APP. NO. 21/83

In the matter of:

JOHN DISCO HLOPHE Appellant and

HEGINA Respondent

CORAM: VAN WINSEN J.A.

WELSH J.A.

HANNAH J.A.

VAN WINSEN J. A,

JUDGEMENT

(14/3/86)

Appellant was convicted in the High Court on charges of:

(i) Rape of Jabulile Phumaphi Mamba and

(ii) Abduction of the said Maraba with the intention of having sexual intercourse with her.

On the first count he was sentenced to 6 years imprisonment and on the second count 1 year's imprisonment, the second sentence to run concurrently with the first. He lodged an appeal against the conviction and sentence on each of the two counts. Two co-accused, indicted on the abduction charge together with appellant, were acquitted at the conclusion of the Crown case on the ground that the Crown had failed to establish that they were aware of the fact that Miss Mamba was under 21 years of age.

It appears from a reconstructed record that the essential features of the evidence adduced both by the Crown and the Defence on the two charges can be summarised as follows.

Complainant, who admiteed to having had a love-affair with appellant from 1979 up to sometime in the earlier half of 1982, testified that on 12 July 1982 she went, together with another girl, to the Usuthu River to draw water. On. their way back to her home from the river she was approached by appellant and his two co-accused who against her will hundled her into a motor vehicle which was then driven to Sigeawini where appellant's home is. There she was instructed to and did enter the homestead. Appellant further instructed her to get into bed in the hut in which he slept. She at first refused but then complied with his instruction. Appellant hit her with a piece of wood and told her to undress which she also refused to do. He then took her dress off and when he hit her with a belt she took off her panty. Appellant lay on top of her and had sexual intercourse with her three times. She says she cried when he had sex with her and also because she wanted to go home. In the morning appellant left and she went to enquire from persons how to find her way hone. She lived in Big Bend - some distance from appellant's home. She says that when she asked certain people the way she "told (then) about everything." In response to a

question put to her by one of those people as to whether she was in love with one of the "boys" she said she was.

It does not appear from the record to which boy reference was being made but presumably, judging by the context they were appellant and his two co-accused.

3

Her parents who were searching for her found her that afternoon at about 4p.m. at appellant's hone. She stated in her evidence-in-chief that she did not talk to her parents nor did she make a report or statement to then about what had happened to her.

Under cross-examination she denied that she had willingly accompanied appellant to his homestead as his lover. She also rejected the suggestion made to her that the trouble only started when her parents cane looking for her and that when they found her, she had no alternative but to put the blame for her absence from home on appellant.

She testified that she had cade a report about what had happened to her to her teacher and school nates but she at first disdained having made a report to her parents or to the police but subsequently testified that when her mother had asked her, presumably about what had happened to her, she then reported to her.

She admitted having had sex with another person before she became appellant's lover. There is evidence to the effect that when complainant was seen in the motor vehicle by Mavimbela she was crying aloud and saying "mother help me".

A witness Annan Bhila, who knows complainant, testified that on the afternoon of 12 July 1982 she saw appellant coning from the river and standing and talking to a "boy". She then ran from him. and he and another "boy" went after her, caught her and holding on to her put her into a motor behiele which was subsequently driven away.

Aaron Mamba, the father of complainant, testified that he received a report from his wife and went to his hone, where he lives with his wife and complainant, to find the latter to be missing.

4

Not having found his daughter by the next day he, presumably on the strength of some information, went to appellant's homestead where he found his daughter and was told by her that she had been taken forcibly by appellant and other adults. The evidence of complainant's father is in conflict with that of his daughter in regard to whether she reported to him as to what had happened to her. He testified quite emphatically that she had told him. He further said she was lying when she testified that she had not reported to the police. She had, according to him, made such a report to the police. He describes his daughter as being "unhappy and angry" when he found her.

Thabitha Sibiya, complainant's mother, was present when complainant was found. This witness was asked whether her daughter had told her where she had been and her answer was:-"She did not tell me but she said that she was grabbed and put into a vehicle by one Hlophe boy."

The vehicle was thereafter driven away. Her daughter said "nothing more."

In re-examination by Crown Counsel the witness said that her daughter told her that when she was in appellant's hone "he grabbed her and put (her) into his house and in the night removed

her panty and had sexual intercourse with her."

Appellant in evidence gave a very different version of the events. He said he had asked his co-accused to accompany him to complainant's house and offered to pay one of them E10 to drive him there. His evidence is to the effect that she indlged in a stratagem - no doubt to decive her parents - pretending to go to the river to fetch water so as to enable her to join him at the vehicle where it was parked

5

near the river. She net him there and of her own free will got into the vehicle and drove away with him. On the way to his home they stopped at the Jet stores where appellant bought cold drinks. From there they drove to his hone. The witness testified that he slept that night in the sane hut with complainant and that they had sexual intercourse. He denied that the intercourse was against her will and he denied that she cried while at his home. Apparently his elder sister was at hone and he said he introduced complainant to her. Appellant left his home in the morning and on his return in the day complainant was gone. He found her sometime later sitting at the Big Bend Police Station.

The trial judge states in his judgment that he found complainant to be honest and convincing witness. Since the only eveidence of the rape was that of complainant the trial judge stated that he had sought and found corroboration for her evidence in certain features of the evidence, three of which he specified. The first was the evidence of Mavimbela to the effect that she saw complainant in the vehicle before it drove away and she was crying aloud and calling for help from her mother. The second was the evidence of the complainant that she reported to her mother that appellant ha had sexual intercourse with her against her will. The third feature from which the learned judge a quo sought corroboration for complainant's story was that appellant had failed to adduce the evidence of one of his co-accused Johannes Ndabandaba and of his appellant sister, the first to say that complainant had entered the vehicle at her hone voluntarily and the latter to say that complainant had not been forcibly kept by appellant in his hut when at the latter's home.

6

The appeal against the conviction for abduction can be readily disposed of. Appellant had pleaded guilty to this charge and there is in any event evidence on the record indicating that complainant did not voluntarily enter the vehicle with which appellant had come to fetch her at her hone.

The important question, however, is whether the Crown had succeded in proving beyond reasonable doubt that appellant had raped complainant at his home as she alleged. One of the constituent elements of the crime of rape viz; that sexual intercourse took place between the parties, is, by common consent, present in this case. The crucial question, however, is whether it has been proved to have taken place against her will of the complainant. There is only the word of complainant that it did. On examination by the medical officer he found no injuries to her private parts nor indeed were such injuries to be expected since she had had a relationship with appellant which had begun in 1979.

Had there been evidence that she had voluntarily and timeously complained, for instance, to her parents or to the police such evidence would have served to negative the evidence that she had consented to have intercourse with appellant. See South African Law of Evidence by Hoffman and Zeffertt 3rd Edition page 23; Phipson on Evidence 10th Edition 355 at page 354 and Rex vs Osborne 1905 1 K. B. 551 at page 557 et seq. The evidence as to whether or not she did complain and to whom. is anything but clear.

If complainant is to be believed in what she said in one part of her evidence then she made no complaint to her parents. Her father however, said in evidence that she did complain and that she was lying when she said she had not.

7

Her mother on the contrary testified that she told her no more than that she had been forcibly put into the vehicle at her hone. Even when she told her mother that appellant had taken off her panty and had had sexual intercourse with her at his hone she does not tell her mother that it was without her consent. Complainant's evidence that she talked to her teacher, presumably when she returned to school, does not take the matter any further since it is no evidence what she said to the teacher and in any event whatever was said was not said at the first reasonable opportunity after the offence had been committed.

The corroboration on which the Court a quo relied also does not serve to bolster the lone evidence of complainant. There was no onus on appellant to call his co-accused or his sister to underwrite his version of what occured between him and the complainant. The Crown bears the onus to prove its case and no obligation rests upon appellant to disprove it.

Mr. Sibandze for the Crown sought to rely upon the abduction by appellant of complainant as evidence in support of the latter's evidence that she was raped. In other circumstances - had the parties for instance been strangers to each other -there might have been more weight in this argument. But in the present case an intimate relationship had existed between appellant and complainant for a period from 1979 up to the earlier part of 1982 and it does not follow therefore that sexual relations between then after her abduction must necessarily have taken place against her will.

Looking at the totality of the events disclosed by the evidence in this case I an not satified that the Crown has discharged the onus of proof resting upon it in regard to the rape charge.

8

Accordingly the appeal against the conviction and sentence on the charge of rape is allowed and Tooth conviction and sentence are set aside. The appeal against the conviction and sentence on the charge of adduction is dismissed.

WELSH J. A.

I agree

HANNAH J. A.

I agree