified and corroborated the version that S[…] was at no stage involved in a love relationship with the appellant. While she was at the bushes with accused 2, she managed to wrestle herself free from accused 2 and she outran him. He then discharged a shot with the firearm, but she nevertheless managed to escape. Her cellular phone was robbed by accused 2.

[6] D[…] M[…] also testified and corroborated the versions of S[…] and K[…] in all material respects. She saw the appellant. She was approximately five (5) meters away from where the appellant raped S[…]. She was robbed of her cellular phone by accused 2.

[7] The medical report (J88) of S[…] was handed in by consent, the correctness of the contents of which was admitted. Of importance is the date and time of the medical examination of S[…] to wit, at 08H49 on 26 August 2011, which lends credence to the evidence

tendered that the incident happened in 2011 and not 2013, as was stipulated on the charge sheet (J15). Furthermore, the clinical findings of sexual assault with the hymen torn and swollen; and that there were “soily particles around the anus”, also lends credence to S[…]’s evidence, as to the place where the sexual intercourse occurred.

[8] The appellant’s plea explanation, after the amendment of the date from 2013 to 2011, is that on 26 August 2011 (the date of the incident) he had consensual sexual intercourse with S[…], who was his girlfriend. This, according to him, happened inside his house. The doctor's observation of “soily particles around the anus” of the complainant, S[…], put paid to the version of the appellant that the sexual intercourse happened inside his place of residence. This is corroboration for the evidence of S[…] that the sexual intercourse (rape) occurred in the bushes on the ground in the area of the river. Insofar as the observation by the doctor of S[…]’s clothing is concerned, the doctor recorded that the trackpants were torn at the genital area and left (1) leg, which also serves as corroboration for the version of the complainant, S[…].

[9] Much was made of differences between the *viva voce* evidence in court of S[…] and the statement she made to the police shortly after the incident occurred. These differences relates to who among the appellant and his co-accused had the fire-arm and at what stage; and whether the fire-arm and knife changed hands between the appellant and accused 2; and at what stage did it

change hands. So too, did she during cross-examination state that the appellant threatened her with a knife during the rape but omitted to mention it during her evidence-in-chief in court. Another difference that was pointed out was whether the appellant ran away after the incident or whether he took her back to where the others (her siblings) were.

[10] These differences or contradictions are in my respectful view immaterial, and does not warrant the rejection of the complainant's evidence. Sight should not be lost of the fact that the incident happened unexpectedly; at night; and that the complainants (S[…] and K[…]) and witness quite obviously observe and recollect minor details of what happened or transpired differently. Not every error or difference or mistake in relation to how the events unfolded, necessarily leads to the rejection of a witness' evidence.

See: **S v Mkohle** (639/88) [1989] ZASCA (7 September 1989) at paragraph [13], where the following is stated:

> *"Contradictions per se do not lead to the rejection of a witness's evidence. As NICHOLAS J, as he then was, observed in S vs Oosthuizen 1982(3) S A 571(T) at 576 B - C, they may simply be indicative of an error. And (at 576 G - H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence. WILLIAMSON J obviously did this. In my view, no fault can be found with his conclusion that what inconsistencies and differences there were, were "of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and*

reconstruction." One could add that, if anything, the contradictions point away from the conspiracy relied on. And, of further significance, Clifford and Gloria corroborate each other in material respects."

[11] It will be remiss of me not to express my concern with the manner in which this trial was conducted and the results thereof. At first, insofar as count 1, the rape of S[…] is concerned, the charge sheet annexure makes reference to the fact that Section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA) finds application, without specifying the jurisdictional factor(s) which makes this section applicable. No mention is made that weapons in the form of a fire-arm and knife were used in perpetrating these offences.

[12] There was an attempted rape by accused 2 on K[…], for which he was not charged. Furthermore, common purpose was not alleged by the State, although the evidence clearly indicates that the appellant and accused 2 acted in concert with one another, in the commission of these offences. It is not unsurprising that no appeal lies against the sentence of both the appellant and accused 2. These are but obiter observations and remarks. I am mindful that this Court is constrained to decide the appeal on the basis it is assailed, in order to determine its merits and demerits. As court of appeal we are confined to the four corners of this record. The instances where a court of appeal can interfere with the factual findings of a trial court, is very limited.

[13] In conclusion, I am of the considered view that the former Regional Magistrate Mr. Motsomane was correct in his finding that the appellants' guilt on counts 1 and 2 were proven by the State beyond any reasonable doubt. The appeal against conviction on these two (2) counts (counts 1 and count 2) should consequently fail. However, because of the failure of the State to allege and prove common purpose, the same cannot be said about counts 3 and 4. It is the evidence of K[…] that her cellular phone was robbed by accused 2 . This is with regard to count 3. The same applies to D[…], the complainant in count 4. Likewise her cellular phone was also robbed by accused 2. In the absence of proof that the appellant and accused 2 were acting in the furtherance of a common goal or common purpose, the State failed to prove the guilt of the appellant beyond any reasonable doubt on counts 3 and 4. No onus rested on the appellant as an accused person to prove his innocence. The onus is on the State to prove the guilt of an accused person beyond any reasonable doubt. This is trite. I am unconvinced that the State proved the guilt of the appellant on counts 3 and 4 beyond any reasonable doubt. The convictions on counts 3 and 4 should therefore be set aside.

[14] The setting aside of these two counts (count 3 and 4) will not have any bearing on the sentence imposed. As already alluded to earlier, counts 2, 3, 4 were taken as one for the purpose of sentence and an effective term of three (3) years imprisonment was imposed. Not only does this not accord with the prescripts of the minimum sentence ordained in the CLAA, but it is shocking inappropriately lenient, having regard to circumstances of this

case. This amounts to a miscarriage of justice. As court of appeal we are constrained to decide the merits of the appeal before us and cannot substitute the sentence or increase the sentence without affording the appellant, his representative, and the State an opportunity to make submissions. Even more so, in the absence of an appeal against sentence, or even a cross appeal for that matter by the State.

[15] Finally, I would like to express my sincere gratitude to counsel for their assistance and their comprehensive heads of argument.

Order

[16] Resultantly, the following order is made:

(i) The appeal against conviction on counts one and two fails.

(ii) The conviction on counts one and two are confirmed.

(iii) The sentence on counts one and two are confirmed.

(iv) The appeal against conviction on counts three and four succeeds.

(v) The conviction and sentence on counts three and four are set aside.

(vi) The sentence with regard to these counts, seeing that they are taken as one for the purpose of sentence, remains the same.

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

I agree

E M MMOLAWA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG