IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE No. 399/2022**

In Matter between:

BONGINKHOSI FEDE MAKHANYA **APPELLANT**

And

REX **RESPONDENT**

Neutral citation: *BONGINKHOSI FEDE MAKHANYA v REX (399/22) SZHC 261 [2022] (21.09.2023)*

CORUM: Makhanya A.J

Dates heard: 02.02.23, 13.02.23, 20.02.23, 08.03.23, 20.03.23, 27.03.23, 26.04.23, 30.05.23, 07.06.23, 07.08.23, 11.08.23, 24.08.23, 30.08.23 & 31.08.23.

Date delivered: 21.09.23

Summary: *Appeal – Conviction Rape of a 16 years old girl. Evidence of a Single witness considered. Sentenced to 15 years imprisonment - No misdirection by the court aquo-appeal conviction and sentence dismissed.*

JUDGMENT

INTRODUCTION

[1] The appellant who was not legally represented at the commencement of the trial and was legally represented from towards the close of the Crown's case, was tried before Manzini Principal Magistrate on three counts.

[2] Count 1 related to rape of a 16 years old girl under the common law. Count 2, related to the cultivation of or allowing the growing of dagga plants in contravention of Section 2 (1) as read with Section 8 (1) of the Opium and Habit-Farming Drugs Act 37/1922 as amended. And count 3 related to the possession of dagga in contravention of Section 7 as read with Section 8 (1) of the Opium and Habit-Farming Drugs Act 37/1922 as amended.

[3] On arraignment, the Appellant pleaded not guilty to count 1 and guilty to counts 2 and 3.

[4] The Appellant was alleged to have had sexual intercourse with a 16 years old girl. The offence was said to be accompanied by aggravating factors, that Appellant did not use a condom and the victim was a minor.

[5] At the conclusion of the proceedings, the Appellant was convicted as charged and the Learned Magistrate imposed a sentenced of 15 years imprisonment on the count of Rape. On count 2, he was sentenced to E 2 000.00 fine or 2 years imprisonment and on count 3, sentenced to E 2 000.00 fine or 2 years imprisonment. The sentences were to run concurrently to count 1, and the 110 days spent by Appellant in custody before liberation on bail to be deducted from his sentence.

[6] The Appellant is appealing against both conviction and sentenced on count 1 only. His main ground of appeal is that he is innocent of the charge. The rape is fabricated. The doctor who examined the complainant did not corroborate her.

CONVICTION

[7] The rape charge arises from an incident which occurred in the afternoon of 27 July, 2018 at around 2-3 pm when the complainant was returning home from Bhunya Primary School. She was walking and one of her school mates, Lindelwa who was walking behind her called her requesting her jersey. She told her that she had given it to Bongekile.

[8] A friend of the victim, Joe, came to her and they had a conversation. Whilst still there, the Appellant emerged from the nearby bush and pushed the said Joe, alleging that the complainant was his sister. Joe left without any challenge.

[9] The Appellant then went back to the nearby bush. The victim was walking alone on her way home. The Appellant who was well known to the complainant as they were also neighbours, re-emerged from the nearby bush in front of her.

[10] Appellant grabbed the victim, assaulted her with an open hand on the face, dragged her into the nearby bush. Appellant did not utter any word. He used force and the victim's efforts to resist failed.

[11] When they were in the bush, Appellant was violent, her shirt and bracelet were torn. She tried to raise an alarm but her friends had gone.

[12] Appellant, forcefully pulled her trouser, as a result it's button fell off. He pushed her on the ground and came on top of her while pulling down his trouser. He forced his penis into her Vagina without her consent.

[13] When he had finished, he told her to go home. He also threatened to kill her should she report about the incident.

[14] Complainant went home crying. She reported the incident to Cophumlandvo Maseko (her sister) and to her mother. Her mother inspected her vagina, noticed some fluids and also on her panty, there were some fluids.

[15] She then took the victim to police station. She was subsequently taken to hospital to be examined by a doctor (Pw6)

[16] The doctor who examined the victim, found that she was sexually active. Her hymen was not intact and had no injuries. She did not find any spermatozoa . She stated that the complainant's vagina allowed three (3)

fingers, Pw6 further stated that did not mean she was not sexually assaulted.

[17] The doctor further stated that at times the opening of the vagina walls may have widened to sexually activity even if she is raped, she may not suffer any injury or abration.

[18] The evidence of Cophumlandvo Maseko (to whom the first report was made) not only established consistency in the version of the complainainant but it also corroborated the complainant's version of her condition at the time, of what had happened when she made the report.

[19] The Appellant made an admission to Bongakonkhe Joe Mtshali (Pw4) when he met him later on that he discovered that the victim had been sexually wasted and he found out when he had sex with her after he had left them. Appellant did not dispute that evidence. Refer to page 18 of the court record.

EVIDENCE BY THE APPELLANT

[20] The Appellant testified under oath that he knows the complainant. On that day in question he was at home with his girlfriend. They agreed that he must go to Bhunya Village to buy cooking oil from the shop.

[21] He crossed the Usuthu river on his way to the shop, along the way, he found the victim with Sibongakonkhe Joe Mtshali (Pw4), they were holding each other by hands. He asked the complainant what she was doing in the bush. She responded by saying why he should bother as he was not a member of her family.

[22] Appellant told the court *aquo* that he then told them to go home as most students had gone to their respective parental homesteads and the time was between 3 or 4 pm.

[23] He further told the trial court that the complainant left for home and he proceeded to the shop. Appellant said before he parted with the complainant, the complainant had threatened him that if he involve himself in her matters, her parents would make life difficult for him. This was an after thought. It had not been put to the complainant nor to any of the Crown witness. See **Dormice Mngometulu and others v the King Appeal case no. 96/94.**

[24] He further testified that he had been seeing the complainant and Pw4 for the first time. He clarified before me during their arguments that he meant that he was seeing Pw4 and the victim for the first time together.

[25] The Appellant called his girlfriend as his only witness in the trial court. Her evidence is briefly that the Appellant did go to the shop sent by her. He came back between 2 or 3 pm. She also knew the complainant and she was attending school. The witness did not know what happened when Appellant had gone to the shop.

[26] The Appellant contended that the trial court erred by convicting him when the evidence of the complainant was not corroborated by all the Crown witnesses.

[27] In the case of **Zinhle Samson Magagula v Rex Appeal case no.31/2011, page 5, paragraph 3,** the court stated as follows.

> *"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"*

[28] In the present case the Learned Magistrate stated that the complainant's evidence regarding penetration may not be rejected solely because of lack of medical corroboration. He cited a number authorities in this regard.

[29] In the case of **Roy Ndabazabantu Mabuza v The king Appeal case no.35/2002,** at page 4 (the then court of appeal). Stated as follows:

> *"...However, courts should not act upon rigid rule that corroborated must always be present before a child's evidence is accepted....The question which the court should ask itself it's whether the evidence of the young witness is trustworthy"*

[30] The trial court went further to state that the complainant gave her evidence in the clearest of manners, with all the necessary details. Even

a. *Perjury on the evidence of any one witness, unless in addition to and independence of the testimony of such witness, some other competent and credible evidence as to the guilt of such person is given to such court; or*
b. *Treason accept upon the evidence of two witnesses where one overt act is charged in the indictment or, where two or more such overt acts are so charged, upon the evidence of one witness to each such evert act"*

[35] The Appellant's version was found to be unreal and false by the court *aquo*. He had put to the Crown witnesses that complainant and the investigation that he could not have dragged the victim because his hand was not functioning. Clearly, this piece of evidence was a fabrication. The witness also dispute it. Appellants' both hands looked normal.

[36] I am satisfied that the evidence on the record considered in totality, establishes the guilty of the Appellant beyond any reasonable doubt. The Appellant, in my views, was correctly convicted on the charge of rape.

[37] I know turn to the sentence, there are a plethora of authorities in this jurisdiction that have applied the principle that sentencing is a matter which lies within the discretion of the trial court. An Appellate court will not ordinarily interfere with the sentence imposed by the trial court in the absence of a material misdirection resulting in a miscarriage of justice. See **Elvis Mandlenkhosi Dlamini v Rex Criminal Appeal no.30/2011** at paragraph 29;

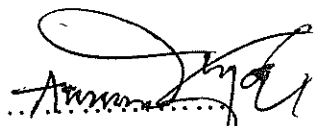
> *" It is trite law that the imposition of sentence lies within the discretion of the trial court, and, that an Appellate court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the Appellate court to satisfy the Appellate court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interest of justice. A court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the court of appeal would itself have passed. This means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied*

consistently by this court over many years and it serves as the yard stick for the determination of appeals brought before this court."

[38] In the instant case, the trial court took into account the triad, this involves the balancing of competing interests of the offender and the interests of society. Appellant was a first offender, and was a bread winner.

[39] The sentence imposed by the Learned Magistrate was within his jurisdiction in terms of the **Magistrates court (amended) Act no.2 of 2011, Principal Magistrate cannot exceed 15 years imprisonment**. The sentence is justified as Appellant did not use a condom and he assaulted complainant. He can not be faulted for imposing such a sentence.

[40] In the result, the appeal on both conviction and sentenced is dismissed.



A.Makhanya
Acting Judge of the High Court

Appearances:

For the Appellant – In Person

For the Respondent – N.F Zwane