THE SWAZILAND COURT OF APPEAL

Themba Donald Dlamini Appellant

v

The King *APPEAL CASE NO*

For Appellant In Person
For Respondent Miss Nderi

Coram Kotze, JP
Schreiner, JA
Browde, JA

JUDGMENT
(01/10/98)

SCHREINER JA:

The appellant was convicted on the 18th March, 1998 of the crime of rape and sentenced to seven years imprisonment, the imprisonment being deemed to have commenced on the date of his arrest, namely, the 5th March, 1997. The appeal document from the decision of the High Court dated the 8th April, 1998 is in the form of an application for leave to appeal. It asks that the application "be passed on to the judges of the Court of Appeal for further scrutiny……" Despite the form of the appeal document it will be treated as if it noted an appeal because the matter was heard by the learned Chief Justice in the High Court and so does not require leave. There is a right to appeal to this Court.

The complainant at the time of the alleged offence was a person who was probably only nineteen years of age. When she was examined by a medical practitioner at the R.F.M. Hospital at eight o'clock on the 5th March, 1997 nothing was found which indicated rape or the use of violence upon her. No sperm was found. Her clothing was clean and not torn. There were no external injuries. She told the doctor that four days prior to the alleged rape she had last had intercourse with her boyfriend so that the fact that she was not a virgin at the time of the examination is of no significance. These findings were not inconsistent with her evidence of the assault upon her. According to her she was held tightly with one hand with the other gagging her mouth.

The complainant stated that on the day in question she was visiting her sister-in-law in Matsapha. When she left the sister-in-law's house after ten o'clock on the morning of the 5th March she "found two gentlemen by the gate". The taller of the two men offered her an orange and told her to eat it. When she refused the man said he would force her to do so. A third man then appeared at a stage when one of the two men was starting to move away from the gate saying that he "had better excuse you so that you can discuss the matter" (presumably meaning that he had better excuse himself). The newcomer then borrowed a cassette and the two went away leaving the Appellant and the complainant by the gate. The Appellant then held the complainant by force and gagged her mouth with his hand. They then "proceeded to a house whereby he tried to take off my clothes but he failed to do that as we were struggling but he ended up overpowering me. At that time he then locked the door as he was then trying to take off my clothes. He overpowered me and did what he wanted to do. At all times he was gagging my mouth and he pressed me by the knee. He then told me he was taking a rest and again he did what he wanted to do. And thereafter he stopped and at that time I managed to get out of his house.
PW2 (Complainant) He had sexual intercourse with me.
JUDGE: How did he do this when you were clothed?
PW2: He had taken off my panty.
CC: Could you just describe how that was? Was it completely removed or was it put on one side?
PW2: He took it off from one leg".

This is a very unsatisfactory description of the events immediately preceding the alleged rape. It is somewhat difficult to envisage the Appellant gagging the complainant with one hand and, at the same time, locking the door of the room and, thereafter, removing one leg of her panties presumably using his other hand without inflicting any bruises or other superficial injuries. But the rape, if it occurred, would have been a terrifying thing to the young person and this could possibly explain the very sketchy and somewhat unlikely description of the events leading up to an actual rape. It cannot however be ignored in weighing the evidence.

The complainant then says that after sexual intercourse happened for the second time she "woke up and went out of the house" (presumably the key of the door was in position). She continues: "As I was moving out of the homestead he moved on the other side of the homestead and called me and said that I must wait for him. He would like to talk to me but I never listened and I proceeded walking". She went to her sister-in-law and then proceeded straight to the Police where she made a report. With a Police Officer she went to find the Appellant. The sister-in-law was not called as a witness because she had left Swaziland and was not available.

The place where the alleged rape took place appears to consist of a group of houses of which the Appellant was the landlord. The complainant does not say that if she screamed or shouted she would not have received assistance from some of the inhabitants. She merely says that the appellant throughout all the preliminary attack "gagged" her with one hand while using the other to subjugate her and to remove her panties and carry out his purpose. Her conduct after the alleged rape is not really consistent with any effort on her part to draw attention to her predicament. Dloko Mahlaba, a nephew of the Appellant, says that when the complainant was going to her sister-in-law's house, after going to the Appellant she passed his door and he and his companion asked her "where is our brother?", where is the appellant?. She replied: "just leave me alone". This is a statement which expresses some measure of anger but not the outrage of a young person who had been subjected to the ultimate indignity of being raped at ten o'clock in the morning in a well-populated area by someone whom she did not know and despite her vigorous resistance.

Though, as a matter of law, corroboration is not required in order to secure a conviction on a charge of rape, the present case is one where a Court should hesitate to convict without corroboration. There were no injuries, no medical evidence concerning the presence of spermatozoa in the complainant's body ten hours later, no torn or dirty clothing, no shouting or screaming in an area where there were people who could have been expected to come to her assistance and no evidence of real distress after the alleged assault when this could have been expected.

Miss Nderi, who argued well for the Crown realised that in the present case it would be dangerous to convict without some independent corroborating evidence and sought to persuade this Court that the evidence of the two men who were present when the complainant and the appellant met for the first time at the gate of the complainant's sister-in-law supplied the needed corroboration. She pointed to the fact that on their evidence the complainant and the Appellant were together at the gate and that there seems to have been some conversation of an intimate nature between the two. They move in the direction of the Appellant's house. Then the complainant comes back from the direction of the house of the Appellant after the lapse of a period of time which would have allowed of the commission of the offence and goes to the house of her sister-in-law. This does indeed coincide with what the complainant had already told the Court, but it does not assist in a manner which has real bearing upon the veracity of the complainant's story concerning the assault itself. It corroborates only a neutral piece of evidence given by her and does not in the mind of the Court tend to strengthen materially an inference that a rape was committed.

The learned Chief Justice found that the version given by the Appellant was "inherently improbable" and that if it were true it would not have supplied adequate reason for the complainant to go to her sister-in-law and then to the Police. The Appellant who was not represented did give a sketchy version of events. He said that he met the complainant at the gate at her sister-in-law house and she complained that he had not invited her into his house "to discuss the matter". He had another woman in the house and did not allow the complainant into the house for this reason. He says that he told the complainant about the other woman. The complainant who, it would seem, was supposed to have come from Big Bend to meet the Appellant then asked for money to enable her to return. The Appellant said he did not have

money. She said she would "fix him up". When she was leaving the Appellant went to the fence and told her that he would have money in the afternoon. She did not actually enter the house but left the area at about 1 p.m. That afternoon she came back with the Police. He was arrested. He tried to explain to the Police what had happened when asked why he had raped the complainant and he asked for an opportunity to tell what really happened but the Policemen said they were busy and he should not waste their time. He says that on the following morning he told the Police the version of events which he had given to the Court. He was then asked to sign a document which had not been completed which he did. The contents of the document were composed by the Police and amounted to a defence of consent. Constable Mkhweli said that on the day following the arrest the Appellant said to him that he had sexual intercourse with the complainant and that they had agreed on monetary terms. This was recorded in writing by the policeman and signed by the Appellant.

This, of course, conflicts with what the appellant said in Court and he denied making it. Neither what he is alleged to have told the Police nor what he said in Court is, however, "inherently improbable". However the learned Chief Justice accepted the evidence of the Police so that the case falls to be decided on the basis that the evidence of the Appellant cannot be accepted.

The learned Chief Justice then goes further when he said at the end of his judgment:

"I am satisfied that the accused has given a lying explanation of the events of the day and ***this makes an acceptance of the complainant's version as beyond reasonable doubt the truth of the matter. I find the accused guilty as charged".***

This approach is, I think, incorrect. The fact that the Appellant gave evidence which conflicts with what he told the Police and therefore lied to the Police or the Court cannot be disregarded but this does not mean that the complainant was telling the truth. In my view the improbabilities in her version of events are such that it would not be safe to convict the Appellant. The appeal is upheld and the conviction and sentence set aside.

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W.H.R. SCHREINER

I agree

…….
G.P.C. KOTZE, JP

I agree

……

J. BROWDE, JA