IN THE HIGH COURT OF SWAZILAND

APPEAL CASE NO.

In the matter between:

BHEKIMPI BHEKINKOSI MABUZA		**APPELLANT**
VS		
REX		
CORAM	**:**	**MATSEBULA J**
		ANANDALE J
FOR THE APPELLANT	**:**	**IN PERSON**
FOR THE CROWN	**:**	

JUDGMENT
19/03/2001

Matsebula J:

The accused to whom I will henceforth refer to as the appellant was charged with rape and convicted thereof by a senior magistrate sitting at a periodic court at Mbabane. The appellant was sentence to an imprisonment for seven (7) years without an option of a fine. The sentence was backdated to the 17th August 1999, which was the date on which he was arrested and kept in custody.

The appellant has noted an appeal against both the conviction and sentence. The grounds of appeal against the conviction and sentence are somewhat confusing, but I will read them as stated by the appellant in his notice of appeal.

AGAINST CONVICTION

1. "That she claims I assaulted her at about 4pm when there was still light and I wonder what people said to this.
2. That the house in which she claims I raped her was with people with whom I live.
3. That she even stated how we parted ways with each other when I accompanied her to the bus station the next day in the morning and even offered her with some fare.

4. That also, the police and the prosecution failed to compile my witness who were also known to them, as they were attending remind hearings for sometime before trial.
5. That we even went to a restaurant where I bought her some drink before we went home. I wonder why then, she did not notify the people.

AGAINST SENTENCE

"I am a young man of eighteen (18) years of age. It is on this basis that I would like to ask the High Court to be lenient with me, for the sentence of nine (9) years is destructive to my future.

As a first offender, it would be my wish to ask the High Court for leniency as the sentence is too harsh and raises a sense of shock.

I trust that the above listed grounds would be enough for an appeal to be granted."

PW1 the complainant Ntombifuthi Ngomane gave evidence which was accepted by the learned Magistrate. Her evidence was to a greater extent corroborated by the appellant himself, except that the appellant states that the complainant was at the diamonds mine dumps per appointment between the two of them.

Appellant alleged complainant was his lover. He denies that complainant was ever assaulted by him. I will come back to the appellant's evidence later in this judgment. According to the complainant she had gone to church at plus minus 11am. After the church service she proceeded to the old diamond mine dumps searching for diamonds. She suddenly heard someone whistling for her. She looked and saw a group of boys. Of the group, two boys followed her and stopped her but she ignored them. One of them started accosting her, kicked her that she fell. Once she was on the ground he started throttling her. The attacker's companion intervened but to no avail. The attacker continued throttling her and started pulling her to a place called Croydon. The attacker's companion also joined in the pulling of the complainant. At Croydon the attacker went to a bottle store and left his companion in charge of the complainant. The attacker had gone to Croydon to purchase beers. The attacker returned and it was the turn of the companion to go to the shop as well. The attacker then pulled the complainant to a house of a homestead. The companion was left at Croydon. At this homestead he took her into the house and ordered her not to make noise. Once both were in the house the attacker lit a candle and ordered the complainant to sit on a bed and the attacker sat next to her. The attacker then ordered the complainant to have sexual intercourse with him, after he had put off the candle. The complainant resisted. He ordered the complainant to undress. She refused. He forced her by removing the complainant's clothes himself and came on top of her. He forced her thighs apart and then inserted his penis into her private parts. The exercise was painful and she cried out. Another person who was apparently at the house shouted and asked the attacker with whom was he in the house. The attacker ordered the person who was shouting not to disturb him. Complainant tried to resist but failed and the attacker proceeded raping her. The attacker had locked the door of the room and put them into his pockets. After this ordeal the attacker fell asleep as it was now late in the night. The complainant also fell asleep. In the morning the attacker left leaving the complainant behind and told her he would be coming back. In his absence the complainant also left and went and boarded a bus to her homestead. At her house,

she reported to her brother Nhlanhla what happened to her. She was then taken to the police station where a charge of rape was reported. She was taken to the Health Centre where she was medically examined. She never gave the attacker her consent to have sexual intercourse with her. Under cross-examination, she identified her assailant and rapist as the appellant.

This evidence of identification, the appellant never challenged. On the contrary he stated complainant was his lover and he had met her at the mine dumps per appointment.

In my view the question of identify does not arise at nor does the ***actus reus***. Appellant admits having had sexual intercourse with his girlfriend, the complainant. The learned Magistrate accepted the complainant's evidence, correctly in my view and rejected the appellant's version. I will deal with the reasons which the learned Magistrate was correct in rejecting the appellant's version cited in my judgment.

I have said the complainant was taken to Dokolwane Health Centre and there she was medically examined by PW2 Dr. K.O. Okumba. PW2's evidence was that on the 16th January 199 he examined the complainant who informed her that she had been sexually abused. I must hasten to add that this evidence although in the form of hearsay, is admissible in cases of sexual mature if such a report is made within a reasonable time after the commission of the alleged sexual assault. (See in this regard **HOFFMAN AND ZEFFERT 23-6 & CROSS 238-44).** The evidence is admissible to show consistency on the part of the complainant. The requirements for the admission of this evidence are the following:-

(a) It must have been voluntarily made.

(b) The victim must testify.

(c) It must be made at the first available opportunity.

It is my considered view that the complainant satisfied all the above requirements in reporting to all the witnesses she reported to. One further observation that must be made is that this report is not used to prove that the complainant was infact reaped by the person she alleges raped her. The evidence is used to show consistency and to rebut a recent fabrication.

In so far as corroboration is concerned, PW2 found the following:-

(a) The complainant had superficial bruises on her knees and thighs.

(b) The hymen was ruptured and was bleeding.

PW2 explained in his evidence why the absence of spermatozoa does not necessary mean the victim was not raped (see page 7 of the typed record of proceedings). In the doctor's opinion the absence of the hymen was compatible with recent penetration and her injury was fresh. The wounds indicate evidence of forced entry of her private parts. The appellant did not challenge the doctor's evidence.

PW3 Nhlanhla Ngomane brother to the complainant took the complainant after she had made a similar report to him as the one she made to the doctor. She made this report crying. This evidence was admitted by the learned Magistrate, correctly made in my view. PW3 also testified the complainant's buttons of her shirt were torn and had bruises on her neck.

PW3's evidence, PW1's evidence and PW2's evidence probative value is of such a nature that the learned Magistrate in the court a quo had no impediment in noting it as evidence in the way of trial court should use evidence against an accused. Moreso in the present case the appellant admits having had sexual intercourse with the complainant.

PW5 2917 Detective Constable Siza Dlamini. He was one of the investigating officers. His evidence was that he had warned the appellant in terms of the Judges' Rules. The accused admitted having met the complainant at the mine dumps and took her to his house where they spend a night together. He said in the morning he gave her some E3.00 to board a bus to her homestead. PW5 noticed the bruises on complainant's neck and knees and that she had difficulty speaking.

PW5 then put the following questions to the appellant:-

Q: Do you recall when I asked the complainant in your presence as to what had caused the bruises on her body?

A: Yes.
Q: What did she say?
A: She said she was injured by myself.

One may pause here and ask one question to which no answer is necessary. The question is "Why would one's girlfriend who is at the mine's dumps by appointment need to be injured in order to force her to go with her lover.

The appellant also gave evidence on oath. It was his evidence that he had gone to the mine dumps per appointment with the complainant who is his girlfriend. After meeting her at the mine dumps, the appellant asked her rather a strange question. "I asked her if she recalled that this was a day that she was supposed to (not clear) me." If the meeting was per appointment why would a dear lover ask such a question.

According to the appellant's story, complainant did not even know where the appellant's home was. Appellant and complainant ended at accused's work place and not at his home as per appointment. Complainant was introduced to the other residents of that workplace and she told them she was appellant's girlfriend. They spend the night there and in the morning the appellant brought her water to wash but declined the food which he offered to her. Another appointment

was made for a Tuesday when appellant was to have been paid. Appellant only had E3.00 which he gave her. He then promised to bring a lot of goodies when they next meet on Tuesday. For some strange reason unknown even to the appellant the complainant went and laid a charge of rape against her lover. One at the police station he noticed that she had injuries around her neck and when asked by him how she sustained these injuries, she failed to answer. She was then taken away by the police when she returned she then said he (the appellant) had caused those injuries. The police then arrested him and charged him with rape.

Under cross-examination, the appellant told the court the appointment was made on a Saturday but they were to meet on a Sunday. Asked by the Crown that the complainant had said she had gone to the mine dumps on a Sunday. The Crown wanted to know why appellant did not remind her that she was mistaken. The appellant answered that he had forgotten to remind her of the true position. He also forgot to remind her that he and she had met on the previous day.

Asked why he had not disputed that she had not gone there to look for diamonds, he said he did not think of that. The cross-examination was long riddled with contradictions from the questions appellant put to complainant after her evidence in chief. The appellant on each and every of these contradictions stated either forgot or it did not occur to him.

It is true that the Crown bears the onus to prove that the crime was not only committed, but it was committed by the accused with the requisite ***mens rea*** **BLOM 1939 AD 188.** But fanciful possibilities should not be allowed to deflect the course of **JUSTICE MILLER VS MINISTER OF PENSIONS 1947(2) AER 372, 373.** See also **R VS DIFFORD 1937 AD 370** the following remarks at 272. "It is not disputed o behalf of the defence that in the absence of some explanation the court would be entitled to convict the accused. It is not throwing any onus on the accused, but in these circumstances it would be a conclusion which the court would do if not explanation is given. It was opinion that in the instant case the appellant told the court an untruth in such a way that it had only one and the only option that the Crown had proved its case beyond a reasonable doubt.

In so far as the sentence is concerned, I can only say that the appellant was lucky to have appeared before a senior Magistrate whose jurisdiction did not exceed the sentence imposed by him. The commission of the crime was certainly accompanied by aggravating circumstance. The appellant ought to have been sentenced in accordance with the provisions of Section 185 bis of the **CRIMINAL PROCEDURE AND EVIDENCE ACT** which stipulates a minimum sentence of nine (9) years.

In the result, the appeal against the conviction and sentence fails. The learned Magistrate's findings are confirmed.

J.M. MATSEBULA

JUDGE

I agree :

J.P. ANANDALE
JUDGE