

**IN THE COURT OF APPEAL OF BOTSWANA**  
**HELD AT LOBATSE**

**Court of Appeal Criminal Appeal No. 29 of 2000**  
**High Court Criminal Appeal No. F54 of 1998**

**In the matter between:**

**ATHOLANG MGWELANI**

**Appellant**

**Versus**

**THE STATE**

**Respondent**

**Mr Attorney P.A. Kgalemang for the Appellant**  
**Mr Attorney S. Tiroyakgosi for the State**

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**J U D G M E N T**

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**CORAM: T.A. Aguda**  
**K.R.A. Korsah**  
**N.W. Zietsman**

**ZIETSMAN J.A.**

The appellant was found guilty in the Subordinate Court of the First Class for the Northern District, held at Francistown, of attempted robbery in contravention of Section 293(2) of the Penal Code and he was

sentenced to 10 years' imprisonment. He was thereafter granted leave to appeal to this Court against his conviction on the following two issues:

- (a) whether on the evidence before the trial Court the appellant was adequately identified as the person who had committed the alleged offence; and
- (b) whether on the evidence before the trial Court the prosecution had succeeded in proving beyond reasonable doubt that the offence of attempted robbery had been committed by the appellant as charged.

At the trial three witnesses testified on behalf of the State, the two most important witnesses being Rennie Kamakana (the complainant) and Innocent Ntepa.

Rennie Kamakana stated that on 29 July 1996 she opened and entered her shop between the hours of 8 and 9 p.m. The appellant and another man, referred to as the appellant's companion, then entered her shop. The appellant, who had no weapon in his hands, was wearing a dungaree and he had on a white cap which had been pulled down over his face to the level of his mouth. His companion was wearing a balaclava and was armed with a gun. The appellant seized hold of the complainant and demanded money from her. His companion did not say anything but he had his gun pointed at her. The complainant shouted for help and the appellant and his companion then ran away.

Innocent Ntepa stated that he saw the appellant and another man earlier on the day in question sitting on a culvert. Later, at around 8.30 p.m., he heard people shouting in the vicinity of the complainant's shop and he saw the appellant and his companion running away and being pursued by members of the public. He joined in the chase and he managed to catch and arrest the appellant. The appellant's companion managed to elude the pursuers and he ran away. Other members of the public arrived at the place where Innocent Ntepa and the appellant were, and an Okapi Knife was found in the appellant's possession. This knife was handed over to the police.

The appellant, who denies that he attempted to rob the complainant, also gave evidence. He stated that he was with his cousin Thabo Mpofu on the night in question and that he purchased cigarettes at the complainant's shop. He also had a can of beer with him which he tried to open and some of the beer spilt onto a security guard. He apologised, but an argument with the security guard ensued and he and his companion ran away. He says that he was then chased and arrested by members of the public who handed him over to the police.

Mr Tiroyakgosi who appears for the respondent does not support the conviction as he considers that it was not proved beyond a reasonable doubt that it was the appellant who attempted to rob the complainant.

He points to the fact that according to the complainant she could see only the lower part of her assailant's face when he assaulted her. When the appellant was taken to her by members of the public she identified him as her assailant merely from the clothing that he was wearing.

The witness Innocent Ntepa was approximately 200 metres from the complainant's shop when he heard screams and saw the appellant and his companion being chased by other members of the public. What we however do not know is how far the appellant was from the shop when he was seen by Innocent Ntepa and where he was when he was first chased by members of the public.

Purely on the facts stated above there may be a measure of doubt as to whether Mr Tiroyakgosi should have made the concession which he did make concerning the lack of proof of the identity of the complainant's assailant. There is however a further matter that concerns us and which could affect the complainant's credibility.

The charge sheet alleges that the appellant and another person attempted to rob the complainant "by threatening to stab her with a knife." No mention is made of a gun, and in her evidence the complainant did not say that she was threatened with a knife. She did not even see a knife in the possession of the appellant or in the

possession of his companion. There is thus a material variance between the allegations in the charge sheet and the evidence given at the trial, and no attempt was made at the trial to amend the charge sheet. Section 149 of the Criminal Procedure and Evidence Act provides for a possible amendment of a charge sheet in such circumstances at any time before judgment provided that this will not prejudice the accused in his defence. The likelihood of prejudice being caused to an accused by such an amendment increases as the trial progresses. See in this connection the case of **DITHAPO v. THE STATE 1990 B.L.R. 624(CA)**.

In the present case no amendment to the charge sheet was sought at the trial and the discrepancy between the allegations contained in the charge sheet and the evidence given by the complainant remains and is not explained. This discrepancy suggests that the complainant's statements concerning the alleged assault upon her may not have been consistent. It is otherwise difficult to understand why a knife is mentioned, and why no mention is made of a gun, in the charge sheet which presumably was drawn up after a statement had been taken from the complainant. This unexplained inconsistency in the matter, which also affects the credibility of the complainant, is a further reason why there must be at least a reasonable doubt as to whether the identity of the alleged assailant, and the guilt of the appellant, was proved at the trial.

It is our conclusion that such proof was not established beyond a reasonable doubt and in the result the appeal is allowed and the conviction and sentence set aside.

**DELIVERED IN OPEN COURT THIS 25<sup>TH</sup> DAY OF JULY 2000.**

  
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**N.W. ZIETSMAN**  
**JUDGE OF APPEAL**

I agree

  
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**T.A. AGUDA**  
**JUDGE OF APPEAL**

I agree

  
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**K.R.A. KORSAH**  
**JUDGE OF APPEAL**