

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 13/99

IN THE MATTER BETWEEN:

ELPHAS SIPHO DUBE APPELLANT

VS

THE KING RESPONDENT

CORAM : BROWDE, J.A.

: VAN DEN HEEVER, J.A.

: SHEARER, J.A.

FOR THE APPELLANT : IN PERSON

FOR THE CROWN : MS NGWENYA

JUDGMENT

Van den Heever. J. A

The appellant was convicted in the Magistrate's Court on a charge of rape, with aggravating circumstances, and sentenced to twelve years' imprisonment. An appeal to the High Court was unsuccessful. Hence the present proceedings. The appellant had been represented at the trial for a portion of the time, but lacked the funds to permit him that benefit throughout. In the proceedings before the High Court he was on his own, and received short shrift there. That was unfortunate, since there had been serious defects in the case presented by the Crown, and the magistrate in my view misdirected himself in his approach to the evidence.

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The indictment alleged that the appellant - I refer to him hereinafter for the sake of brevity simply as Dube - did "upon or between the 14th to the 28th October, 1996 and at or near Mangcongco area in the District of Manzini... unlawfully and intentionally have sexual intercourse with Nonhlanhla Ngwenya without her consent". It also informed Dube that for purposes of sentencing in terms of section 185(bis)(l) of the Criminal Procedure and Evidence Act, the Crown intended to prove the following:

1. "1, [He] used an axe, a knife and a hammer to threaten and physically injure complainant in order to submit to sexual intercourse.
2. [He] inflicted physical injuries on the person of the complainant by kicking her in the face.
3. [He] locked complainant in his house keeping her captive while he had gone away.
4. [He] Robbed complainant of her money the sum of E200.00 he had gone away
5. [He] had sexual intercourse with another woman on the same bed where in complainant was also sleeping".

The trial commenced on 9th July, 1997. Dube pleaded "not guilty". The complainant told a strange story.

The dates are more important than the Courts of either first or second instance appear to have appreciated. On 14th October 1996 she had been at Manzini with her boyfriend Lucky

Nhleko, in a public place where the two of them were intending to buy vegetables from a street vendor. In full view of many people, Dube had summoned her to accompany him, because, he said, she was in love with him. She denied this, and was about to go off with Lucky. Dube whipped out a knife and

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holding it in one hand at the ready, he took both her hands with the other and dragged her to a taxi where he instructed her to get in. She did, and so did Dube. Someone unknown to her, sent by Lucky, came to the taxi and told Dube he would regret what he was doing. Dube replied that he was "Mr Border Gate" and that the Police did not arrest him. They drove off, Dube having put the knife in his pocket. This was at about 5.30pm. En route they stopped. Dube and the driver disappeared in the dark, leaving her alone in the car. They returned about an hour later. They continued on their journey but stopped again to pick up a passenger, who was dropped off along the way. They reached the Mangcongco area, which Dube said was his home territory. The taxi parked near a house. Dube grabbed her handbag, took out E200.00, all the money in it, paid the taxi driver his fare - she did not know how much was handed to him - and threw her bag back at her. The taxi turned and drove off. The two of them went to the house. It was now about 8.00pm. Dube unlocked the door, they went in, he lit a lamp and the two of them sat down on the bed. Dube asked why she had made a fool of him by wanting to go with Lucky and denying that she and Dube were lovers, at which she said in effect that she told him that she would not agree to an untruth. Dube's brother came to the house, and was told that she was Dube's lover. He left. Dube instructed her to undress. She did, "and when I undressed myself, accused was threatening me since he produced the knife and warned me that if I do not comply with his instructions he will injure me". He ordered her to lie down on the bed, then undressed himself, and had intercourse with her, which she says was very painful "and I was in fact screaming loudly". When it was over she discovered that she was bleeding. She went to wash her private parts. After this she returned to the bed where the pair slept until the following morning, when he left after locking her in the house. He returned after sunset, bringing a loaf of bread and "sweet aid" and instructed her to prepare the latter. She did, they ate, then went to bed and had intercourse again that night - i.e. the 15th. The next morning - the 16th of October -he again left, having locked her into the house. At this stage the court adjourned until the 17th of January 1998. She was "duly warned till then". She was, however, missing on that day. A warrant for her arrest was issued and the matter adjourned until 23rd January, and on that day again to 30th January, when she continued with her evidence in chief. The record does not reveal

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whether the warrant had to be executed, or what reason she gave for not having been present on the 17th.

Her evidence in chief when she continued with it on the 30th, was as folio ws;-Dube, having locked her in the house on the 16th of October, (I put in the dates, she merely speaks of "the next day" every time as her tale unfolds), returned that evening carrying nothing. He was drunk. He sat down. Later after he had rested, he said they should go and sleep. He again ordered her to take off her clothes and panty. He also undressed. They had intercourse, after which they slept until the following morning. From the rest of her evidence, it is clear that this was the last time they had intercourse, namely during the night of the 16th of October.

On the morning of the 17th he left without locking the door. She remained inside the house. That afternoon at about three o'clock he returned accompanied by a woman whom he said was his wife, " a Dlamini by surname". He left the two at the house, without locking the door. The pair of them sat chatting - complainant's description — waiting for Dube's return. When he arrived he ordered the pair of them to cook food. When it was ready his wife served him, all three ate and then the three went to sleep on the same bed. He had intercourse with his wife, but not with the complainant, and slept until morning- the 18th.

Again he left without locking the door. That evening he came back drunk and beat both of the

women, for no apparent reason. Her description is bald: he used the blunt side of an axe on complainant's back, hit her twice on the right hip with a hammer, kicked her on her left eye, scratched her on her right arm with a knife. (There was no inquiry as to where he got hold of these implements, and why he changed from one to the other, what the other woman was doing at that stage, and so on). Equally bald: he also assaulted his wife with the axe on her body and by kicking her on her eye. When he had done so, he brought them water and instructed them to wash the blood from their wounds. They did, but were still bleeding when the three went to sleep on the same bed. Dube had intercourse with neither of them.

The following morning - thus the 19th - he left as usual, the two women remaining behind in the unlocked house. That evening he caught and killed a goat. His wife

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helped him skin it. The whole animal was cooked, so as not to spoil. The three slept again on the same bed, no sexual intercourse taking place.

On the 20th the complainant "attempted to escape" at about 1.00pm. She reached a tarred road which she recognised as the Bhunya/Manzini public road and followed that, but fate was against her, the only car she speaks of seeing, had Dube as a passenger in it. It stopped, he got out, produced a knife which he opened, came straight towards her and stabbed her on the left side of her neck and then cut her left ring finger. She showed the trial magistrate scars in the relevant places. Dube told the occupants of the car that she had stolen E700.00 of his from his parental home and assaulted her in their presence. They advised Dube "that we should come to Bhunya Police Station to report the matter but (Dube) stated that he would not do that." They left, and he continued beating her with sticks on her legs all the way back, reaching Mangcongco when it was already dark. The three again shared the same bed, no intercourse taking place.

The following day (21st) he again departed, leaving the two at the house. That afternoon he gave instructions that some of the cooked meat was to be warmed. They served him. He ate. The three slept on the same bed, without intercourse taking place.

On the 22nd in the morning he took his wife to the Mangcongco Clinic, returned, and then left again. The complainant then "escaped" - walked for a long distance, came across some boys who accompanied her, all of them getting a lift and being dropped off at Malutha Border gate. There she reported to the police and made a statement, having arrived there at 5p.m. She spent the night there, and was taken to the Mankayane Government Hospital the following day, therefore the 23rd. She was examined by a doctor to whom she showed all her injuries. He also examined her private parts. She was treated, and discharged. I come to his evidence later.

Almost as an afterthought, she added that –

1. "All the time I had been kept captive" Dube had hidden her clothes, giving her only an apron and hat to use. She was wearing these "and my white shoes" during her first, abortive, escape. When

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she walked out successfully, she was wearing a skirt and T-shirt she had simply taken, not knowing whose they were; which she had handed to the Bhunya police; who had collected her own clothes from Dube's house in her absence,

2. During the first few days when she was locked in, she had to use a basin in which to relieve herself, which Dube would take out. Dube's brother came to visit at the house, but only after Dube had returned in the evening.

3. She also sustained a loose tooth as a result of the assault.
4. She made her report to the Police on the 28th of October, 1996 (which leaves a number of days between her successful escape and her statement unaccounted for).
5. Dube had never "proposed love" to her, but "was in love with my home neighbour girl Lungile Dlamini".

At the end of her evidence in chief, Dube asked for a postponement. According to the record, he stated that

"the witness has told lies in court and in some portion of her evidence she has stated the truth as I know her to be my girl friend, and so I ask the court to be patient with me and postpone this case so that my Attorney be present to ask questions on my behalf.

The postponement was granted. Mr Vilakati appeared at the resumed hearing, but funds apparently ran out: he did not stay the full course. In cross-examination it was inter alia put to the complainant that she had voluntarily accompanied Dube to his homestead; that the main reason she did so was to attend the funeral of Dube's brother; that she had been assaulted only after she had quarreled with Nomkhosi Dlamini; and that she is a "girl friend" of Dube's and used to visit him "at Elwandle area at his place;" all of which she denied. She admitted that her home, at Mponono, was only about 30km from Mangcongco, and that there is a bus service from Manzini

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through Mangcongco to Mponono. The reason she did not board this bus after the house was left unlocked was "first, I did not have money, and secondly (Dube) did not tell me where he was going to and I feared that when I go I will meet (Dube) as I thought that he was around Mangcongco." She admitted that when she had prepared food for Dube it was not done at knife-point. There were other homesteads in the vicinity, the nearest merely 100 metres away. She could not have run to look for help there because he had told her it was his parents' home, she thought he would possibly be there. Others would not come to her rescue "because I saw (Dube) assaulting his father and when he was told to stop or cautioned by his brothers, (Dube) did notheed... their pleas."

Her last answer to Mr Vilakati's last question is a total non sequitur:

"Q: I put it to you that (Dube) never forcefully took you to Mangcongco but you freely went there and that sex never took place

A: That is not correct, (Dube) hired a taxi from Manzini Bus Rank which took us to Mangcongco."

The tale she told in her evidence in chief merited closer scrutiny than either defence counsel or the Court accorded it. At no stage did the complainant ask assistance from anyone - from Lucky or any bystanders when she was forced allegedly at knife-point into the taxi; or from the driver of the taxi (being "abducted" by a man she admits she already knew could have held few terrors for her), where she waited patiently for an hour in the taxi when Dube and the driver disappeared, for their return or from the passenger picked up en route and then dropped off; or from the brother of Dube when he came visiting; or from Dube's wife Nomkhosi Dlamini when she arrived on the scene. There is no suggestion that she complained to Nomkhosi that she had been brutally raped, shortly before, and no reason advanced why she should not have told her of this: the two chatted amicably once Dube had left. The only reason she gives why she made no earlier attempt to flee, is that she was nervous lest she should come across Dube.

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We learn later that there was a second bed in the house, albeit an old one. That she should

have fallen asleep in the same bed with a man who had had intercourse with her while she was screaming with pain instead of fleeing as far as she could from him is strange, to put it mildly. During her alleged first, abortive, attempt to escape, she not so much as murmured, let alone demanded, that the suggestion of going to the police, made by those in the car from which Dube had emerged, be followed. I myself would have been curious about the slaughter of the goat, where defence counsel had put it to her that there was to be a funeral in the Dube family. And the evidence the complainant volunteered in chief, that while the pair of them were sitting on the bed in his house, Dube asked why she had made a fool of him by wanting to go with Lucky and denying that she and Dube were lovers, is far more compatible with the proposition that there was indeed a relationship between them, than with her story of an abduction by violence in full view of a number of bystanders.

The further prosecution witnesses highlighted flaws in the improbable story told by the complainant.

The evidence of Lucky contradicts hers in a number of respects. He denies that he sent a messenger to the taxi to warn Dube. The latter took out a knife when he saw that Lucky was angry and wanted to take the complainant with him - therefore, not in the first instance to intimidate her into leaving with Dube himself. He could hardly have regarded her as being forcibly abducted, judging by his conduct: he did not call on bystanders for assistance or call the police, made no attempt to protect her, find her, merely made a note of the registration number of the "taxi", which had no taxi "cap" on top, without doing anything with the number he had noted. Although he had testified that Dube "dragged" the complainant to the taxi rank, he contradicted himself virtually in the same breath: " when they were there, another taxi stopped and (Dube) said there was his brother and the taxi stopped and when going to the taxi rank, (Dube) was following (the complainant) from behind. Then Nonhlanhla boarded the taxi while accused stood outside the taxi talking with some other people. The accused later on boarded the taxi and the taxi drove away" (The emphasis is mine)

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Lucky is also shown to have been untruthful in saying that he had not discussed the case with the complainant. He had asked her about Dube - and she had lied to him, because she had told him she did not know him which contradicts her own evidence. Lucky also protests too much on this score, and under cross-examination admits that the two of them had during the trial period been sitting together, she with her hand on his knees, and that she had moved off when she saw that she had been observed by Dube and his lawyer.

Nomkhosi's evidence differs from that of the complainant in many respects. What is important, is that she and the complainant do not link the physical assault upon the pair of them with any compulsion to intercourse by the accused. Nomkhosi herself testified to far more assaults than the complainant says she suffered. Dube had hit complainant with a hammer for refusing to kiss him, and that night assaulted both of them with a stick because they would not tell him what they had been talking about. The following day after slaughtering a goat, he had heard from his brother that the two intended escaping and assaulted them both: with an axe, a stick (which broke) a sjambok, a "table made of some fence"; and he had kicked the witness on the left eye - wearing gumboots at the time. It was the following day that the complainant had left, and Dube had fetched her back after Nomkhosi had told him in which direction the complainant had gone. She herself had now broken off her relationship with Dube. She corroborates the proposition earlier put by Mr Vilakati to the complainant and denied by the latter, that "there was a funeral on those days." Cross-examined by Dube himself her answer makes even more improbable the complainant's story of having been kept prisoner:

"Q: While you and Nonhlanhla were at my parental home, were people visiting my home?

A: People came before you slaughtered the goat because they were coming for the bereavement at your home, and after you had slaughtered the goat you then locked us in the house"

In the process she supported Dube's subsequent evidence as to the funeral. She said, as he did, that she had been pregnant at the time. And she testified that

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"to me Nonhlanhla told me that she used to be in love with Dube sometime back."

The medical evidence was hardly reconcilable with the complainant's version of events, still less that of Nomkhosi. Dr Bolaji, it is true, denies that the complainant told him a tale which he accepted and transformed into his own conclusions after his physical examination of her. That had taken place at 10.55pm on the 28th October, 1996. There were bruises around her left eye, multiple abrasions on the left side of the neck, multiple superficial abrasions on the back, bruises on the right side of the trunk, abrasions on the right hip, top of the head, above the left ear, on the right knee, right foot, left leg and left finger. Her upper incisors were loose. A vaginal smear showed blood mixed with cell debris. However, no sperm cell were identified. The markings as shown on the sketches on the next page of his report, do not purport to cover large areas. Then follow his comments next to various topics, the only relevant ones being as follows:

Physical Condition :In bad shape Mental state : Depressed and sad Sex life : She is not a virgin Menstruation : 1-7/10/96 Assault :Yes. Brutally assaulted with a weapon having a sharp edge. She was dragged on the ground.

Her breasts and genitals were normal, save that there was no hymen, and the posterior wall of the vagina was badly bruised, "suggesting repeated intercourse". It admitted two fingers, the examination was painful, there was a blood-stained discharge, and next to "Haemorrhage" he had written "Yes. Slight". Next to this list under the heading "OPINION" he wrote in his report "Sexually and physically assaulted as evidenced by the multiple extra-genital injuries and the blood-stained vaginal discharges and the badly bruised posterior wall of the vagina. The injuries might have been caused with different weapons, including fists, sharp objects, and boots. This is a brutal attack from by a sadist"

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Unfortunately no-one saw fit to ask him how fresh or old the injuries were which he saw; nor what the difference was, if any, between the vaginal discharge described as "blood-stained" and "slight haemorrhage", nor why - if complainant had not given him her story of the assault upon her - he thought that she had been assaulted with a weapon having a sharp edge when there was no incised wound found at all; nor what made him conclude that "boots" may have been used, unless she had told him this. Most important, no-one thought to ask him whether she would in the ordinary course still have been haemorrhaging, even slightly, or had a badly bruised vagina, if she had been raped without having been actually assaulted but merely threatened with stabbing, fourteen days earlier, on the 14th followed by one instance of intercourse on each of the two following nights; nor whether her incisors (his marking on the sketch shows four teeth to have been affected) could have been loose from natural causes, where she herself spoke of only one tooth having been affected by violence.... And of course his evidence is totally silent about the stab and cut wounds which she is supposed to have sustained when Dube brought her back after her alleged first attempt to escape.

Dube testified after the close of the Crown case. He admitted that the complainant had accompanied him home. He said she had invited herself, despite the fact that he told her that there was a funeral to be attended to at home. She had gone voluntarily. During the period she was there, he had had no intercourse with her (since she was menstruating) nor with Nomkhosi who came a few days later (since she was pregnant) and he in any event was in mourning for his brother. He admitted to having chastised both of the women, using a belt to do so, when he came home and found the two of them fighting, after telling them "that they should not do such a thing at my house bearing the fact that it was still too soon after the

burial of my brother". The women had injured one another, complainant apparently having got the upper hand, since he had found it necessary to take Nomkhosi to the clinic the following day to be attended to. I find nothing in his evidence under cross-examination which unmistakably shows him up to be a liar. His cross-examination was in at least one respect unfair, when the prosecutor forgot the actual medical testimony:

"Q: If you say you did not have sex with Nonhlanhla, are you suggesting that the doctor lied by saying he found sperms on the private parts of

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Nonhlanhla? A: Yes, because I never had sex with the two".

His greatest "failing" was that he called witnesses on totally peripheral matters, who did not support him as he had expected they would.

The magistrate seems to have been quite unaware of the glaring differences between the versions of the two women, the improbabilities in the evidence of the complainant, and the deficiencies in the medical testimony. He summarised the evidence of the complainant, and accepted it without analysis since he commented half-way through already, "Here one observes the callousness and inhumanity of one human being to other fellow human being". Her credibility was assessed purely on the basis that under cross-examination she had not broken down or wavered, but continuously answered questions in a "candid and frank manner". The same test was applied to Lucky and to Nomkhosi. He criticises Dube since his lawyer had not put it to the complainant that she was menstruating at the time she alleged she was raped, which "would have been somewhat a good defence". It had been put to her that the accused denied having had intercourse with her at all. It had been put to her that there was a Dube funeral and period of mourning, which she said she knew nothing about (although Nomkhosi did not know of this). Apart from the fact that the magistrate appears to saddle Dube with an onus (how was her vagina injured, if not as she said and the doctor found); he indulges in speculation which is not justified:

"If (the complainant) was indeed menstruating, why would the accused stay with her all the days, and if they were lovers, who had been anxiously waiting to meet each other, naturally the sexual sentiments and anxiety was too high, and therefore complainant would have no reason to withhold such information of her menstruation. And she would in fact inform the accused at the earliest opportunity in order not to disappoint accused at the moment when his sexual appetite had arisen and expecting to get sexual satisfaction it sounds very absurd to me that complainant would have withholden such information. And I therefore reject the evidence of the accused as untruth".

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Where all of this comes from, is a mystery. According to Dube he had a funeral, not sex, on his mind when the complainant suggested that she come home with him. He told her of his bad news, just received, then she "asked what it was that I was concealing from her as she too wanted to see what had happened to my home". There is no suggestion that he would have known she was menstruating other than from her - the reasoning of the magistrate is based on the assumption that she concealed this from him, and that the Crown evidence is credible beyond doubt, that he was intent upon one thing only, and that was intercourse with one or other or both of the women. The magistrate's approach is summarised in his phrase, "I fail to find reason to uphold the accused story as true". That, of course, misplaces the age-old test entirely: Dube did not have to satisfy the court that his story was true. In the light of the conduct of the complainant, and inter alia the fact that neither she nor her "room-mate" suggested any reason why Dube had assaulted them - certainly not to compel them to have sex with him: they did not suggest that — there is no reason why his story must be rejected that it was because they were fighting one another;

The court of second instance similarly burdened the appellant with an onus: he was called upon to explain the doctor's evidence and account for the injuries to the complainant's private

parts despite the fact that those injuries are not compatible with her own evidence. That the medical examination on the 28th of October was painful, is far more compatible with her vagina having been recently ill-treated - perhaps during the days between her successful "escape" and that examination - than with intercourse having been painful a full fortnight earlier on the 14th. That pain must have eased soon: she did not allege that the (single) acts of intercourse on each of the subsequent two nights caused her any discomfort. And the evidence of the complainant was misread: she is supposed to have "testified that the appellant used a knife, hammer and an axe to threaten her when she resisted. When they arrived at his homestead he assaulted her to submit to have sexual intercourse with her. He proceeded and had sexual intercourse with her without her consent. As a result of the assault she suffered numerous injuries which were examined by a doctor called as PW 3" This is a far cry from the content of the record placed before us. So too the allegation that the appellant's defence was a bare denial, and that "he even denied having had sexual intercourse with (the complainant) and this had never been denied during a trial" (emphasis added) is simply not correct. The record could not have

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been studied carefully for purposes of the then appeal. His version had indeed been put to the complainant; as pointed out earlier.

In my view the magistrate misdirected himself in his approach to the evidence. The Crown failed to prove the guilt of Dube on the charge of rape beyond reasonable doubt. And the accused did not have a fair hearing on appeal to the High Court. On his own evidence he is guilty of assault. He had no right to "chastise" the two women for fighting one another, even if their doing so was an abuse of his hospitality. That act of violence to which he confessed is however no component of the rape charge advanced by the Crown against him in this matter. In any event both women have in effect been avenged and Dube suitably himself chastised since he has been incarcerated since the end of October 1997 until now.

In my view the appeal should be allowed and the order convicting and sentencing Dube replaced by one acquitting him of the charge of having raped Nonhlanhla Ngwenya as alleged by the Crown.

VAN DEN HEEVER, J.A.

I agree

BROWDE, J.A.

I agree

SHEARER, J.A.

Delivered in open court on the 3 vel day of December 1999