CRIMINAL APPEAL NO.33/96

In the matter between:

THE KING

VS

ABRAHAM NGWENYA AND ANOTHER

CORAM : SCHREINER J A

: LEON J A

: STEYN J A

FOR THE APPELLANTS : MR. C. NTIWANE

FOR THE CROWN : MR. M. NSIBANDE

JUDGMENT

Leon J A

At the outset however, I wish to refer to certain concessions made by the Crown. With regard to the question of sentence the counsel for the Crown conceded that the learned judge of the High Court was not justified in increasing on appeal the Magistrate's effective sentence of nine (9) years to fourteen (14) years in the case of the first appellant. That was the concession which he made in his heads of argument. However, when the appeal was called today he endeavoured to argue initially that the sentence was a proper one, but then subsequently conceded that in the absence of any cross-appeal it was not a matter that we can deal with in this Court.

With regard to the convictions, counsel for the Crown conceded that the High Court had in certain respects misdirected itself But the evidence against the appellants was so overwhelming that a trial court properly directed would without doubt have come to the same conclusion. For the reasons which follow I agree with that submission.

However, there is one point which requires further elaboration. Counsel for the Crown submitted that the High Court was wrong in holding that common purpose had not been proved against each

of the accused with regard to both counts of rape and that we should restore the judgement of the Magistrate on both of these counts. However, when he was pressed on the point by this Court in his argument today he conceded that in the absence of a cross-appeal by the Crown this Court does not have the power on appeal to set aside an acquittal by the High Court. With that prelude I turn now to discuss the facts in this case.

The two appellants appeared before a Magistrate on eight (8) counts. Count one, rape and count

two, indecent assault were alleged to have been committed on the 4th May, 1994. Counts five, six, seven and eight were all counts of crimen injuria which were committed on the same day as the rapes on counts three and four. The Magistrate found both accused guilty as charged on all counts and sentenced them as follows: on count one nine (9) years for each accused, on count two 2 years for each accused, on count three nine (9) years for each accused, on count four nine (9) years for each accused, counts five, six, seven and eight two years for each accused. He ordered the sentences on count one and two to run concurrently which has the effect of a custodial sentence of nine (9) years imprisonment. He also ordered the sentences on the other counts to run concurrently which has the effect of a custodial sentence of nine (9) years imprisonment. He then, apparently, also ordered all these sentences to run concurrently because he states that in total each accused has to serve nine (9) years imprisonment. I pause to say that the trial court found that aggravating circumstances were present in regard to the rape count because the first appellant threatened the complainant Lungile with a gun. While the second appellant threatened the second complainant with a knife.

Moreover, both the complainants were young girls, the first being sixteen (16) years of age and the second being fourteen (14) years of age. At one stage counsel for the appellants today tentatively suggested that aggravating circumstances may not have been present but later did not advance that argument any further. Both appellants then appealed to the High Court against both their convictions as well as their sentences.

On appeal Thwala J confirmed the conviction of accused no. 1 on count one but set aside the conviction and sentence of accused no.2 on that count. He acquitted both the appellants on count two, that count relates to the alleged poking of a broom stick into the vagina of the first

complainant. As no medical evidence was led in respect of this complainant, he gave the appellants the benefit of the doubt. On count three he confirmed the conviction of the first appellant but set aside the conviction and sentence of the second appellant. On count four he set aside the conviction of the first appellant but confirmed the conviction of the second appellant. He then confirmed the convictions of both the appellants on counts five, six, seven and eight. However, he increased the sentence for the first appellant as follows: on count one five years imprisonment, this was in fact less than the nine (9) years ordered by the trial magistrate. On count three nine (9) years imprisonment. Those sentences were not ordered to run concurrently. On counts five, six, seven, and eight he sentenced each of the appellant to two years imprisonment on each count. These sentences being ordered to run concurrently with the other sentences.

This has the effect, as I mentioned earlier, of sending the first appellant to prison for fourteen (14) years instead of nine. Having confirmed the convictions of the second appellant on counts four, five, six, seven and eight he left the sentence of nine years imprisonment undisturbed. The appellants then sought and obtained leave from this court to appeal against the convictions and sentences. The notice of appeal attacked the conviction on count one and this point was strongly argued by counsel for the appellants in his very full and helpful argument today to whom the court is grateful for his submissions.

And it is factually correct that no medical evidence was led and it was also argued that there were no independent witnesses led with regard to this count or count number three. With regard to counts five, six, seven and eight it was argued that there was a splitting or duplication of charges and I may say that I was initially of the same view because there was only one act of what I could call vagina sucking in respect of two counts. And I was originally of the view that there ought to have been two counts not four. However, having heard counsel for the Crown I am persuaded that there was in fact in this rather unusual case no splitting of charges because although there

was only one act on each care of two occasions, both complainants were subjected to the offence of crimen injuria committed by the appellants and as each occasion involved two complainants. It was correct to charge them in respect of two counts for each occasion.

I am therefore of the opinion that there was no splitting of charges. Count one relates to the

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complainant Lungile Lomasontfo Masilela. Her evidence on this count was briefly as follows:

The accused came to her home looking for her mother Gertrude and she and the second complainant Sibongile Kunene were ordered to go in a motor car with the appellants. The appellant bought liquor and they all returned home. After some preliminary conversation the first appellant ordered Lungile to open her vagina as he wanted to have sexual intercourse with her. He pointed a firearm at her threatening to shoot her. He placed the gun on her head and having ordered her to undress proceeded to rape her. He then ordered her to place a knife on the second complainant's neck. She then alleged that the first appellant inserted a broom stick into her vagina. The second complainant then entered the bedroom. The first appellant opened her panty and pulled her vagina. Having ordered the second complainant he proceeded to rape the first complainant the second time. Lungile ran out of the house clad in a towel otherwise she was naked. She ran to the home of Cecilia Khoza, PW6, to whom she reported she had been raped by the first appellant. Her nakedness and that report although as was argued by counsel for the appellant do not prove penetration. But they are entirely consistent with the evidence of the complainant and quite inconsistent with the denial of the first appellant that he had intercourse with the complainant at all. She then went to a police station and she reported that she had been raped by the first appellant. That report was entered in the police Occurrence Book. About a week later the two appellants returned to the house again. The first appellant ordered the two complainants to undress and to such each others vaginas. They complied, he had a gun in his hand. After this had happened the first appellant then raped Lungile, that is count number three. She left the bedroom and informed the second complainant who had been with the second appellant naked. They went to Ntshaneni Police Station where they reported the rape. The nakedness of the second complainant is again consistent with the evidence of the second complainant. And also serves rather to suggest that the complete denial by the second appellant is not true. They went to the police station where they reported the rape. The first complainant was examined by a doctor the following morning but no medical evidence in respect of her was led by the prosecutor who took the view that she was examined too late.

The magistrate quite rightly was highly critical of this omission and of course in rape cases medical evidence should always be led or a report handed in by consent wherever that is possible.

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However, the failure to lead medical evidence does not, in my view, mean that such failure must inevitably lead to the conclusion that that is fatal to a conviction. In fact, when this point was put to counsel for the appellant he was constrained to concede the correctness of that view. There is no rule of law which requires a court to refuse to convict an accused in the absence of corroborative evidence of penetration. Caution must be exercised because rape cases are easy to lay and difficult to disprove. But even where there is no corroboration properly so called of the actual penetration there may be direct and circumstantial evidence which cumulatively points in that direction and in that direction only.

Where a court is dealing with circumstantial evidence it looks not at the sum total of the probabilities but rather at the compound result of them. The evidence of the second complainant,

Sibongile Kunene, was substantially similar to that of Lungile save that in her case she was raped by the second appellant and was not present when the first complainant was raped, although she heard her crying and confirms that she was naked apart from a towel when she ran out of the bedroom. That evidence, again, is consistent with the evidence of Lungile and inconsistent of the denial on the part of the first appellant.

In her case she was threatened with a knife and was examined by a doctor. A medical report was handed in which was to the effect that she had been carnally assaulted. An abrasion was found and the examination was painful. A creamy white discharge was found which was sent for analysis but a further document reflects that no spermatozoa was found, but that the procedure used was irregular. A young boy Sicelo Kunene (PW4), who was in Standard One when he testified and his age is given as ten years. He said that he saw the two appellants at his home where the complainants were. He heard the first complainant crying and they were ordered by the first appellant to undress so that he could repeat her, meaning to have sexual intercourse with her.

The first appellant drove off returning later. When he returned he called the complainants. Lungile went into his father's bedroom while the second complainant went into the kitchen with the second appellant. He heard Lungile crying, the second appellant then told the second complainant to kiss him showing her a knife. They entered his father's bedroom and he heard her

crying. In cross-examination he said that he asked the complainant why she was crying, she, telling him that the first appellant had raped him.

Later he added that he saw the first appellant raping Lungile twice through the open door of his bedroom. This latter part of his evidence is rather unlikely in view of his earlier testimony. PW5 was Gertrude Simelane who had defrauded the first appellant by selling him a fake diamond and to whom she owed several thousand Emalangeni. This was substantially common cause. The second complainant is her daughter who complained to her about the rape of herself and Lungile. There was police evidence about the report of the rape. The two appellants were arrested by Sergeant Magagula, PW8, who recovered a pistol, a knife and 13 rounds of ammunition in the dashboard of the first appellant's van.

Both the appellants gave evidence under oath. They denied all the allegations against them save that they admitted going to Gertrude's house to look for her. The first appellant indeed claimed that he had been Lungile's lover since April 1994 but that was not put in cross-examination. Nor was his evidence that the two appellants have slept in Gertrude's house put in cross-examination. He was unable to give any reason why the complainants should falsely implicate him, but he admitted that both the pistol and the knife belonged to him. The evidence of the second appellant was similar to that of the first appellant.

The magistrate found that the complainant were simple village girls. Although there was no medical evidence to support that of the complainant, he found correctly in my view, that the evidence was supported in the direct and circumstantial evidence of the second complainant. Although there are imperfections in their evidence, the evidence of the boy Sicelo also supports the evidence of the complainants. And there is the important evidence to which I have already referred of the first complainant fleeing naked save for a towel to the comfort of her neighbour. Finally, the magistrate, in my view, correctly disbelieved the appellants. They claimed to have gone to Swaziland to buy large quantities of sugar without first establishing whether there was any available. Their evidence reads badly while certain parts, of the first appellant's evidence were never put in cross-examination. On the whole of the case, that is on the totality of the evidence I am satisfied that the magistrate was perfectly correct in accepting the evidence of the

complainants as true and that of the appellants as false beyond reasonable doubt. I might add that the falsity of an accused's evidence is a factor which a court is entitled to take into account in a criminal case including a rape case in deciding whether the complainant's evidence is to be accepted. It follows, in my view, that the convictions must stand.

With regard to the question of sentence, I have already mentioned that counsel for the Crown ultimately conceded that the High Court was not justified in increasing the sentence as there has been no cross-appeal. In the absence of a cross-appeal we do not have power on appeal to increase the sentence from nine (9) years to fourteen (14) years imprisonment. It follows from what I have said that I would allow the appeal only to the extent of reducing the effective sentence of the first appellant from fourteen (14) years back to the nine (9) years imposed by the Magistrate and that the sentences imposed by the magistrate must stand in respect of both the appellants. Save to that extent I would order that the appeals against the convictions and the sentences must be dismissed, that the conviction and sentence of accused no.2, that is the second appellant must stand. That the convictions of the first appellant must stand but that his sentence is to be reduced back to that imposed by the magistrate of an effective custodial sentence of nine (9) years imprisonment in his case.

R.N. LEON J A

I agree:

W. H. R. SCHRETNER J A

I agree:

J. H. STEYN J A

Delivered on this.....day of September 1997.