CRIM. APPEAL NO.56/99

In the matter between:

FEZILE MAKHISHI MATSENJWA **Applicant**

And

THE KING **Respondent**

CORAM : MAPHALALA J.
MASUKU J.

For Applicant : MR B.J. SIMELANE

For Respondent : MR S. MAGONGO

JUDGEMENT
4th April 2001

Masuku J.

The Appellant, to whom I shall continue to refer to as the accused, was convicted and sentenced to seven years imprisonment by the Principal Magistrate sitting in Manzini. The charge preferred against the accused was that of rape, it being alleged that on or about the 6th October, 1998, and at D area, the accused did wrongfully and unlawfully and intentionally have sexual intercourse with A, a minor female of 16 years without her consent.

The Appellant noted an appeal to this Court against both conviction and sentence. He first filed a notice of appeal together with the grounds therefor in person. He subsequently instructed an

attorney to act for him and his attorney filed amended grounds of appeal. It is the latter document to which reference will be made in this judgement. The grounds of appeal as set out in the Amended Grounds of Appeal are as follows:

AD CONVICTION

1. The totality of the Crown's evidence shows an inherent improbability that the Crown has proved it's case beyond a reasonable doubt.

2. The trial Magistrate erred in law and in fact to find that the Crown has proved it's case beyond a reasonable doubt in the light of the contradictions and lack of corroboration in the Crown's case.

3. The trial Court misdirected itself in not believing the story of the Appellant, as it might have been reasonably true in the circumstances.

4. The trial Court committed an irregularity resulting to a failure of justice in not explaining to the Appellant the right to cross-examination or in failing to assist the Appellant in his cross-examination but without descending into the matter.

5. The trial Court erred in law and in fact resulting to a failure of justice in not allowing the Appellant to address the Court before passing sentence.

AD SENTENCE

(a) The Appellant was a youthful first offender and or he had no previous record of conviction.

(b) The trial Magistrate erred in law and in fact in placing emphasis on the ground that such are cases on the rise and thus being the position a deterrent is required.

Before proceeding any further, I find it appropriate to state that amendment of the grounds of appeal cannot be done as of right. The proper approach was stated with absolute clarity by Nathan C.J. as he then was in **DIFFENTHAL v R 1977 – 78 SLR 27 at 29 B,** in the following

terms:-

> *"Be that as it may, the approach in Swaziland hitherto has been that all time limits may be ignored with impunity and that an application for amendment of the grounds of appeal will be granted practically as a matter of course. This is not a correct approach. As was laid down in regard to similar provisions in **R v MOHAMED 1954 (3) SA 317 (C)** the question whether an appellant should be allowed to amend his notice of appeal after the expiry of the times laid down in in the Rules is of the Court's discretion. There should be an explanation as to why it has become necessary to amend the grounds of appeal and, I may venture to add, a satisfactory explanation of the delay in making the application."*

In this instant case, the position is worse because no application whatsoever for the filing of the amended grounds of appeal was made. In future, such departure from procedure and practice will not be tolerated. We shall however condone the non-compliance, appreciating that the initial grounds of appeal were drawn by the accused himself and when he engaged an attorney, it became necessary to amend same.

At the hearing the Respondent's Counsel indicated that they no longer wished to pursue the appeal against conviction as the learned Magistrate did not misdirect himself, on reflection. This is apparent from the record and can only be commended. That notwithstanding, we find it apposite to deal with the grounds as raised by the Appellant.

It is necessary to briefly outline the facts in this matter. The Complainant, PW2, was a scholar at D, where the accused also attended school. It was her evidence that she knew the accused. She testified that on the 6th October, 1998, she was in a house with N when, around 19h00, ZM knocked at the door. PW2 opened the door and Z entered and told her that one MM and PM wanted to discuss a certain issue with her. PW2 obliged and went outside where she found the accused instead of the aforementioned boys. PW2 tried to run away but Z grabbed her and brought her to the accused. The accused asked her what she had decided about his love proposal and she said that she had forgotten to consider it. The accused then pulled PW2 to the bush and proceeded to have sexual intercourse with her. The experience, which she says was her first, was painful. Her skirt became wet and was stained with blood.

On return to the house, she told N of her ordeal. The following day, PW2 went to her parental home to report the incident to her father. Z then came to her parental home to apologise to PW2 for what had happened and said that she did not know that the accused would rape PW2. Zanele was also introduced to PW2's father. Whilst accompanying Z, the latter told PW2 that she had come with the accused who wanted to offer his apologies to her. PW2's father refused to speak to the accused. The complainant was then taken to hospital where she was attended by Dr.Benjani of Mankayane Hospital. She had however washed before she saw the doctor.

Dr. Benjani also testified and opined that although he examined PW2 after three days from the alleged assault, there was evidence of sexual intercourse, possibly rape. He further stated that during examination, he established that the hymen had been ruptured and the vaginal examination was painful. He further confirmed the evidence of trauma on PW2. No spermatozoa could be detected and this he attributed to the lapse of time between the alleged rape and the examination. PW2's father also gave evidence, which in large measure corroborated that of PW2. Sinqobile A was also called as a witness and she confirmed PW2's evidence as recorded above in material respects.

In cross-examination, the accused's story was that PW2 was his girl friend and that she had consented to being carnally known by the accused. This was disputed by PW2. In his sworn evidence in chief, the accused stated for the first time that it was PW2 who had wanted to see him and he, on meeting her, enquired why she wanted to see him and her response was that she just wanted to be with him.

I shall now deal with the arguments raised by both parties for and against the appeal.

(1) **Inherent improbability of Crown's case**

This Court, sitting as an Appeal Court is bound by the record of proceedings brought before it. The learned Magistrate had this to say about the evidence led before him at page 20 of the record:

> "The issue to be decided is whether complainant consented to sexual intercourse or not. Accused says the complainant was his girlfriend. Complainant denies this. The messenger, Zanele Mkhombe went to call the complainant and instead of telling the truth and say he (sic) was being called by the accused, her boyfriend, she said one Mfanasibili was calling her. The question is why had she to tell lies if at all accused was complainant's boyfriend?

Another question is why would the complainant go all the way to her parental home to report the matter if at all she had consented to sexual intercourse?

The last question is why would she come back crying if she had consented to sexual intercourse?

The answer to all these questions is only one: and that she had to go to report the matter to her father because she did not like and she did not agree to the intercourse. She came back crying because she had not consented to sexual intercourse.

> The Court believes the story by both complainant and S who observed complainant's condition immediately on her arrival in the room. It rejects the story by the accused that

complainant consented to sexual intercourse."

This correctly sums up the position in this matter. From the aforegoing, it is clear that the Crown proved the accused's guilt beyond a reasonable doubt. The accused's story was clearly fanciful and devoid of truth. In cross-examination by the Crown, the accused admitted that he assaulted the complainant and stated that he was wrong in so doing. He further admitted under cross-examination that he went to apologise to the complainant's father. He said that he was also wrong in so doing. These answers, given by the accused are clearly not consistent with his innocence; rather, they are consistent with his guilt. His story could not be regarded as reasonably possibly true. This ground of appeal ought to fail.

2. **Contradictions and lack of corroboration of Crown's case**

This is another ground that lacks substance. I do not find any contradictions in the Crown's case which are material and would cast doubt on the Crown's case. Not every contradiction should be regarded as material. The Crown's evidence in this case was good. If there were any blemishes, then they were minor and do not detract from the fact that it was proved beyond a reasonable doubt that the accused raped the complainant. I am also of the view that the Crown's case was sufficiently corroborated in respect of the crucial issues, viz. sexual consent, lack of consent and the identity of the assailant. I also find it apposite to refer to an excerpt from H.C. Nicholas, in his article entitled, "Credibility of Witnesses",1985, South African Law Journal, Vol.102, 32 at page 35, where the learned author reasoned as follows:

> "The argument is often advanced in court that, because witnesses' accounts disagree, they lack veracity, and considerable time is spent in establishing, and basing argument on contradictions, and discrepancies. Such argument is fallacious. It is the case that where two or more witnesses give consistent evidence that may be a strong and indeed decisive indication that their story is a credible one…But the converse is not true. It is not the case that lack of consistency between witnesses affords any basis for an adverse finding on their credibility. Where contradictory statements are made by different witnesses, obviously at least one of them is erroneous but one cannot, merely from the fact of the contradiction say which one. It follows that an argument based only on a list of contradictions between witnesses leads nowhere so far as veracity is concerned"

Based on the foregoing, I am of the view that this ground of appeal is liable to be dismissed

and it is so ordered.

3. **Misdirection by the Court in not believing the Accused's story**

As mentioned in 1.above, the accused's story was without doubt false. I repeat what I stated in 1.above as if specifically traversed herein. Exercising the highest degree of benevolence to the accused cannot lead to a conclusion that the Court misdirected itself in any manner whatsoever in reaching the verdict that it did. This ground is also lacking in substance and is hereby dismissed.

4. **Failure to explain the right to cross-examination by the Court**

It was contended on the accused's behalf that the Court committed an irregularity by not explaining the accused's rights to cross-examination or in failing to assist the accused in his cross-examination. Although one cannot find an entry confirming that the accused was informed of his rights to cross-examination, it is however clear that he was fully aware of these and he cross-examined all the witnesses save the doctor and his cross-examination was informed and directed at the nub of his defence. In view of the above, it was unnecessary to assist the accused as he was well aware of his defence and conducted his cross-examination admirably.

6. **Failure to allow accused to address the Court in mitigation on sentence**

The failure to lead evidence in mitigation does not vitiate the proceedings but places the Court in a position to consider the sentence afresh. See **MANGISI HLATSHWAKO AND OTHERS V THE KING CRIM. APP. 55/96** (unreported) by Dunn J. The position in this matter is that at page 18 of the record, line 12, the learned Magistrate asked the accused if he had anything to say in mitigation and the accused pleaded with the Magistrate to backdate the sentence to the 10th October, 1998.

It is therefore incorrect to say that the accused was not allowed to address the Court in mitigation. This ground of appeal lacks substance and is liable to be dismissed.

7. Severity of the sentence imposed.

The accused contends that he was a youthful offender and/or had no previous record of convictions. He contends further that the trial Court erred in law and in fact in placing emphasis on the ground that such cases are on the rise and thus being the position, a deterrent

sentence is required. Mr Magongo further urged the Court to backdate the sentence to the date of arrest.

The proper approach to be adopted by this Court sitting as an Appeal Court was pronounced with absolute clarity by the late Mahomed C.J. in **S v SHIKUNGA AND ANOTHER 2000 (1) SA 616 @ 631 F.I. (Nm SC).** His Lordship had this to say:-

> *"It is trite law that the issue of sentencing is one which rests discretion in the trial Court. An Appeal Court will only interfere with the exercise of this discretion*
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> *where it is felt that the sentence imposed is not a reasonable one or where the discretion has not been judiciously exercised. The circumstances in which a Court of Appeal will interfere with the sentence imposed by the trial Court are where the trial Court has misdirected itself on the facts or the law (**S v RABIE 1975 (4) SA.***
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> ***855 A);** or where the sentence that is imposed is one which is manifestly inappropriate and induces a sense of shock (**S v SNYDERS 1982 (2) SA 694 (A));** is such that a patent disparity exists between the sentence that was imposed and the*
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> sentence that the Court of Appeal would have imposed (***S v ABT 1975(3) SA** or where there is an under emphasis of the accused's personal circumstances (**S v MASEKO 1982 (1) SA 99 (A) at 102; S v COLLETT 1990 (1) SACR 465 A."***

I cannot find fault with the reasoning of the learned Magistrate in sentencing the accused to seven years imprisonment. The offence he committed was a serious one and which the Court *a quo* correctly considered was on the rise. Courts do and must consider the ubiquity of an offence for purposes of meting out a sentence that will serve as a deterrent, both individually and generally. I do not consider that there is a disparity between the sentence imposed and that which this Court would have imposed. It may successfully be argued in other quarters that the sentence is lenient regard being had to the assault you meted to the victim, together with the emotional trauma that she has and continues to undergo.

In conclusion, I can do no better than quote an excerpt from **S v RADEBE 1974 (4) SA 249 at 251 E-F** where Bekker J. stated as follows:

> *" This Court is only too conscious of its difficult task, when assessing punishment to balance as fairly as possible the scales of justice in the interests of the offender on*
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> *the one hand, and that of the community, which includes complainant, on the other hand. There comes a time when an inherently serious crime reaches proportions that the interests of the community should be accorded paramount importance and the interests of the offender be subservient thereto."*

These are the considerations that weighed heavily in the mind of the learned Magistrate and I dare say correctly. It was totally in order to render your interests and personal factors subservient to those of the community, regard also being had to the seriousness of the crime you committed. There is no reason for interfering with the sentence. Magistrates normally indicate on the record the fact that the sentence will not be backdated. This was not done *in casu.* This to us is indicative of the Magistrate's intention to backdate the sentence which was however not done. We consider the accused's age and the practice generally to backdate sentences, unless otherwise stated. We use our discretion to backdate the sentence to 11th October 1998, the date of arrest.

On the whole, I would dismiss the appeal against conviction and order that the appeal against sentence is successful only to the extent that the sentence be reckoned to run from the date of arrest.

T.S. MASUKU

JUDGE

I agree.

S.B. MAPHALALA
JUDGE.