IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE **Appeal Case No. 22/99**

In the matter between

ALBERT MATSE

vs

REX

Coram Leon, JP
Van den Heever, JA
Beck, JA

For Appellant In Person
For Respondent Ms M. Langwenya

JUDGMENT

LEON, JP

Despite his plea of not guilty the appellant was convicted of rape and

sentenced to 8 years imprisonment. He is a first offender. The appeal is brought against the conviction as well as the sentence.

At the hearing of the appeal the appellant appeared in person and argued the appeal. After hearing his argument and that of Counsel for the Crown we allowed the appeal setting aside the conviction and sentence stating that our reasons would be filed later. These now follow.

The complainant testified that she was crossing the road which goes to Maphiveni and Mhlume next to the Post Office when she saw a man sitting there. He called her twice but she refused to go to him. He then came and grabbed her by the arm proposing love to her which proposal was rejected by her. He then grabbed her, threw her down and had intercourse with her. Two men arrived, she raised the alarm and she related to them what had happened to her. The man who had raped her beat them on their chests, threw their bicycle down and they left.

I pause to note a number of curious and indeed most unsatisfactory features of her evidence. They include the fact that she denied ever having seen the appellant. Later she referred to "the man" who raped her not referring to the appellant. She referred to "the man" more than once. Later "the accused" was suddenly introduced by her into her evidence. It was also part of her evidence that the alleged rape took about three to four hours.

Despite the fact that the complainant complained of having been raped by the appellant it was part of her testimony that it was the appellant himself who walked home with her to her parents house where he had an altercation with her father. If the appellant had raped the complainant it seems to me in the highest degree unlikely that he would walk home with her. His more obvious course of conduct would have been to run away. Her evidence is thus inherently improbable. There is, inter alia, another disturbing feature about her evidence. When she went home with the appellant she asked him "where would I tell my parents I was at this time". If she had been raped she would hardly ask the alleged rapist such a question. She would know precisely what to tell her parents, namely that she had been raped.

The complainant was examined by a doctor on the following day. He did not give evidence but it would appear that his report (annexure "A") was handed in by consent. According to the report the complainant may or may not have been raped. But the report reveals that the complainant had had sexual intercourse two weeks

earlier and that a whitish offensive discharge was found in her vagina and a bulky uterus was observed. Smears were taken but the results were not produced. What is of significance about the medical report is that it is consistent with the complainant suffering from a venereal disease. And that possibility fits in into the evidence of the appellant. According to him, he and the complainant had been lovers. On the day in question he had agreed reluctantly to accompany the appellant home. The material part of his evidence reads:-

> *"When we were coming back Zandile told me that she is here to see her mother to borrow E500.00 because she was desperate. I asked her why she needed so much money for. I asked her if she was facing any charge. She told me that she was not facing any charge but suffering sickness that does not go away. She told me that she has been to hospital but they could not cure her. I asked her further what kind of sickness that could not be cured at the hospital. I insisted until she told me that she had aborted while at her place of work. I then told her that I could not help her……..I asked if the aborted pregnancy was my responsibility or not. She told me that it was my responsibility She further told me that the pregnancy was seven months old. I then asked her the months since we separated in April 1996 when she told me she was going to leave for work at Simunye. She insisted that it was my responsibility but when I did the calculation it did not correspond with the seven months pregnancy. Then she became annoyed and said that if I could not help her then she will report the matter to the police."*

The above passage is entirely consistent with the medical report. Moreover the appellant would not have known that the complainant was suffering from a venereal disease unless she had told him and his refusal to assist her financially would provide a powerful motive for her to trump up a charge of rape against him by reporting to the police, and others, including her father, that the appellant had raped her.

Some support for the complainant's version is provided in the evidence of one Dumisane Gwebu (PW3). He knows the complainant and her father. According to his evidence, he and one Themba Ngwenya (who was not called as a witness) while on their way to the Post Office on the day in question he heard a child crying in the field. She complained to him that a man wanted to have sexual intercourse with her. The appellant appeared, threw PW3's bicycle down and hit him on the chest. PW3 departed. The complainant's evidence was different. According to her "two gentlemen came and it was <u>at that stage</u> that she raised the alarm. The appellant's evidence was also quite different. According to him they only saw Gwebu when they were entering Section 19 and there was no question of the complainant crying or any assault by him on Gwebu..

There are also unsatisfactory features in the evidence of the appellant himself particularly in the fact that most of his defence was never put to the crown witnesses. That may have been due in part to his legal representative. Indeed his cross-examination of the complainant was perfunctory and he failed to exploit a number of weaknesses and improbabilities in the complainant's evidence.

Furthermore it appears that the complainant, a young girl, was of easy virtue whose own father was angry with her for being promiscuous .

In his brief judgment the learned Judge a quo simply accepted the complainant's evidence supported as it was to some extent by the evidence of Gwebu. He rejected the evidence of the appellant largely because his defence was not put in cross-examination. There is nothing in the judgment which in any way suggests that the court was alive to the imperfections and improbabilities in the complainant's evidence or to the contradictions between the Crown witnesses. Moreover the probabilities in the appellant's evidence are not referred to.

This is one of those cases where there are unsatisfactory features both in the crown and the defence case. But at the end of the day the court, in order to convict the appellant had to be morally certain of his guilt. I have no doubt that a reasonable doubt of such guilt exists and that the appellant should have been acquitted.

For these reasons we made the order referred to at the beginning of this judgment.

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LEON, J.P.

I AGREE

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VAN DEN HEEVER, J.A.

I AGREE

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BECK, J.A.

DATED AT MBABANE THIS 31 ST DAY OF MAY, 2000