IN THE HIGH COURT OF SWAZILAND

CRIMINAL APPEAL NO.64/98

In the matter between:

LUCKY BETHWELL BHEMBE

VS

REX

CORAM	**:**	**MATSEBULA J** **MAPHALALA J**
FOR THE CROWN	**:**	**MS. LANGWENYA**
FOR THE APPELLANT	**:**	**MR. MAGAGULA**

JUDGMENT

The appellant was charged on three counts as follows:

> Count one - rape with an alternative under the provisions of Section 3(i) of the **GIRLS AND WOMENS PROTECTION ACT 39/1920** i.e. canal connection with a girl under the age of 16;

Count two - escaping from lawful custody;
Count three - escaping from lawful custody.
The accused pleaded not guilty to count one and the alternative charge and pleaded guilty to counts two and three.

The learned Magistrate proceeded with the trial and on the 23rd February 1998 he convicted him on all three counts and sentenced him as follows:

> On count one - seven (7) years' imprisonment backdated to the 7th July 1997.
> On counts two & three - the appellant was sentenced to one (1) year imprisonment on each count. The Magistrate ordered that the sentences run consecutively.

It was not immediately clear from the Magistrate's sentences on counts two and three whether the order that the sentences run consecutively referred to the counts two and three only or also included the sentence on count one. What was clear is that the sentences on counts two or three were not ordered to be backdated.

The complainant, A stated that on 28th June 1997 she had been sent to a relative at the Police Camp. She could not find the relative at the Camp and traced him at the soccer ground. From there she went to town to get her transport back home. She found that her transport had left she then went to the taxi rank where she met B , a cousin of hers. When her transport did not turn up her cousin left her to arrange alternative transport. It was while she was waiting that a stranger approached her and asked her why she was waiting there and she informed him why she was waiting. The stranger was the appellant who then grabbed hold of her and accused her of waiting for a boyfriend who was a taximan. It was at this stage that B Mabuza who gave evidence as PW3 returned. PW3 requested the appellant to let go of her but he refused and started dragging her and threatening to shoot her. Although he did not produce a gun she said she was afraid. He had also threatened PW3 in similar a manner. Appellant dragged her across the road. It was already dark by then. Appellant dragged her towards Mathendele Location and took her to a house where he ordered her to enter. In the house there was a television set and the complainant was able to see the appellant undress himself and also undressed the complainant by removing her dangaree jersey and panties and proceeded to have sexual intercourse with her. It was the complainant's evidence that the exercise was painful. After the appellant had finished having sexual intercourse with her she said she felt wet in her private parts. Complainant stated that she had struggled and made noise hoping that someone nearby could hear her but this was to no avail. After the appellant had finished having sexual intercourse with her, he ordered her out of the house. She went out and he followed her. The complainant told the appellant that the last kombi home had already left and the appellant told her that she should not worry he had money to hire a taxi for her. Appellant arranged a taxi for the complainant and paid E50.00 to the taximan. He ordered the taximan to take the complainant to her destination. The complainant said she was still crying at the time and the taximan enquired why she was crying and she told him. The taximan suggested she reports the incident to the police but the complainant preferred to see her guardian to report to her first. She did that. She testified that she had never had sexual intercourse before and that she had never consented to sexual intercourse with the appellant.

According to her evidence the rape took place on 28th June 1997 and the doctor only examined her on 30th June 1997. This was confirmed by the medical examination form which was handed in and formed part of the proceedings. According to the doctor's evidence at page 29 of the

typed record, first paragraph the doctor states and I quote. "*I found one of the sexually transmitted diseases which also means she was penetrated.*" The form was handed in as exhibit "B" and under "*opinion*" the doctor writes and I quote, "*young lady with no previous sexual experience*". The doctor continued, "*penetration probably attempted*" and a medical abbreviation is used and the sentence end up with "*achieved*."

Mr. Magagula who appeared for the appellant before this court, viciously attacked the contents of exhibit "B" on the basis of the doctor's opinion. While respecting Mr. Magagula's attitude with the greatest of all respects, I can find no basis for this attack. As I have indicated above, the doctor examined the complainant two days after the alleged rape. The doctor's evidence before the ***court a quo*** leaves us with no doubt that the complainant was penetrated. The complainant's evidence is corroborated by the doctor's evidence.

The evidence of the taxi driver is a further corroboration of the complainant's evidence. The taxi driver's evidence further demonstrates beyond any doubt that the appellant is lying. He could not have paid a taximan E50.00 to convey his girlfriend to her home and for unexplained reason, he himself decides against accompanying his girlfriend in a taxi that will come back to his residence.

What has been stated so far is the evidence that he learned Magistrate accepted for his decision. I can find no misdirection on his part. The appellant who conducted his defence in the ***court a quo*** did not deny that he had sexual intercourse with the complainant. On the contrary he put it to the complainant that she had washed herself when the doctor examined her on the day she was examined.

In my judgement, I find no merits in this appeal against conviction. I would in the result dismiss the appeal against conviction and confirm the conviction by the learned Magistrate.

The Magistrate dealt extensively with the matter of sentence. There is evidence that the complainant was only 16 years old. PW2 C gave evidence about her age. She had not turned 16 when the offence was committed and she had been a virgin. I find no misdirection on the part of the Magistrate, nor can I find any reason to interfere with the learned Magistrate's sentence.

The learned Magistrate ordered the sentences on counts 2 and 3 to run consecutively. In the appellant's favour, I will assume that the sentences to run consecutively are those in counts 2 and 3 and not count 1 as well.

The learned Magistrate's attitude in regard to counts 2 and 3 is understandable. The appellant wanted to escape at all costs, escaping twice within a very short space of time.

In the result, the appeal against conviction on count 1, is hereby dismissed and the appeal

against sentence is similarly dismissed. The Magistrate's finding in relation to conviction and sentence is hereby confirmed.

J.M. MATSEBULA

JUDGE

I AGREE

S.B. MAPHALALA

JUDGE