CRIM.APP.CASE NO.8/2000

In the matter between:

MTSETSELELI NDZINISA **APPELLANT**

AND

REX **RESPONDENT**

CORAM **:** **MATSEBULA J.**
MASUKU J.

For the Appellant: **In person**
For the Respondent: **Mr M.T. Nsibande**

JUDGEMENT
22-02-01

Masuku J.

The Appellant, (to whom I shall continue to refer to as "the accused") appeared before the Senior Magistrate, Manzini District on a charge of rape. It was alleged that upon or about the 18th December, 1998, and at Moneni area, he did wrongfully, unlawfully and intentionally have sexual intercourse with B, a girl of 13 years, without her consent.

Notwithstanding his plea of not guilty, the learned Magistrate found him guilty of having committed the said offence and, sentenced him to seven years imprisonment, without the option of a fine. The accused has now appealed against the conviction on the grounds stated herein below, namely:-

a) The *court a quo* erred in law and in fact in finding and holding that all witnesses

who testified did not set out wilfully to misinform regarding their experiences in respect of material facts and allegations.

b) The *court a quo* erred in law and in fact in finding and holding that the investigating officers carried their investigations according to the dictates of the law when they failed to conduct an identification parade in this matter.

c) The *court a quo* misdirected itself in finding and holding that the description of of the assailant as described by the complainant, - i.e. “short with big mouth” has any bearing to appellant and that such evidence should be used as a basis of conviction as it is in admissible in a court of law.

d) The learned magistrate misdirected himself in finding and holding that the absence of the exhibit alleged to have been used during the commission of the crime does not reflect the innocence of the appellant.

e) The learned magistrate misdirected himself in finding and holding that the uncorroborated evidence of the complainant should be used as a basis to convict appellant.

f) The *court a quo* erred in law and in fact in finding and holding that the absence of DNA tests to link the appellant with the crime is of no significance as such evidence is essential to the prosecution and defence cases respectively, and without which, the evidence of the complainant stands alone, and the absence of spermatozoa in the vagina is further proof of the lack of evidence in the whole case.

It is necessary, before dealing with the above grounds of appeal to briefly chronicle the evidence led before the *Court a quo.* PW 1 was the complainant, who testified that on the said date she was sent by Khetsiwe Nyawo at night to purchase a bottle of beer. She was accompanied by Ntombintombi Tsabedze. When they reached the liquor store, the accused accosted PW 1, grabbed her and pulled her outside the bar. PW 1 started crying and the accused produced a knife and ordered her to stop crying. As she struggled, the knife cut one of her fingers. The accused dragged her until they reached the market place, where he forcefully had a carnal connection with her.

It was her evidence that when she cried, telling him it was painful (because it was here first sexual encounter), the accused slapped her, telling her to keep quiet. After completing his exploits, PW 1 ran to a house where Nhlanhla Gamedze lived and reported her ordeal to him. Nhlanhla tried to look for the accused in vain. He took PW 1 to Khetsiwe’s house. Khetsiwe advised her not to bathe until the matter was reported to the Police.

Nhlanhla Gamedze confirmed PW 1’s evidence. He stated that he was asleep and heard a

person shouting for help whereupon he got up and found PW 1 crying. He heard the footsteps of a person running away but did not see who it was.

Ntombintombi also confirmed PW 1's story. It was her evidence that she knew the accused, who grabbed PW 1 in her presence. She went to look for somebody to assist PW 1 but on her return, she found that PW 1 and the accused were nowhere in sight. She further testified that she saw the accused the following day and asked him of PW 1's whereabouts and the accused threatened to assault her. There was a point of divergence between PW 1's evidence and Ntombintombi and this related to the item they had gone to purchase. Ntombintombi said it was milk, whilst PW 1 said it was a bottle of beer.

Dr Bitarabero Jackson of the Raleigh Fitkin Memorial Hospital testified that he examined PW 1. It was his evidence that PW 1's clothing was dirty. There was a laceration above her left knee and her vagina was bruised and had a fresh laceration. The examination was painful. He opined that there was a sexual assault on PW 1.

The accused in his cross-examination never denied committing the offence. All he cross-examined on was the knife and his identity. The Magistrate found that he had a case to answer at the close of the Crown's case. In chief, the accused was content to make a bare denial, barely explaining what happened or extricating himself. He said he knew nothing about the offence.

(a) The accused alleges that the Court *a quo* erred in law and fact in finding and holding that all the witnesses who testified did not set out to wilfully misinform the Court. This ground of appeal has no basis whatsoever as the Crown's evidence was corroborative in material respects. The accused, during his cross-examination of the Crown witnesses never put it to them that they were lying in any respect. The only issue worth mentioning, and which the learned Magistrate properly considered was regarding the item that PW 1 had gone to purchase. That contradiction was however immaterial and it is clear that one of them was not telling the truth.

(b) An identification parade in this matter was unnecessary because Ntombintombi stated in evidence that she saw the accused, whom she knew, grabbing the complainant. She went to look for people to assist PW 1 and when she returned, PW 1 and the accused were no longer around. The accused never denied that Ntombintombi knew her. Furthermore, Ntombintombi stated that she asked the accused about PW 1's whereabouts the following day and the accused threatened to assault her. The accused did not dispute this either. If he knew nothing about PW 1, he could have just said so without a threat of aggression. This ground of appeal must also fail.

© Identification of Accused by PW 1.

The accused contends that the Court erred in relying on the description by PW 1 of the accused. PW 1 stated that she could identify the accused by his big lips, the shape of his head and his height. She further stated that she recognised his t-shirt and Ntombintombi knew her name.

The Magistrate's conclusion that it was the accused who raped the complainant was not mainly based on the identification of the accused by PW 1 but on the uncontroverted fact

that Ntombintombi, who lived in that area knew the accused by name. The learned Magistrate reasoned as follows at page 21 of the record:-

> *"The accused did not deny the evidence of PW 5 that she knew him prior to that night and she saw him on the following day. There is therefore no mistake about identity of the accused person."*

I agree with the learned Magistrate's reasoning and conclusion in this regard. This ground is also lacking in substance and deserved to be dismissed and it is so ordered.

(d) Absence of exhibit

The absence of the exhibit in this case, like in many others does not always have a bearing on the innocence of the accused. The evidence in this case was clear in respect of the accused's identity, the fact of sexual intercourse and the lack of consent on PW 1's part. It is also significant in this regard that the accused did not deny carrying a knife on the night in question. He sought to raise this issue with PW 5, who said she did not see it. This is quite conceivable because according to PW 1, the accused produced the knife outside the bar and whilst PW 5 had gone to enlist some assistance for the beleaguered PW 1. PW 5 was unfortunate to find PW 1 and the accused already gone. This ground is likewise liable to dismissal and it is so ordered.

(e) Uncorroborated evidence of PW 1

It cannot be said that the evidence of PW 1 was uncorroborated. As to the identity of the perpetrator, PW 1's evidence is confirmed by PW 5, who knew the accused. Regarding the lack of consent, PW 1's evidence is corroborated by the evidence of one Nhlanhla Gamedze, who heard the complainant crying and shouting for help. Gamedze stated that he heard someone running away. PW1's state of clothing and the bruises recorded by the Doctor also corroborate the lack of consent. The Doctor's evidence corroborates her story regarding the act of sexual intercourse. I form the view that the complainant's story was sufficiently corroborated and the accused ran no risk of being falsely accused.

The learned Magistrate was perfectly justified in arriving at the conclusion he did, also taking into account the accused's bare denial, in the face of direct evidence placing him at the centre of the commission of this crime. This ground of appeal must also fail for lack of substance.

(f) Absence of D.N.A.tests.

There is no evidence on the record that the issue of DNA tests was ever raised, argued and ruled upon in this matter. Should it be true that this issue was raised and dismissed by the learned Magistrate, there was no error on his part in so dismissing the argument. As stated earlier, all the elements of the crime of rape were satisfied and the conviction was based

on the evidence of credible witnesses which evidence was corroborative on all the material issues.

The absence of spermatozoa is meaningless and does not advance the accused's case at all. P.M.A. Hunt, in his work entitled, "South African Criminal Law and Procedure, Vol.II, Second Edition, Juta, 1982, at page 440-441, states as follows:-

> "*There must be penetration, but it suffices if the male organ is in the slightest degree within the female body. It is not necessary in the case of a virgin*
>
> *that the hymen should be ruptured, and in any case, it is unnecessary that semen should be emitted."*

In this case, the complainant stated that she was penetrated and this was confirmed by the Doctor's evidence. The Doctor stated that PW 1's vagina was bruised and had a fresh laceration. He opined that there was sexual assault on the complainant.

In view of the foregoing, I am of the view that the accused was properly convicted and I find no cogent reason as to why the conviction should be set aside.

Virginity to girls is a precious and priceless jewel. Once it is lost, it can never be regained. As girls grow up, it is their hope that they will surrender their virginity to the person they love. For a girl to lose her virginity during a rape ordeal is atrocious. It leaves her asking an unanswered question, why lose it this way and to a stranger and predator? Raping a girl is a wrong way to satiate your sexual appetite. For the few moments you enjoyed, you will have to endure seven years imprisonment, which is quite negligible compared to physical and emotional agony that the complainant suffered and continues to suffer.

The appeal against conviction is therefor dismissed.

T.S. MASUKU
JUDGE

I agree

J.M. MATSEBULA
JUDGE