1068

THE HIGH COURT OF SWAZILAND

Crim.Appeal Case No.8/2002

In the matter between:

BHEKI MNDZEBELE **Appellant**

Vs

REX **Respondent**

CORAM : **MAPHALAL J.**
MASUKU J.

For Applicant : **In person**
For Respondent : **Mrs N. Lukhele**

JUDGEMENT
16th May 2002

Masuku J.

The Appellant, to whom I shall continue to refer to as "the accused", was tried and convicted by His Worship Mr N. Nkonyane, Senior Magistrate, Manzini District, of the crime of rape. The charge sheet alleged that on the 24th February 2001 he wrongfully, unlawfully and intentionally had sexual intercourse with Thobile Dlamini, a 21 year old female without her consent. The accused was sentenced to seven (7) years imprisonment without the option of a fine. Due to certain infractions by the accused, which appear to have occurred *in facie curiae,* an additional sixty (60) days imprisonment was imposed on the accused by the learned Magistrate.

The accused's appeal has been levelled against both conviction and sentence. The grounds of appeal are enumerated *ippsissima verba* below:-

1. The Court *a quo* erred in fact and in law by finding appellant guilty as charged overlooking that the evidence of the complainant was inconsistent and there was no corroboration of evidence with her witnesses.

2. The Doctor's report was overlooked by the Court *a quo* that it did not specify whose spermatozoa were found.

3. The Honourable Magistrate erred in fact and in law by showing interest in the case by taking sides and appellant feels there was miscarriage of justice in his case.

4. The Court *a quo* misdirected itself by passing harsh a sentence which induces a sense of shock.

The evidence led before the court *a quo* can be summarised as follows: - The Crown paraded four witnesses, PW 1 being Dr Clement Daudu, who testified that a patient PW 3 was brought to him by the Mliba Police on the 25th February, 2001. He examined the patient and recorded his findings and conclusions in a *pro forma* medical report which was handed in. He observed bruises on the face, neck, left hip and buttocks of the complainant. As the complaint was one of rape, he examined the complainants organs of generation and took a specimen from her vagina for examination in the laboratory. The results were positive for spermatozoa. He opined in view of all the foregoing factors that the complainant had had recent sexual activity with penetration and concluded that the circumstances suggested forced sexual intercourse. The accused, notwithstanding an explanation of his rights did not cross-examine the Doctor.

PW 2 was the Thembinkosi Magagula a brother-in-law to the complainant. His evidence was that he arrived at home on 24th February 2001 at about 10 pm accompanied by his brother Jabulani. PW 3, the complainant came crying and reported that she had been attacked and raped by a Mndzebele boy who used to come to borrow some tools. PW 2 and his brother who knew the accused, ran after some people entertaining the hope that the

assailant could be among them but to no avail. On return, PW 3 explained the details of her ordeal. PW 2 went to the scene and found marks consistent with a struggle on the ground. The matter was then reported to the Mliba Police and PW 3 was taken to Dvokolwako Clinic. Nothing of significance turned on the cross-examination of PW 2 by the accused.

PW 3 was the complainant. She testified that she knew the accused who used to come to borrow tools from her brother-in-law PW 2. On 24th February 2001, at around 21h00 a person knocked on the door in a manner similar to her husband's and even said "open for me my wife". PW 3, realised that it was not her husband but the accused and she refused to open the door. The accused informed her that he had been sent by PW 3's husband to collect his coat but still PW 3 was not persuaded to open the door. The accused pushed the window and it gave way and when he attempted to enter the house, PW 3 hit his feet and he desisted.

The accused went to a pile of stones and threatened to throw them at the house and destroying everything in the process. PW 3 quickly ran out of the house but was pursued and apprehended by the accused. He pulled her to the house and told her he wanted to have sexual intercourse with her. He throttled her telling her that he had always desired to know her carnally and that his dream had come to pass as it were. PW 3 raised a hue and cry but was overpowered by the accused eventually. She fell down and he proceeded to have sexual intercourse with her. At some stage during the process, PW 3 stated that she lost consciousness. Some men were heard talking and suspecting that it might be PW 3's husband, the accused stopped and ran away. As he did so, he asked if PW 3 knew her name and she confirmed knowing only his surname. PW 3 raised an alarm to her husband and ran towards the main homestead at it was in that process that she met PW 2. The story she related to Court is consistent with what PW 2 told the Court regarding the report she made of the rape.

In his cross-examination, which did not centre on the crucial issues, the accused never denied having had sexual intercourse with PW 3 and never denied that she had not consented thereto – failed to state who.

PW 4 was 2012 D/Constable Shongwe whose evidence centred around the accused's arrest. The accused adduced sworn evidence which also centred on his arrest. He said nothing about the allegation of rape levelled against him.

It now behoves me to address the grounds of appeal as raised by the accused *ad seriatim.*

1. **The complainant's inconsistent evidence**

The accused alleges that the complainant's evidence, which was inconsistent and received no corroboration from her witnesses was overlooked by the learned Magistrate. The accused was hard pressed to point out the alleged inconsistencies. For an inconsistency to lead to evidence being rejected whether in part or as a whole, the inconsistency must be material. Not every inconsistency will lead to a Court rejecting the evidence led. *In casu,* there is no such inconsistency and PW 1's evidence found corroboration in the evidence of PW 1 and PW 2. Her story of the struggle and the bruises is confirmed by PW 1 and PW 2 and her report to PW 2 is likewise confirmed. There is in my view no merit in this ground of appeal.

The Court was entitled to rely on the evidence before it to convict the accused person and there is nothing to suggest any misdirection on the part of the Court. The evidence led was compelling, pointed directly to the accused and he offered no plausible or any explanation whatsoever, in view of that incriminating evidence. This morning, the accused had another ace up his sleeve. He alleged that PW 2 and PW 3 concocted the rape charges. When cross-examined by the Crown, he failed to advance any reasons for them to have done so. This ground is liable to fail.

2. **Overlooking of Doctor's Report**

The accused alleges that the Court *a quo* overlooked the Doctor's report as it did not specify whose spermatozoa, was found. Again, this attack is totally unjustified. The Court relied in part on the Doctor's observations which were consistent with the complaint reported by PW 2. The presence of spermatozoa is a factor consistent with PW 2's allegation that she had penetrative sexual intercourse on the day in question with the accused and without her consent. It is not the Doctor's function to identify the source of

the spermatozoa. His conclusions are consistent with the complainant's evidence and that suffices to lead the Court to a finding that PW 3's story regarding sexual intercourse is plausible and true. It is imperative in this regard to point out that the slightest degree of penetration suffices in cases of rape and that semen need not be emitted. See Hunt "South African Criminal Law and Procedure", Vol. II 2nd Edition, 1982 at page 440 – 441.

The Court *a quo* never erred in this regard and its approach and conclusions in this regard cannot be faltered. This ground of appeal accordingly fails.

3. Presiding Officer's Bias

It is alleged that the learned Magistrate exhibited signs of bias against the accused person, thus resulting in a miscarriage of justice. Such a conclusion is insupportable regard had to the record of proceedings. There is not a whit to suggest any impropriety whatsoever in the conduct of the proceedings by the learned Magistrate and the accused had grave difficulty in pointing out any on the record before us.

In my view, the attack upon the probity of the learned Magistrate is unjustified. The record reflects that the accused was accordingly warned of his rights and was afforded every opportunity to cross-examine witnesses, to call witnesses e.t.c. That is consistent with a fair, independent and open-minded Judicial Officer. The one thing that I noted, which may have escaped the learned Magistrate's attention, and I do not ascribe this to bias or any such ill motive, is recorded at page 13 of the record at lines 9 to 10, where the accused was cross-examining PW 4. The following occurs in the battle of wits:-

> "Q: What real proof did you have that it was me who committed the crime?
> A: From the information that I got from the complainant."

In my view, the accused ought to have been warned about the danger of asking such a question as the answer may have had incriminating content. No warning is recorded in this case. Judicial Officers should warn unrepresented accused persons on the dangers of asking incriminating questions and this is a duty from which presiding Officers cannot escape without hampering the interests of justice. No prejudicial answer was received from this question and should I be wrong in this regard, there is nothing to indicate that the

answer given tilted the scales against the accused. There was in my view, ample evidence that answer excepted, upon which to convict the accused person and which the learned Magistrate relied upon as may be seen from the reasons for his judgement.

This ground also has no substance and is liable to fail. It is therefor dismissed.

(4) Appeal as to Sentence

The operative criterion in interfering with sentence was stated with authority by Mohomed C.J. (as he then was) in **S v SHIKUNGA 2000 (1) SA 616 at 631 F – I (Nm S.C.)** as follows:-

> *"It is trite law that the issue of sentencing is one which vests discretion in the trial Court. An Appeal Court will only interfere with the exercise of this discretion where it is felt that the sentence imposed is not a reasonable one or where the discretion has not been judiciously exercised. The circumstances in which a Court of Appeal will interfere with the sentence imposed by the trial Court are where the trial Court has misdirected itself on the facts or the law (**S v Rabie 1975 (4) SA 855 (A);** where the sentence that is imposed is one which is manifestly inappropriate and induces a sense of shock (**S v Snyders 1982 (2) SA 694 (A);** is such that a patent disparity exists between the sentence that was imposed and the sentence that the Court of Appeal would have imposed (**S v ABT 1975 (3)** etc: or where there is an under-emphasis of the accused's personal circumstances (**S v Maseko 1982 (1) SA 99 (A) @ 102; S v Collett 1990 (1) SACR 465 (A).**"*

There is not an iota of evidence to show or suggest that the Court *a quo* misdirected itself in any of the respects enumerated above. To the contrary, it even handedly considered all the competing interests and meted out a sentence that was in the circumstances in which it found itself rehabilitative, deterrent and retributive. This Court could have imposed a heavier sentence. The learned Magistrate correctly exercised the discretion vested in him. His sentence should, in view of the foregoing stand.

We have been invited by the accused to consider suspending the sentence or a portion thereof. We find this unattractive in cases of rape, even if we had the discretion to do so.

More importantly, we are precluded from so-doing by the provisions of Section 313, as the offence in respect of which the accused was convicted falls under the Third Schedule of offences listed in the Criminal Procedure and Evidence Act, 67/1938.

On the question relating to the backdating of the sentence, Beck J.A. succinctly stated the position as follows in **ROBERT MAGONGO vs REX APPEAL CASE NO. 38/2000** (unreported), at page 15 in the following terms:-

> *"When an accused person has been kept in custody awaiting trial, it has become customary in this jurisdiction to backdate custodial sentences to the date of the accused person's arrest. It is of course, entirely permissible not to do so, but in that case the trial Court should indicate that it has considered doing so, but he decided not to because in assessing sentences the time spent in custody awaiting trial has to be taken into consideration."*

In dealing with this aspect, the learned Magistrate had this to say at page 19 of the record:-

> *"But owing to the accused's conduct in court of passing disparaging remarks in court the sentence will not be backdated as it showed that the accused is not sorry for what he did. (After the sentence was passed the accused issued a threat to the presiding officer). The accused is further sentenced to sixty days' imprisonment for contempt of court. The accused will serve this sentence after he has served the seven years' term."*

It is clear, from the foregoing that the learned Magistrate considered the question of backdating the sentence but decided for reasons advanced, namely, the accused's conduct indicative of contumacy of the Court, not to do so. I see nothing untoward in the exercise of the discretion by the learned Magistrate. His reasons for not backdating the sentence are sound and justified. It would in circumstances be a travesty if I were to interfere with this exercise.

Regarding the question of contempt of Court, no issue has been raised about the conviction on this aspect. Courts rely in large measure on respect in carrying out their divine call. Any action or words which tend to belittle or disparage the Courts or the Presiding Officers

must be attended to swiftly and in a summary manner if they occur *in facie curiae.* To allow persons to denigrate the dignity of the Court with impunity would constitute a fertile ground for cancerous tendencies which would consume the Court's consummate integrity and the esteem at which it is and is to be held. The accused sowed the seeds and received a just reward. The sentences imposed on him be and are hereby confirmed.

On the whole, I would dismiss the appeal and it is thus ordered.

Should you wish to appeal to the Appeal Court against this judgement you are advised to make application for leave before this Court within fourteen (14) days of the date hereof. You must indicate reasons why you say you have prospects of success.

T.S. MASUKU
JUDGE

I agree

S.B. MAPHALALA
JUDGE