THE HIGH COURT OF SWAZILAND

MBONGENI NDWANDWA

Vs

REX

Criminal Appeal Case No. 4/2002

Coram	MAPHALALA - J
	ANNANDALE – J
For the Appellant	IN PERSON
For the Crown	MRS M. DLAMINI

JUDGEMENT

(13/08/2002)

Maphalala J

The appellant who appeared in the court *a quo* with another, to whom I shall continue to refer to as “the accused”, was tried and convicted by His Worship P.M. Dlamini, Senior Magistrate, Shiselweni district of two counts as follows:

> “Count 1
>
> The accused are guilty of the offence of rape in that on or 3rd April 2000 at or near Sandleni area in the Shiselweni region the said accused each or both acting in common purpose did unlawfully and intentionally have sexual intercourse with A without her consent.

Count 2

Accused no. 1 is guilty of the offence of assault in that on or about 3rd April 2000 at or near Sandleni area in the Shiselweni region the said accused did unlawfully and intentionally assault B by hitting her with fists and with a straight stick".

In respect of accused no. 1 in the court *a quo* and who is the appellant before us the sentence is couched in the following terms:

> "Both counts taken as one. Accused is to serve a term of seven (7) years imprisonment with effect from 5th April 2000".

In respect of accused no. 2 in the court *a quo* he was sentenced to serve a term of one (1) year imprisonment with effect from the 4th April 2000. No appeal lies before us in respect of the second accused person in the court *a quo.*

The accused's appeal has been levelled against both conviction and sentence. The grounds of appeal are enumerated *ipsissima verba* below:

a) Conviction

a) The court *a quo* erred in fact and law when convicting the applicant on the charge that (sic) was not arrested for, charge of assault which was later attached to the rape charge.

b) The court *a quo* erred in fact and law when convicting the appellant for the rape without any convincing evidence given before court.

c) The court *a quo* erred in fact and in law when not considering the evidence given by the doctor's report that clears the court that the complainant had never fell (sic) into sexual intercourse that day and nothing was found to show that she had intercourse that day except a transmitted disease.

d) The court *a quo* erred in fact and in law when forwarding some insults to the applicant when pausing some questions to the third witness Mrs Roster B during the cross-examination thus proves that the court had long planned to convict the appellant without any distinct reason.

e) The court considered the evidence given by the complainant when denied that she is a lover to the appellant but so much surprising touchable evidence (photographs) was brought to the court by the appellant as proof asked by the court during cross-examination.

f) The court did not consider the in-corroboration (sic) of the evidence brought by the first, second and third witnesses which completely differs the story as a whole.

b) Sentence

The court *a quo* erred in fact and in law when passing a harsh sentence compared to the weight of in-convincing evidence brought before court.

The evidence led before the court *a quo* can be summarised as follows: The crown called five witnesses, PW1 B, who testified that she was cousin to the complainant. She together with one P acting on a certain report proceeded to where the accused person and the complainant were. She saw the accused beating up the complainant and when she tried to intervene she was also beaten by the accused. P left to fetch Mrs B for help. However, Mrs B could not help as the accused person continued to beat up the complainant. She told the court *a quo* that it was accused no. 2 who stopped the fight. They all walked off. The accused and the complainant were behind her. She went home where attempts were made to report the matter to the community police.

PW2 was A the complainant in this matter. She related at great length the sequence of events up to the time she was with the accused at accused no. 2's home where the alleged offence was committed. She recounted how the accused beat her up and this evidence was at all fours as that of PW1, her cousin. She described how the ordeal which started at the bus stop in the early hours of the morning culminated in the commission of the offence at accused no. 2's homestead.

PW3 was R, who was the grandmother to the complainant. She confirmed the evidence of PW1 and PW2 as regards the incidents of assault on the complainant and PW1 on the road that day. Later on she went to search for the complainant to no avail until the following day at 6.00am when complainant came back and related what had happened to her.

PW4 was J who stated that in the evening on the day in question the accused came with the complainant to his parental homestead. The accused asked for accused no. 2's house keys. During the night he heard the complainant crying out for help. He then came closer to the house where the accused and the complainant were. The complainant asked him to help her inform her grandmother that the accused had locked her up in that house. PW4 told the court *a quo* that he did not go to complainant's grandmother because the accused threatened to assault him if he dared help complainant in whatever manner.

The last crown witness called was PW5 Constable Zwane, the arresting officer. This witness

described how the accused produced and handed over to him a black cable which was identified by the complainant as the one used by the accused to beat her up.

The accused person in his defence made an un-sworn statement where amongst other things he told the court *a quo* that the complainant was his lover at the material time.

The accused called his uncle DW2 Bukhosi Ngwenya. On his evidence the court *a quo* heard that this witness was told by accused no. 1 that the complainant was his lover.

Accused no. 2 in his evidence gave a sworn statement where he denied participating in the commission of the rape. It would appear from the judgment of the Senior Magistrate that accused no. 2 was convicted of rape on the basis of being an accessory before the fact. The court *a quo* held that the fact that accused no. 2 provided the house to accused no. 1 where the rape occurred was sufficient to convict accused no. 2. We respectfully disagree with the learned Senior Magistrate in this regard. The evidence against accused no. 2 fell far short of justifying a conviction of rape in these circumstances.
Although accused no. 2 has not filed an appeal in this matter we are of the view that we are entitled to intervene under our powers of review to quash the conviction. The crown's counsel who appeared at the hearing of the appeal shares this view. In this regard it would be ordered that accused no. 2's conviction be set aside.

It now behoves me to address the grounds of appeal as raised by accused no. 1 *ad seriatim.*

(a) **Incorrect Charge**

The accused alleges that the court *a quo* erred in fact and law when convicting him on a charge that he was not arrested for, a charge of assault which was later joined with the rape charge. There is no merit in this ground of appeal as the accused in *casu* is charged with two counts, viz count 1 that of rape and count 2 that of assault of one B. The second count was sufficiently proved by the evidence of PW1 B and the complainant.

b) **No Sufficient Evidence led by the crown**

The appellant alleges that the court *a quo* erred in fact and in law when convicting him of rape without any convincing evidence given before court. In my view, there was overwhelming evidence against the accused person that he raped the complainant on that day. The evidence of PW1, the complainant, PW3 Mrs B and that of PW4 J corroborate each other in a number of material respects as to what transpired on that day. The evidence before the court *a quo* prove the rape beyond reasonable doubt and the conclusions drawn by the learned Senior Magistrate were entirely correct in for as they related to the accused person, now appellant.

The accused person in his defence gave an un-sworn statement where he introduced new matters which were not put to the crown witnesses. The learned Senior Magistrate was entitled to draw an adverse inference in the circumstances.

c) **Overlooking of doctor's report**

The accused alleges that the court *a quo* overlooked the doctor's report as it stated that the complainant had "never fell (sic) into sexual intercourse" that day and nothing was found to show that she had intercourse that day except a transmitted disease. Again, this attack is totally unjustified. The court relied in part on the doctor's observations which were consistent with the complaint reported by PW2. His conclusions are consistent with the complainant's and that suffices to lead the court to a finding that PW2's story regarding sexual intercourse is plausible and true.

The court *a quo* never erred in this regard and its approach and conclusions in this regard cannot be faulted.
This ground of appeal accordingly fails.

d) **Presiding officer's bias**

It is alleged that the learned Senior Magistrate exhibited signs of bias against the accused person, thus resulting in a miscarriage of justice. Such a conclusion is insupportable in regard to the record of proceedings. There is no evidence before us to suggest any impropriety whatsoever in the conduct of the proceedings by the learned Senior Magistrate.
This ground of appeal accordingly fails.

e) **The evidence of the photographs**

The accused alleges that the photographs which he brought to court were proof that he and the complainant were lovers. These photographs do not advance the accused's defence at all. Neither of the two (2) photographs showed any intimacy between the two. One photograph is that of the complainant posing against a green door. The other is that of the complainant with another girl.
This ground of appeal accordingly fails.

f) **No corroboration in the evidence of crown witnesses**

This ground of appeal is similar to (b) above and no further discussion is necessary as the reasons advanced therein applies *mutatis mutandis* in this ground of appeal.

Appeal on sentence

The accused person alleges that the court *a quo* erred in fact and in law when passing a harsh sentence compared to the weight of the "unconvincing evidence" brought before court. It is trite that this court sitting as a court of appeal the ambit of the court's jurisdiction in relation to sentence is relatively restricted. This is because the question of sentence, the appropriateness of it, what particular sentence should be passed, is primarily the responsibility of the trial court. On appeal it is clearly established that, in the absence of misdirection or irregularity, the court on appeal will only interfere if, as it is sometimes expressed, there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the court of appeal would itself have passed.

In the present case there is no irregularity nor misdirection worthy of such a censure. The only criticism that may be levelled against the learned Senior Magistrate is the rationale behind the sentence. The following appears at page 14 of the typed record:

> "In the case of accused no. 1 the two (2) counts will have to be taken as one for the purposed of sentence since the intention was one, to rape when he assaulted PW11".

However, this is not borne by the record which reflects the complainant as one B (PW1) not the complainant in count 2. The two events are different and the accused could not have had a single intention. The intent to rape was directed against the complainant in the rape charge. The intent to assault was directed against the complainant in the assault charge. Both the different types of intent as well as the persons against whom it was directed differ materially. It cannot be said that "the intention was one", therefore the sentences must be taken as one. To this extent the Magistrate misdirected himself. In our view a proper sentence in the circumstances would be 7 (seven) years for the crime of rape in count 1 and one (1) year in count 2. That the sentences to run concurrently backdated to the date of arrest as ordered by the Senior Magistrate in the court *a quo.*

In the result, I propose that the appeal against conviction be and is hereby dismissed. The appeal against sentence succeeds to the extent that for count 1 the sentence to be 7 (seven) years imprisonment and for count 2 to be 1 (one) year imprisonment backdated to the date of arrest. The sentences to run concurrently.

On review, the conviction and sentence of the second accused at the trial in the court *a quo* is ordered to be set aside. The conviction and sentence must be expunged from his criminal record.

<u>S.B. MAPHALALA</u>

JUDGE

I agree

J.P. ANNANDALE

JUDGE