IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **Criminal Appeal No. 19/2004**

In the matter between

MALCOLM MBONGISENI DLAMINI **Appellant**

Vs

REX

Coram: Annandale - ACJ
Maphalala – J

For the Appellant: In person

For the Crown: Mr. A. Makhanya

JUDGMENT
(12th July 2006)

Maphalala J

[1] This appeal before us has an unfortunate history in that it first appeared before Matsebula J sitting together with the late Shabangu J. The two judges heard arguments on the appeal and thereafter reserved their judgement sometime last year. Before their Lordships could deliver their judgment Shabangu J passed on. It was then set before the coram involving Matsebula J and Maphalala J of the present court. On the 10th August 2005, it appeared before the two Judges where it was decided that the appeal be heard by a fresh court excluding Matsebula J. It was then heard by the present court on the 30th August 2005, where the court heard arguments and reserved judgment. This court wishes to apologize profusely to the Appellant for this delay which has been occasioned by other cases which also needed urgent attention of the court. The excessive workload of the Court precluded the handing down of this judgment for a long time, but due to the outcome of the appeal, it causes no serious prejudice to the Appellant.

[2] The Appellant stood before Senior Magistrate N. Nkonyane of the Manzini Magistrate Court charged with the crime of rape where it was alleged by the Crown that upon (or about) the 1st January 2003, and at (or near) Ngogodla area the Appellant, who was the accused person in the court *a quo,* did *"wrongfully and unlawfully and intentionally have unlawful" (sic)* sexual intercourse with N M, a female 20 years of Ngogodla area without her consent and did thereby commit the crime of rape. Appellant was subsequently found guilty and sentenced to seven (7) years imprisonment without the option of a fine and that the said sentence was backdated to the 3rd January 2003.

[3] The Appellant being aggrieved with the judgment of the court *a quo* has filed an appeal before this court on the following grounds as set out in his Notice of Appeal dated the 9 September 2003:

> **Ad conviction.**
>
> 1. The court *a quo* erred in law and in fact in convicting the Appellant on the crime he was charged with as there was insufficient cogent and reliable evidence to warrant his conviction.
>
> 2. The court *a quo* erred in law in convicting the Appellant in that the Crown's evidence lacked corroboration in material respects.
>
> **"Ad sentence.**
>
> 3. The sentence meted out on Appellant is excessively harsh and induces a sense of shock warranting interference by the appeal court.

[4] The Crown in the court *a quo* led the evidence of five (5) witnesses including the complainant in this case. The Appellant also gave a sworn statement before the court *a quo* and he also led the evidence of two other witnesses in his defence.

[5] It emerged in the evidence adduced in the court *a quo* that the Appellant and the complainant were prior to the incident of the case, involved in a love affair which was categorised by elements of violence on the part of the Appellant. This stormy relationship ended when complainant sought the love and comfort of another man. It appears from the facts advanced in the court *a quo* that this decision by the complainant did not go well with the Appellant who accused certain people in the community for having sown the "bad spirit" in her. The complainant deposed what transpired on the 31st December 2002, relating to the present case in very graphic terms as to how sexual intercourse between them took place. She also described

various acts of violence towards her by the Appellant.

[6] Reverting to the grounds of appeal filed before this court, it is contended by the Appellant in respect of the first ground thereof that the Appellant acknowledges having sexual intercourse with the complainant but alleges that this was consented to. In support of this proposition the court was referred to certain portions of the record. It was contended that throughout the whole time the complainant was with the Appellant from the party to the Appellant's homestead she never raised an alarm and had gone to the Appellant's home consentually. The report about the alleged rape was made up because the complainant foresaw problems about spending the night at the Appellant's house, as she was also involved with another man, M D. Therefore, argues the Appellant, the court *a quo* erred in law and in fact in convicting him on the basis of the evidence led by the Crown in as much as the story advanced by the accused could reasonably be true, particularly when taking into account the evidence of E M who is Appellant's mother.

[7] On the question of sentence it was argued for the Appellant that the sentence meted out on the Appellant by the court *a quo* was excessively harsh and induces a sense of shock warranting interference by the Appellate Court.

[8] In our assessment of the evidence led in the court *a quo* and the submissions by both parties before us we have come to the considered view that the court *a quo* did not err in law or in fact in convicting the Appellant. There was sufficient evidence to enable the learned Senior Magistrate to come to the conclusion that Appellant did commit the offence. The complainant gave clear evidence in the court *a quo* that Appellant assaulted her with the wooden baton and when they were in Appellant's house, he removed her panty by force and had sexual intercourse with her without her consent. She stated that in her evidence in-chief and maintained it under cross-examination. Complainant reported the matter to her sister-in-law (PW5) immediately after the ordeal. In the totality of the evidence we are in respectful agreement with the learned Senior Magistrate that there was no lack of corroboration in this case in view of what was stated by the doctor (PW4) who examined the complainant and came to the conclusion that complainant had been sexually assaulted even though she had washed herself. In this regard we are in total agreement with the *dictum* in the judgment of Rooney J in the case of *The King vs Vadelmar Dengo* - Review Case No. 843/1988 (unreported) where the learned Judge in dealing with corroboration in such cases, stated the following at pages 4 to 5.

> "... the need to be aware of special dangers of convicting an accused on the uncorroborated testimony of complainant in such cases must never be overlooked. Corroboration may be defined as some independent evidence implicating the accused, which tends to confirm the complainant's testimony ... Corroboration in sexual cases must be directed to (a)

> the fact of sexual intercourse or indecent assault (b) the lack of consent on the part of the complainant and (c) the identity of the accused. Any failure by the trial court to observe these rules of evidence may lead to a failure of justice".

[9] In sum, on the aspect of conviction we are of the considered view that in the instant case sexual intercourse did take place and that beyond reasonable doubt, there was lack of consent thereto.

[10] On the aspect of the proper sentence, it is trite law that on appeal it is clearly established that in the absence of misdirection or irregularity a Court of Appeal will only interfere if, as it is sometimes expressed, there is a striking disparity between the sentence of the court *a quo* and that which the Court of Appeal would itself have passed, (see *S* v *Shikunga* 2000 (1) S.A. 616 at 631 F - I *(NRSCper Mahomed CJ).* On the facts of the present case we cannot find any misdirection or irregularity and we venture to say that this was a serious case of rape which might have attracted a very heavy sentence before the High Court.

[10] In the result, for the afore-going reasons the appeal against both conviction and sentence is dismissed.

S.B. MAPHALALA J

I agree

J.P. ANNANDALE JP

Dated the ….. June 2006