REPUBLIC OF SOUTH AFRICA

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

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

09 September 2016 .....
DATE SIGNATURE

21/9/16

CASE NO: A89/2016

In the matter between:

THABO MARCUS MAIMELA **Appellant**

and

THE STATE **Respondent**

Case Summary: **Criminal Law – Robbery with aggravating circumstances; Rape of a 14 year old girl; Discharging a firearm in a built up area or any public place; and Kidnapping- An appeal against conviction on Robbery with aggravating circumstances; one count of Rape; Discharging a firearm in a built up area or any public place; and Kidnapping-Conviction confirmed on appeal.**

Order

The appeal against conviction is dismissed.

JUDGMENT

MOLOPA-SETHOSA J (Van der Westhuizen AJ concurring)

[1] The appellant in this matter, Thabo Marcus Maimela (1st accused in the court *a quo*), together with his co-accused, Mpho Moloi (2nd accused in the court *a quo*), appeared in the Regional Court for the Regional Division of Gauteng, held at Benoni, on the following charges:

[1.1] Count 1: Robbery with aggravating circumstance;

[1.2] Count 2: Contravening Section 3 of Act 32 of 1997 (Rape), read with the provisions of section 51 (1) of Criminal Law Amendment Act 105 of 1997;

[1.3] Count 3: Contravening Section 3 of Act 32 of 1997 (Rape), read with the provisions of section 51 (1) of Criminal Law Amendment Act 105 of 1997;

[1.4] Count 4: Discharging a firearm in a built up area or any public place; and

[1.5] Count 5: Kidnapping.

[2] On the 25th of September 2013 the appellant pleaded not guilty to all charges. The appellant was subsequently found guilty on counts 1, 2, 4 and 5 on the 29th of June 2015, and was found not guilty and acquitted on count 3.

[3] On the 04th August 2015 the appellant was sentenced as follows:

[3.1] Count 1: 15 years' imprisonment;
[3.2] Count 2: 18 years' imprisonment;
[3.3] Count 4: 2 years' imprisonment;
[3.4] Count 5: 5 years' imprisonment;

[4] The sentences in counts 1, 4 and 5 were ordered to run concurrently with the sentence in count 2. The effective sentence of the appellant is therefore 18 years' imprisonment.

[5] The appellant was legally represented during the proceedings in the court *a quo*.

[6] On the 31st of August 2015 the appellant brought an application for leave to appeal only against his conviction before the learned magistrate. The application for leave to appeal against his conviction was granted. The present appeal is directed only against conviction.

[7] The genesis of the convictions and the sentences arose from events which occurred on 26 August 2012 at Wattville, Benoni. The appellant, together with his co-accused ("accused no.2"), robbed

the complainant in count 1[one Tumelo Raborifi] ("Raborifi") of an LG 100 cellphone, using a firearm. Raborifi was at the time in the company of the complainant in count 2 [one Gontse Marobane] ("Marobane"), and one Sabelo Mthanthi ("Mthanthi"). Thereafter the appellant and his co-accused forcefully pulled/took the complainant in count 2, Marobane, against her will, to an open veld, where he and his co-accused both raped her. Raborifi and Mthanthi who witnessed the appellant and his co-accused pulling Marobane towards the veld ran away and sought help from members of the community to help in rescuing Marobane. When members of the community approached the veld where Marobane was pulled to, the appellant fired shots towards the members of the community; one of the community members also retaliated by firing shots. The appellant and his co-accused then ran away, but the members of the community gave chase and the appellant was caught and assaulted by the members of the community, there and then, near the scene of rape. The police also arrived at the scene and the appellant was then arrested near the scene of the crime. These facts are borne out of the evidence of Raborifi, Marobane, and Mthanthi, which were accepted by the trial court.

[8] In appealing against his conviction, the appellant disputes that he committed the offences he has been convicted of. He disputes that he was ever in the company of his co-accused/accused no.2 when the offences were committed. His co-accused/accused no.2 admitted having committed the offences together with the appellant as testified by the state witnesses/complainants.

[9] The three state witnesses aforesaid, i.e. Tumelo Raborifi, Gontse Marobane and Sabelo Mthanthi all maintained that accused no.2 was in company of the appellant during the commission of the offences herein. They identified the appellant as the man who was in possession of a firearm, and who had fired shots during the commission of the offences aforesaid.

[10] From the evidence on record, and as correctly set out by the respondent in its heads of argument, the following are common cause and/or are not disputed that:

[10.1] Raborifi, Marobane and Mthanthi were sitting in the soccer field watching music videos on a big screen television set.

[10.2] Accused no.2 (Mpho Moloi), who was well known to Marobane and Mthanthi, and another man approached them. The other man produced a firearm and fired several shots, and demanded whatever they had.

[10.3] Accused no.2 and his companion robbed Raborifi of his LG 100 cell phone, valued at approximately R600.00. An LG 100 cellphone was found in the possession of the appellant upon his arrest shortly after the robbery.

[10.4] Accused no.2 and his companion forcefully pulled Marobane, against her will, to the veld where they both raped her.

[10.5] Raborifi and Mthanthi approached community members and requested them to assist them in rescuing Marobane.

[10.6] When the community members together with Raborifi and Mthanthi approached the scene of rape, accused no.2's companion fired several shots at the community members at the scene to try to scare away the community members together with Raborifi and Mthanthi.

[10.7] One of the community members also retaliated by firing shots. Accused no.2 and his companion then began to run away and members of the community chased them.

[10.8] Marobane correctly identified accused no.2 [who admitted this], as one of the perpetrators.

[10.9] There were no lights at the scene except the lighting of the big screen television; however, all three state witnesses could see exactly what was happening at the scene, including the robbery of the cell phone.

[10.10] Marobane could see that both accused no.2 and his companion raped her.

[10.11] Even the community members, together with Raborifi and Mthanthi could see accused no.2 and his companion with Marobane in the veld and approached them.

[11] There is also no dispute [on appellant's version, in his plea explanation, as well as put to Gontse Marobane and accused no.2 under cross examination], that on the night in question, the appellant was in the company of accused no.2.

[12] It is also common cause that on the night in question the appellant had consumed liquor/alcohol, and smelt of alcohol. This was not disputed. It is further common cause that the appellant wore a red jacket on the night in question, with which Marobane identified him. The only difference is that the appellant says the red jacket also had some back colour as well whereas Marobane said it had yellow stripes on the shoulders.

[13] The only issue on this appeal is whether the appellant is the man who was in company of accused no.2, as testified by the state witnesses, and corroborated by his co-accused [accused no.2], who is his cousin, when the offences herein were committed.

[14] Counsel for the appellant submitted that the state did not prove its case beyond reasonable doubt because the guide lines laid in *S v Mthetwa* 1972 (3) SA 766 (A) were not completely followed, in that there were no lights at the scene of crime except for the lighting of the big screen television; that therefore the appellant could not have been properly identified by the state witnesses, including the complainants, as the perpetrator. Further that the firearm was not recovered from the appellant even though he was arrested immediately near the scene.

[15] The appellant testified at the court *a quo* that on the night in question he was just standing in the street next to the gate at his home when members of the community approached and enquired from him if he had seen Mpho, accused no.2, and another boy who was dark in complexion, to which he replied that he had not seen them. That without any reason whatsoever the members of the community then started assaulting him. Counsel for the appellant then submitted to this court that it was unfortunate that we, the appeal judges, were not familiar with Watville, and/or with the area where the offences were committed; that the appellant's home is in the vicinity of the veld where the crime was committed, hence he/appellant having been assaulted and arrested nearby the veld. It is significant to mention at this stage, that this aspect [of the appellant's home being in the vicinity of the veld where the crime was committed; hence he/appellant having been assaulted and arrested nearby the veld] was never raised and/or mentioned in his evidence under oath at the court *a quo*. In his plea explanation the appellant stated that on the night in question he was in the company of accused no.2 at the street where accused no.2 resides, which street is not even next to a veld. That the members of the community came looking for two gentlemen, one fat and one tiny, and that since he and accused no.2 fitted that description they were chased by the members of the community and they were both caught and arrested there and then. I deal with this aspect in detail further below.

[16] Basically the issue at hand pertains to the identity of the appellant as one of the perpetrators of the offences in question herein. It is so that guide lines were set out in *S v Mthetwa* 1972 (3) SA 766 (A) at

768A-B, and *S v Miggel* 2007 (1) SACR 675 (C) at 678d-h, which may assist the court in determining whether there has been proper identification of a perpetrator.

[17] Holmes JA in *S v Mthetwa supra*, at 768A-B stated the following:

> *"Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities."*[My underlining]

[18] As already mentioned above, the three state witnesses aforesaid, i.e. Tumelo Raborifi, Gontse Marobane and Sabelo Mthanthi all maintained that accused number 2 was in company of the appellant during the commission of the offences herein. They identified the appellant as the man who was in possession of a firearm, and who had fired shots during the commission of the offences aforesaid.

[19] Besides being identified by these three witnesses, there is abundant evidence that link the appellant to the commission of the offences. Immediately after the robbery, the appellant was found in possession of the LG100 cell phone which belonged to Tumelo Raborifi. Sabelo Mthanthi was adamant that he could clearly see the appellant and accused no.2 through the light reflection from the big screen television, as the two came from the direction of the television screen that he was watching at the time. Gontse Marobane never lost sight of the appellant as he was chased and eventually caught by the members of the community. She/Marobane further confirmed to the police immediately after his arrest that the appellant was one of the perpetrators that raped her. She identified him, amongst others, by his very light complexion [which is not in dispute] and the red jacket he had been wearing on the night in question. From the evidence on record Marobane was in the presence of the appellant and accused no.2 for a significant period of time. The appellant held her very closely as he forcefully pulled her towards the veld where she was eventually raped by the two perpetrators. She had ample time to see and to recognize him.

[20] The appellant testified in his own defence and closed his case without calling any defence witnesses. As already stated here above, the appellant testified that on the night in question he was just standing next to the gate at his home when members of the community enquired from him if he had seen Mpho, accused no.2, and another boy who was **dark** in complexion, to which he replied that he had not seen them. That without any reason whatsoever the

members of the community then started assaulting him; that he lost consciousness and only woke up at hospital surrounded by two police officers, [my underlining]. As already stated here above also, in his plea explanation the appellant stated that on the night in question he was in the company of accused no.2 at the street where accused no.2 resides, which street is not even next to a veld where the crimes were committed. That the members of the community came looking for two gentlemen, one fat and one tiny, and that since he and accused no.2 fitted that description they were chased by the members of the community and they were both caught and arrested there and then.

[21] In cross examining Gontse Marobane, the rape victim, counsel for the appellant put to her that the appellant's instructions are that on the night in question "he/appellant was standing with Mpho [accused no.2] and they [members of the community] said that he/appellant is light in complexion he ought to be arrested because he was in the company of Mpho." His evidence as to how he came to be arrested differs completely with his plea explanation, as well as with the version put to the state witnesses, especially Marobane, and to his co-accused. However both versions confirm that he was in the presence of accused no.2 on the night in question. In cross examination of all state witnesses it was never disputed that accused no.2 managed to run away, and that the only person arrested on the night in question was the appellant, that accused no.2 was only arrested the next day at his home after Marobane took the police there.

[22] The appellant could not explain why he was in possession of Raborifi's cell phone. It was put to Raborifi under cross examination that the cell phone found in the possession of the appellant belonged to his/appellant girlfriend. This version was never repeated under oath. It was never disputed that the cell phone found in the possession of the appellant was an LG 100. Raborifi positively identified the said cell phone as his. The evidence directly links the appellant to the offences he has been convicted of.

[23] Marobane saw the appellant when he ran away, she/Marobane further saw the community members when they chased and arrested the appellant near the scene of crime and when the police arrived and apprehended him. Both Raborifi and Mthanthi were also present when the appellant was apprehended by the community members, and they confirmed that he was one of the perpetrators.

[24] His version of how he came to be assaulted and arrested is riddled with contradictions, is a fabrication and highly improbable; and was correctly found not to be reasonably possibly true and rejected by the court *a quo*.

[25] As already mentioned above, Counsel for the appellant submitted to this court that it was unfortunate that we, the appeal judges, were not familiar with Watville, and/or with the area where the offences were committed; that the appellant's home is in the vicinity of the veld where the crime was committed; hence he/appellant having been assaulted nearby the veld. This aspect [of the appellant's

home being in the vicinity of the veld where the crime was committed; hence he/appellant having been assaulted nearby the veld], as already mentioned above, was never raised and/or mentioned at the court *a quo,* and this for obvious reasons, because that places the appellant at the scene of the crime.

[26] It is opportunistic of the appellant's counsel to now raise/mention that the appellant's home is in the vicinity of the veld where the crime was committed when no evidence to this effect was never even tendered by the appellant at the court *a quo,* where the court *a quo* may even have conducted an inspection in loco if it saw it fit to do so; and the state would also have had an opportunity to deal with this aspect during the trial. This is also contrary to the appellant's plea explanation in which he stated that on the night in question he was in the company of accused no.2 at the street where accused no.2 resides when they were both apprehended by members of the community; that the street in question is not even next to the veld where the crime was committed, [my underlining]. One can see that the appellant's version keeps changing; a new version is now raised on appeal by the appellant's counsel, which counsel represented the appellant during the trial at the court *a quo*. Clearly the version of the appellant is a fabrication; and his counsel, an officer of this court, disturbingly perpetuates the lie by the appellant knowing it to be so. Counsel is the one that put the various versions of the appellant on record at the court *a quo*; surely any sensible person can discern that these are fabrications on the part of the appellant. Hence I stated above that counsel is opportunistic in now raising a new version on appeal.

[27] It is also significant that the state witnesses also testified that the appellant was very light in complexion and that he smelt alcohol during the attack and still smelt alcohol when he was apprehended. The appellant himself confirmed that indeed on the night in question he had taken alcohol, which would obviously lead to him smelling alcohol. It was never disputed that he is very light in complexion. In fact in his evidence he seeks to create confusion by testifying that the members of the community asked him if he had seen accused no.2 and a boy who is **dark** in complexion; yet it was put to Marobane that the members of the community apprehended him because he was **light** in complexion and they found him in the presence of accused no.2.

[28] Accused no.2 also testified under oath and confirmed that he was in the company of the appellant during the commission of these offences.

[29] In evaluating the evidence before him, the trial magistrate approached the evidence of Marobane with the necessary caution because she was a minor child and a single witness in respect of the rape.

[30] The learned magistrate correctly found that the medical report (J88) corroborates the version of the complainant/Marobane that there was recent sexual penetration. Accused no.2 also corroborates this version, that the appellant and he/accused no.2 raped the complainant on the night in question.

[31] Where the evidence of a single witness was corroborated in anyway which tended to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated, but corroboration may not be essential. Any feature which increased the confidence of the court in the reliability of the single witness may overcome the caution. Refer *S v Banana* 2000 (2) SACR 1 (ZS).

[32] The cautionary rule was set out by Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) as follows:

> *"The absence of the word "credible" in s 208 of the Criminal Procedure Act 51 of 1977, which provides that "an accused may be convicted on the single evidence of any competent witness", is of no significance; the single witness must still be credible, but there are, as Wigmore on Evidence vol III para 2034 at 262 points out, "indefinite degrees in this character we call credibility". There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to in R v Mokoena 1932 OPD 79 at 80 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded". It has been said more than once that the exercise of caution must*

not be allowed to displace the exercise of common sense."

[33] It is trite that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. These principles are no less applicable in cases involving the application of a cautionary rule. Refer *S v Leve* 2011 (1) SACR 87 (ECG); *R v Dhlumayo and another* 1948 (2) SA 677 (A). See also *S v Hadebe and Others* 1997(2) SACR 641 at p. 642, where the following is stated:

> *"It was well to recall yet again the well-established principles governing the hearing of appeals against findings of fact, which were, in short, that in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong"*

[34] In *S v Francis* 1991(1) SACR 198 at page 198 to 199, the court held that:

> *"The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its*

acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony"

[35] The absence of a firearm on the appellant during his arrest does not mean that the appellant was not at the scene, and/or that he did not commit the offences. He may have thrown it away for fear that he might be caught with it in his possession; it might have fallen when he was running away or when he fell into the water.

[36] As much as the onus to prove the guilt of the accused beyond a reasonable doubt rests on the State, it is clear from our authorities that there is no obligation on the State to close every avenue of escape open to the accused. Malan JA in *R v Mlambo*_1957(4) SA 727 (A) at 738A-B stated this principle as follows:

"*...there is no obligation upon the Crown to close every avenue of escape which may be said open to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man after mature consideration comes to the*

conclusion that there exists no reasonable doubt that the accused has committed the crime charged."

See also *S v Phallo and Others* 1999(2) SACR 558 SCA at 562g–j.

[37] The trial magistrate thoroughly considered and evaluated the evidence of all witnesses, the state and the defence, looked at the probabilities and improbabilities and found on the totality of the evidence before him that the state had proved beyond reasonable doubt that on the night of 26 August 2012 the appellant and the erstwhile accused no.2, Mpho Moloi, had robbed Tumelo Raborifi and had and raped Gontse Marobane. Further that the appellant discharged a firearm to scare the community members and indeed had kidnapped Marobane. He correctly rejected the appellant's version. On the totality of the evidence before the trial court, there is no doubt that the appellant was properly identified by the state witnesses as the man who was with accused no.2 on the night in question, and who committed the offences with accused no.2. Accordingly the finding that the appellant's version was not reasonably possibly true cannot be faulted.

[38] I am in full agreement with the findings of the trial magistrate. I cannot find any misdirection of whatever nature on his part as regards the conviction. Looking at the probabilities and improbabilities, the farfetched and fabricated version of the appellant, the learned magistrate correctly accepted the evidence of the State as having been overwhelming, correctly found the State to have proved its case beyond reasonable doubt and correctly

rejected the version of the appellant. I am consequently of a view that the appeal on conviction should fail.

[39] In the result, I would make the following order:

1. The appeal against conviction is dismissed.

L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree

C VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

It is so ordered

For the Appellant : Adv: M E Tshole

For the Respondent : Adv: L A More
Instructed by : National Prosecuting Authority