Crim.Appeal Case No.40/02

In the matter between:

Kini Siyabonga Dlamini	**1st Appellant**
Fika Cyril Mavimbela	**2nd Appellant**

And

REX	**Respondent**

CORAM : BROWDE J.A.
BECK J.A.
ZIETSMAN J.A.

JUDGMENT

Zietsman J.A.

This is an application by the two applicants, to whom I shall refer as accused No.1 and accused No.2, for leave to appeal to this Court against their convictions and sentences in the Magistrates court on a charge of rape, their appeal to the High Court having been dismissed.

The two applicants were found guilty by the Principal Magistrate in the Magistrates court at Mbabane of raping Lindiwe Shongwe on 14th June 1999. They were each sentenced to 10 years imprisonment. After their appeal had been dismissed in the High Court they sought the leave of the High Court to appeal further to this Court, but that application was also dismissed. They now seek similar leave directly from this Court.

The two main Crown witnesses were the complainant and the witness Mduduzi Dlamini. The complainant was clearly raped on the night in question. Not only was she raped. She was also severely assaulted and left for dead at the place where she was raped. The medical evidence given by Dr Joven Jebio Ongone confirms the complainant's evidence of the rape and of the assault upon her.

The defence of the two applicants was a denial that they had been involved at all with the complainant.

The complainant and the witness Mduduzi Dlamini (PW3) described in evidence how

accused No. 2 seized some drinks from a certain Tengetile and then ran away. He was chased by the complainant and by PW 3. Accused No.2 suddenly stopped running and grabbed hold of the complainant. He was joined by accused No.1. Both accused then assaulted the complainant and raped her. Accused No.2 stabbed her with a knife and accused No.1 struck her with an axe. The violence of the assault upon her caused her to lose consciousness and the two accused (the present applicants) then left her, apparently under the impression that she was dead.

The witness Mduduzi Dlamini (PW 3) confirmed the evidence given by the complainant. He also chased after accused No.2 and he witnessed the rape and the assault upon the complainant. After the two applicants had left the complainant for dead and had run away PW 3 went to the complainant's assistance.

PW 3 had prior knowledge of the two applicants. He stated that he at one stage of his life stayed at Ntabamhlophe with his father and he got to know accused No.1 there. At the time of the trial he was staying at Qobonga where he got to know accused No.2. These allegations by him were not disputed. He positively identified the two applicants' as being the persons who attacked and raped the complainant.

The complainant identified accused No.1 by a defect he has to one of his eyes, and she identified accused No.2 by a scar on his face.

In their submissions to us the applicants alleged that they had not been given a fair trial in the Magistrates Court and that they had not been allowed to properly cross-examine the Crown witnesses. They also pointed to certain differences in the evidence of the complainant and of the witness PW 3 which they submitted were serious contradictions. The record indicates that the applicants' rights were explained to them and they did in fact cross-examine the witnesses for the Crown. The applicants alleged that the Crown witnesses had a grudge against them but thus was not put to the witnesses and the record does not bear this out.

The Magistrate was satisfied that the two applicants had been positively identified as the two men who had attacked and raped the complainant. There are certain conflicts in the evidence given by the complainant and the evidence given by PW 3 but despite these conflicts, which are not material, it appears to us that the case against the two applicants was overwhelming. We are accordingly not persuaded that the Magistrate erred in his finding that their guilt had been proved beyond all reasonable doubt.

The applicants also seek leave to appeal against their sentences.

The rape was of such a brutal nature that a sentence of 10 years imprisonment cannot be said to be excessive. However Mr Maseko for the Crown very properly drew out attention to the fact that the Principal Magistrate who heard the case exceeded his jurisdiction in sentencing the applicants to 10 years imprisonment. The limit of his jurisdiction in respect of punishment is 9 years imprisonment.

Although this is an application for leave to appeal we have treated it as both an application for leave to appeal and as an appeal, and we have allowed the applicants to argue the matter fully. The order which we intend to make is that the application for leave to appeal is dismissed save in respect of the sentences which are to be reduced to 9 years imprisonment.

In the result the convictions of both appellants are confirmed. Their sentences are however set aside and substituted by a sentence in each case of 9 years imprisonment, backdated to 29th June 1999.

N.W. ZIETSMAN J.A.

I agree

J. BROWDE J.A.

I agree

C.E.L. BECK J.A.

Delivered on this…….day of November 2002