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

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1361/2016

In the matter between:

TEBOGO PATRICK LEDWABA PHETOE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Phetoe v State* (1361/2016) [2018] ZASCA 20 (16 March 2018)

Coram: Leach, Mocumie JJA and Plasket AJA

Heard: 16 February 2018

Delivered: 16 March 2018

Summary: Criminal law and Procedure – conviction of rape as an accomplice not correct – all elements of the crime including mens rea to be satisfied - association or mere presence at the scene of the commission of the crime, not necessarily proof of assistance or encouragement.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Mokgoatleng and Kumalo JJ and Dama AJ sitting as court of appeal):

(a) The appeal succeeds in respect of all counts except count 9.
(b) The order of the court a quo is set aside and replaced with the following order.
'(i) The appellant's conviction and sentence in respect of count 9 are confirmed.
(ii) The appellant's convictions and sentences in respect of the remaining counts are set aside.

JUDGMENT

Mocumie JA (Leach JA and Plasket AJA concurring):

[1] The appellant stood trial in the Gauteng High Court Division, Johannesburg (the trial court), with six co-accused on eight counts of housebreaking with intent to rob and robbery with aggravating circumstances, eight counts of common law rape perpetrated on numerous complainants, one count of attempted robbery, three counts of assault with intent to do grievous bodily harm, two counts of malicious damage to property and two counts of assault. In January 2000, he was convicted on all counts and sentenced to life imprisonment in respect of the rape convictions as well as sentences ranging from two to 20 years' imprisonment in respect of the other convictions.

[2] In May 2000, the appellant's application for leave to appeal against his convictions and sentences was dismissed. In November 2012, this court granted the

appellant leave to appeal to a full court of the Gauteng Division, Johannesburg. In June 2016, a majority of the full court upheld the appellant's appeal against his convictions on the eight counts of common law rape and substituted them with convictions as an accomplice to those rapes. As the basis for these convictions had changed, the majority of the full court set aside the eight sentences of life imprisonment, reconsidered sentence and re-imposed eight sentences of life imprisonment. The appellant's appeal against the remainder of his convictions and sentences were dismissed. In a minority judgment, Dama AJ would have set aside all of the convictions and sentences but for count 9, it being a count of robbery with aggravating circumstances for which the appellant had been sentenced to 15 years' imprisonment.

[3] The appellant has now appealed to this court against his convictions and sentences, with the exception of count 9. This appeal is with special leave of this court.

Background Facts

[4] It is common cause that late on a Sunday night and early on a Monday morning, in September 1998, a group of young men rampaged through the Umthambeka Section of Tembisa, in the district of Kempton Park. They forced entry into several shacks and once inside, they assaulted, robbed and raped the occupants. Ms D. M. (Ms M.) and her two younger sisters, Ms N. (Ms N.) and Ms M. N. occupied one of the several households invaded. Subsequently, seven people, including the appellant, were arrested. He was well known to Ms M. as the two of them attended high school together. They were both in the same grade but in different classrooms. She knew the appellant as Pat.

[5] In the trial court, Ms M. testified that on the night in question, while she and her sisters were sleeping, the appellant and a group of young men who were unknown to her, forced entry into their shack. The intruders demanded money but they were told that there was none. Ms M. and her younger sister, Ms N., were ordered to cover their heads with blankets. A person, referred to in the trial as 'the first intruder,' demanded to have sexual intercourse with Ms M.. She refused. A

second person, referred to as the ‘second intruder’, assisted the first intruder to assault her and overcome her resistance. Her underwear was torn off. The first intruder then raped her. When he had finished he went outside. Ms M. went to assist her younger sister, who was also being raped by another co-accused.

[6] At some stage, Ms M. saw the appellant lying next to her on the bed. She called him by his name and asked him ‘why are they doing such a thing’. Instead of saying anything in response, the appellant laughed. At some stage, and it is not clear from her evidence whether it was before or after she spoke to the appellant, another co-accused entered the shack and raped her. Two months later, an identification parade was held. Ms M. identified the appellant positively and she did the same in the dock during the trial. Her identification of the appellant was corroborated by Mr T. E. M., an occupant of one of the shacks that was also invaded. He saw the appellant in the vicinity of his shack and Ms M.’s shack. Ms M. was unable to identify any of the appellant’s associates on the night of the incident. During cross examination, Ms M. said that she could not identify who had raped her or Ms N.. In answer to a question asked by the trial judge, she said that she had not been raped by the appellant and she did not know who had raped her sister.

The Trial Court

[7] In the trial court, Willis J, despite no evidence to this effect having been led, found that the accused must have conspired together to commit the crimes that were committed during the rampage. He also concluded on the basis of inferences that he drew from circumstantial evidence that: first, the appellant was the second intruder who assisted the first intruder to assault and subdue Ms M. in order for her to be raped; and secondly, he associated himself with the second rape of Ms M.. He was convicted on this basis of the rapes of both Ms M. and Ms N.. In addition, he was convicted on the basis of the finding as to a prior agreement of all the offences that were committed during the rampage.

The Full Court

[8] On appeal to the full court, the majority (Mokgoatlheng and Khumalo JJ) upheld the view of the trial court that Ms M. was an excellent witness and it justifiably accepted her evidence as reliable in identifying the appellant on the night of the

incident, immediately after she was raped by the first intruder. On that basis it concluded that the appellant was the second intruder that assisted the first intruder in assaulting and overpowering Ms M. when she was first raped. The full court, like the trial court, concluded that the appellant associated himself with the second rape of Ms M.. It however held him liable as an accomplice in respect of each of the eight common law rapes perpetrated on the eight complainants during the course of the rampage. It dismissed his appeal against the remainder of his convictions and sentences.

[9] In his minority judgement, Dama AJ disagreed with the majority's conclusion and held in respect of the rape of Ms M. and her sister that:

'[In this case] there is no minute evidence which was proved by the State that the appellant assisted others in any form during the commission of the rape, save that he was present at the scene and, therefore appellant must escape liability in this regard.'

He found that there was no evidence to link the appellant to the offences committed at places other than Ms M.'s shack. He concluded that the evidence established the appellant's guilt in respect of count 9 only – the robbery with aggravating circumstances committed in Ms M.'s shack. He would have upheld the appeal in respect of all the convictions on all counts, other than count 9.

In this Court

[10] Before us, counsel for the appellant contended that Ms M.' s evidence as to when she saw the appellant in her shack was unclear. He submitted that during her testimony, Ms M. replied 'I do not remember any more as to whether it was before or after I had been raped'. He further submitted that the objective facts showed that there were more than three intruders, whereas Ms N. testified that there were five young men and Ms M. could not remember. Ms M. was also adamant that she and her younger sister were not raped by the same intruder. For that reason, counsel for the appellant contended that the full court misdirected itself for convicting the appellant as an accomplice to the rape of Ms M. and her younger sister. He also argued that the appellant's convictions in respect of all of the other counts, except for count 9, had not been proved beyond a reasonable doubt by the State.

The law and the facts: accomplice to rape

[12] In *Minister of Justice and Constitutional Development & another v Masingili & others*[1] the Constitutional Court grappled with the meaning of the term 'accomplice'. Having considered the facts before it, it stated the following:

'An accomplice is someone whose actions do not satisfy all the requirements for criminal liability in the definition of an offence, but who nonetheless furthers the commission of a crime by someone else who does comply with all the requirements (the perpetrator).The intent required for accomplice liability is to further the specific crime committed by the perpetrator.'

[13] The learned author C R Snyman *Criminal Law* 6 ed (2014) at 266 describes the position as follows:

'Accomplice liability may be defined as follows:

1. A person is guilty of a crime as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the crime and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct whereby he furthers the commission of a crime by somebody else.
2. The word "furthers" in rule 1 above includes any conduct whereby a person facilitates, assists or encourages the commission of a crime, gives advice concerning its commission, orders its commission or makes it possible for another to commit it.'

[14] Against this background, it is necessary to examine Ms M.'s evidence. In my view, the clear identification of the appellant by Ms M. could not be refuted as she knew him well prior to the incident. She also had sufficient opportunity within the confines of a single-room shack to positively identify him as he came into the shack with his co-accused and when he was lying on the bed after the first rape had occurred.

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[1] *Minister of Justice and Constitutional Development & another v Masingili & others* [2013] ZACC 41; 2014 (1) SACR 437 (CC) para 21; See also *R v Jackelson* 1920 AD 486 at 491. For interest, in the United Kingdom, the doctrine is more commonly known as 'joint criminal enterprise'. In *Jogee and Ruddock v The Queen* (Jamaica) [2016] UKSC the Supreme Court stated:
'(1) D2 must assist or encourage D1 in the commission of offence X;
(2) D2 must know any necessary facts which gives D1's conduct or intended conduct its criminal character; and
(3) With that knowledge,D2 must intend to assist or encourage D1 to commit offence X, with the requisite mental fault element of that offence.'

[15] Reverting to the basis on which the full court confirmed the convictions, and applying same to these facts, I have to agree with Dama AJ on his reasons mentioned above in para [9]. To convict the appellant on the basis of his mere presence is to subvert the principles of participation and liability as an accomplice in our criminal law. For criminal liability as an accomplice to be established, there must have been some form of conduct on the part of the appellant that facilitated or assisted or encouraged the commission of the rape of Ms M. during the two separate incidents in her shack. Ms M.'s evidence does not disclose any assistance rendered by the appellants in the commission of the rapes; and the conduct does not amount to facilitation, assistance or encouragement. That, in my view, should have been the end of the matter. The fact that the appellant laughed after being asked why they were 'doing such a thing' may be conduct that showed his approval of what was happening, but that is not enough to establish his liability as an accomplice. In *S v Nooroordien & andere*,[2] in which two persons had been present when a murder had been committed, the court stated:

'Alles wat gebeur het mag, en het in alle waarskynlikheid hulle goedkeuring weggedra. Dit is egter nie genoeg nie…'[3]

[16] Before us, the State relied on *S v Kock*[4] but also conceded that the facts of that case are distinguishable from the present appeal. In *Kock* the appellant was charged with rape together with his co-accused. During the rape of the complainant by the appellant's co-accused, the appellant stood guard with a panga while accused 1 was raping the complainant. In the appeal before us, the least that can be said about the appellant's conduct of laughing and doing nothing to prevent the rapes, is that it was morally reprehensible. That, and his mere presence at the scene, is not enough to justify a conviction as an accomplice to rape.

[17] As no *actus reus* has been established by the evidence, the appellant's convictions as an accomplice in respect of the rape of Ms M. cannot succeed. For

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[2] *S v Nooroodien & andere* 1998 (2) SACR 510 (NC); See *Snyman* above.
[3] At 524f-g. Loosely translated to English it means 'all that happened seems to have carried their approval. That is however not enough.'
[4] *S v Kock en 'n ander* 1998 (1) SA 37 (A)

the reasons set out immediately below, the appellant's conviction as an accomplice to the rape of Ms N. must also be set aside.

Common purpose on the remaining offences where the appellant was not present.

[18] In respect of the remaining charges of being an accomplice to rape, including the rape of Ms N., housebreaking, with intent to rob and robbery with aggravating circumstances, common assault and assault with intent to do grievous bodily harm, housebreaking with intent to rob and attempted robbery with aggravating circumstances and malicious injury to property, which were committed at other households, the trial court found that a prior agreement must have been reached by all those identified at any of the sites at which crimes had been committed. It was on this basis that the appellant was convicted even though he was only identified at Ms M.'s shack. It reached this conclusion by inferential reasoning: because so many offences were committed by so many people at so many places, those who were identified must have agreed beforehand to the rampage and everything that it entailed. This is not, however, the only reasonable inference to be drawn and certainly in respect of the appellant, it cannot be said that because he was seen at Ms M.'s shack he was party to a prior agreement and was present at all of the other scenes.

[19] In the absence of any prior agreement, the State had to prove the following requirements of the doctrine of common purpose as set out in *S v Mgedezi*[5] in order for the appellant to be held criminally accountable. Firstly, the appellant was present at the scene of violence. Secondly, he was aware of the perpetration of such offences on the complainants in the other households. Thirdly, he had intended to make common cause with those who were actually perpetrating the offences. Fourthly, he manifested his sharing of a common purpose with the perpetrators of the offences by himself performing some act of association with the conduct of the others. Fifthly, he had the requisite mens rea i.e he intended to assault, break in and rob or must have foreseen the possibility of the commission of these offences and

[5] *S v Mgedezi & others* [1988] ZASCA 135; 1988 (1) SA 687 (A) at 7051I-706C.

performed his own act of association with reckless disregard as to whether or not such eventuality ensued.

[20] In my view, there was no such evidence to prove that the appellant was present at the scenes of violence where the rapes, assaults, housebreakings, robberies and other offences were being committed other than at the household of Ms M. and Ms N. . Nor was it proven that he had the requisite mens rea, was aware of the violence taking place in the other households and had manifested his sharing of a common purpose with the perpetrators of the rapes, assaults, housebreakings, robberies and other offences. The Constitutional Court in *S v Molimi* [6]put it aptly as follows:

'It is a cardinal principle of our criminal law that when the State tries a person for allegedly committing an offence, it is required, where the incidence of proof is not altered by statute .., to prove the guilt of the accused beyond reasonable doubt. That standard of proof, "universally required in civilised systems of criminal justice," is a core component of the fundamental fair trial right that every person enjoys under s 35(3) of the Constitution. In *S v Zuma and Others*, this Court, *per* Kentridge AJ, held that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond reasonable doubt. The standard, borrowing the words used by Plasket J in *S v T*, "is not part of a charter for criminals and neither is it a mere technicality." When the State fails to discharge the onus at the end of the case against the accused, the latter is entitled to an acquittal. '

Thus the appellant ought not to have been convicted of all the other charges except the charge in respect of count 9.The concession in respect of count 9 was made correctly so. In my view, therefore, the trial court and the full court erred in convicting the appellant of any of the charges with the exception of count 9.

[21] The events of that night were aptly described by the full court as a 'reign of terror, an orgy of violence and pillage which included a paralysis of fear, morbidity, hopelessness and a psychosis of defencelessness' in the complainants.' This court is sensitive and aware of these violent crimes perpetrated against women and children. But there is a more onerous duty on courts to ensure that there is an

[6] *S v Molimi* [2008] ZACC 2; 2008 (2) SACR (CC) para 50.

adherence to the rule of law to the extent envisaged by our Constitution where everyone is treated equally before the law. To use the words of Plasket J in *S v T*:[7]

'The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond reasonable doubt. This high standard of proof – universally required in civilised systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not a part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal even if there may suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to'.

[20] In the result the following order is granted:

(a) The appeal succeeds in respect of all counts except count 9.

(b) The order of the court a quo is set aside and replaced with the following order.

'(i) The appellant's conviction and sentence in respect of count 9 are confirmed.

(ii) The appellant's convictions and sentences in respect of the remaining counts are set aside.

BC Mocumie

Judge of Appeal

[7] *S v T* 2005 (2) SACR 318 (E) at para 37.

APPEARANCES:

For Appellant:	EA Guarneri
Instructed by:	Justice Centre, Johannesburg
	Justice Centre, Bloemfontein
For Respondent:	KT Ngubane
Instructed by:	The Director of Public Prosecutions, Johannesburg
	The Director of Public Prosecutions, Bloemfontein