

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

APPEAL CASE NO. 7/09

In the matter between:

SABELO NATHI MALAZA

APPELLANT

v

REX

RESPONDENT

CORAM

FOXCROFT JA
EBRAHIM JA
MASUKU AJA

FOR THE APPELLANT FOR
THE RESPONDENT

IN PERSON
MS. LOMVULA HLOPHE

JUDGMENT

[1] The appellant was convicted of rape in the Magistrate's Court sitting at Manzini and sentenced to a period of

seven years imprisonment, the sentence being backdated to 1 October 2007. He appealed to the High Court against both the conviction and the sentence.

[2] In the judgment of the High Court, Banda CJ, with Mabuza J concurring, accepted the evidence of the complainant that the appellant had dragged her to a graveyard which was 100 metres distant, threatening to stab her with an okapi knife if she shouted out; that he had proceeded to rape her repeatedly during the night, and that after he had finished he told her never to report this to anyone and "that if I reported the matter he would shoot me to death with a gun", and that he had released her at about 4 a.m. The complainant was heavily pregnant at the time and had delivered the child by the time she testified in the Magistrate's Court.

[3] The complainant's brother PW4 confirmed her evidence that she had visited her half-sister in the home of the appellant on the night of 29 September, 2007 and that he, PW4, was also spending the night there and had gone to sleep. In the morning, the complainant was no longer there. The police arrived and asked for Sabelo Malaza (the appellant). The appellant then misdirected them to another house. PW4 had then told the police that Sabelo Malaza was the appellant.

He was later found hiding under a bed and covered by a mattress in his mother's house. Of equal importance was PW4's evidence that earlier that morning, the appellant had told him that he would be arrested by the police as he had done something very bad "and he told me that he was very sorry to me for what he had done and he asked me to forgive him. When I asked him to tell me as to what he had done he could not tell me. I later learnt that my sister Catherine had been raped"

The appellant's mother confirmed in evidence that the police searched her house and found the appellant hiding under the bed. She also contradicted the evidence of the appellant that his girlfriend had come to see her sick child at his mother's house. The girl friend was not called by the appellant despite his evidence that he had spent the night with her. On the evidence before him, the Magistrate correctly convicted the appellant and imposed a sentence of seven years imprisonment. The High Court upheld the conviction and found, correctly in my view, that this sentence was neither wrong in principle nor manifestly harsh.

[5] Before this Court the appellant confined himself to written Heads of Argument which he had filed, and maintained that he had been given leave to appeal to this Court by the Court

a quo. Ms. Hlophe, for the Respondent had submitted that the appeal was not properly before this Court since the appellant had not complied with section 4 (2) (b) (ii) of the Court of Appeal Act 74/1954 which requires either the leave of the Court of Appeal or the certificate of the Judge **a quo.** Given time to produce proof of this leave to appeal, the appellant failed to provide any evidence that he had received a certificate from the learned Judge in the Court **a quo,** entitling him to appeal to this Court.

[6] Even if this matter were properly before this Court, I would not interfere with the conviction. The grounds advanced on appeal are yet again the paucity of the medical evidence, the absence in Court of the knife allegedly used and the jacket worn by the complainant on the night of the attack, and the fact that the complainant's mother gave evidence at home. These specious grounds have been raised before and rightly rejected. As for the last point, the magistrate had found that the witness was critically ill and could not travel to court. The suggestion in the appellant's written Heads that the witness had lied about being ill and bedridden because she was afraid to "appear at court" is without any foundation. When the court went to her, she gave her evidence. It was not even suggested to her that she had lied

about her illness and bedridden state, and she denied framing a charge against the appellant. She also

confirmed that the appellant had hidden from the police, and that she was the one who had "fetched the police". The appeal against conviction is entirely without merit and is dismissed.

[7] As for sentence, the punishment imposed was, if anything, on the lenient side.

See: **Sam du Pont v. Rex**, Criminal Appeal no. 4/2008.

J. Tembe v. Rex, Criminal Appeal no. 18/2008. In the first of these cases, this Court, in dealing with a sustained and brutal sexual attack upon a ten year old girl, upheld a sentence of 13 years imprisonment. In the latter case referred to above a sentence of 12 years imprisonment for the violent rape on one occasion of a nine year old girl was confirmed. There too a knife was produced to subdue the complainant. The judgment reiterated that it had consistently been held that courts should not act upon any rigid rule that corroboration must always exist before a child's evidence is accepted.

In my view, the appellant was fortunate in receiving a sentence of only 7 years imprisonment in this case. The appeal against conviction and sentence is accordingly dismissed.

J.G. FOXCROFT

JUDGE OF APPEAL

I agree

A.M. EBRAHIM

JUDGE OF APPEAL

I agree

T.S. MASUKU

ACTING JUDGE OF APPEAL

JUDGMENT DELIVERED IN OPEN COURT ON 20th NOVEMBER, 2009