IN THE HIGH COURT OF SWAZILAND

CRIM. APPEAL NO.32/99

IN THE MATTER BETWEEN:

ELIAS MALINGA : APPELLANT

V

REX : RESPONDENT

CORAM : MASCKU J.

: MATSEBULA J.

FOR APPELLANT : IN PERSON

FOR RESPONDENT : MISS S. W. NDERI

JUDGEMENT 23/9/1999

The Appellant (to whom I shall continue to refer to as "the accused") was found guilty of assault with intent to rape by the Magistrate sitting at Manzini and was on the 25 February, 1999 sentenced to two (2) years imprisonment without the option of a fine. The sentence was backdated to the 3rd July, 1998, presumably the date of the accused's arrest..

Initially, the accused person had been charged with the crime of rape it being alleged that on the 2nd February, 1998 and at Dvokolwako area, he wrongfully and unlawfully and intentionally had unlawful carnal connection with Siphilisiwe Dlamini, a minor female of ten (10) years. No aggravating circumstances were alleged by the Crown, notwithstanding the child's age, in particular.

The Crown's evidence, briefly stated, is chronicled thus:

The complainant, who lived with her parents stated that the accused used to be their neighbour before being expelled by a Dlamini family for misconduct without any further ceremony. In the light of the fact that the accused was known by the complainant's mother (Irene Maseko), the latter was moved with compassion and allowed the accused to live with them.

On the 2nd February, 1998, the complainant (PW1) returned home from school at around 16h00 and found her uncle Majuba Matola at home. The latter gave PW 1 money to buy some food. Immediately after PW 1 finished her food thereafter, the accused arrived and stated to Matola that there was free liquor available at a Dlamini homestead. He suggested that Matola should proceed to the Dlamini homestead to imbibe the liquor and that the accused would join him later, as he wanted to have a bath.

PW 1 then went to a room used as a kitchen to collect dirty kitchen utensils for purposes of washing them and she was followed by the accused. The accused locked the door behind him, put the key in his pocket and accosted the complainant. He got hold of her, threw her on the bed and started undressing her. He forcefully removed her panties, pressed her hard against the bed and attempted to open wide her legs. The complainant raised a hue and cry but there was nobody in the vicinity as Matola had already left. PW1 struggled to keep her legs together and he succeeded in getting on top of her. He took out his penis and tried inserting it into her vagina without success. He ended up resting his penis on her thighs and made some up and down movements, which resulted in him ejaculating on her thighs and some semen fell onto the floor as he stood up.

The accused then took a basin with water to bathe himself. PW 1 sat for a while crying and wiped away the semen from her skirt and thighs. She then proceeded to wash the dishes and the accused

asked her not to report the incident and gave her El.00 to silence her, but she refused to take it. The money was left on the kitchen table.

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At around 21h00 PW 2, Irene Maseko, PW l's mother returned from Manzini where she had gone to do some shopping and PW 1 immediately reported what the accused had done.

PW 2, called PW 1 's father, Matola, a boy named Nhlanhla Masinga and the accused and informed them of what PW 1 had said. The accused asked for forgiveness, A Mr Joseph Makhundu Mkhonta was approached to ferry PW 1 to the Dvokolwako Clinic but they found that it was already closed. They then went via Mliba Police Station and reported the matter to the Police. Mkhonta also confirmed that the accused begged for forgiveness.

The accused who was tied both hands and feet, after attempting to escape, was then arrested by the Police and charged with rape. This was after the accused had been cautioned according to the Judge's Rules.

In cross examination of the Crown's witnesses, very little of any significance was raised. The accused put to PW 1 that the El.00 was for liquor which the accused bought from PW 1. This was denied by PW 1, who stated that no liquor was sold at her home on the day in question. The accused also denied to PW 2 that he had asked for forgiveness and this was confirmed by Mkhonta PW 3 in cross examination.

The medical report was handed in in terms of the provisions of Section 221 of the Criminal Procedure and Evidence Act and the accused raised no objections thereto. The report stated the PW 1 was still a virgin and that there were no visible bruises or abrasions. The crown then closed its case.

The accused chose to give testimony under oath in which he denied committing the offence. He stated that he had been drinking with Matola and PW l's father when they were called into the house. PW 2 then confronted him about the rape, which he denied. The El.00 was shown to the accused person and he responded that it was for liquor that he purchased. He was then taken to Mkhonta for conveyance to the Police station, where he denied the offence.

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The accused called one witness, whose evidence did not advance the accused's case at all The witness was to testify that the accused had indeed given PW 1 the El.00 for the liquor he purchased. This witness did not confirm that, save to state that he never spent time with the accused on the day in question.

The Crown then made application in terms of the provisions of Section 154 of the Act for the amendment of the charge sheet and the accused did not object thereto. The charge was altered from rape to attempted rape, as the Crown realised that from the evidence led penetration had not bee proved. The Learned Magistrate then, after furnishing reasons found the accused guilty of assault with intent to commit rape and accordingly sentenced the accused person to two years imprisonment, without the option of a fine.

The accused noted an appeal which appears to be against both conviction and sentence. I pose to state that the notice of appeal is dated 23rd March, 1999 whereas sentence was meted on the 25th February, 1999. This appeal was clearly noted out of time.

We mero motu called upon the accused to give reasons for the delay but he was unable. We however decided to condone the late filing of the notice in view of submissions by Miss Nderi to the effect that there is usually a delay in the typing of the letters of appeal by the Correctional Services Department. We further noted and held in the accused favour, that the record does not reflect that the accused was advised of his rights to appeal.

By this condonation, we have not thereby created a precedent. Appellants must understand that they are bound by the provisions and time limits relating to appeal and that in cases where they fail to note

their appeal timeously, an application for condonation, fully setting out the reasons for the delay must be filed. Condonation will not be granted as a matter of course and in the absence of cogent reasons.

The grounds of appeal are stated herein below:-

(1) The case was a fabrication against appellant as it was reported at the

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Police Station as a Rape but the Doctor's findings were negative.

(2) The appellant learnt very late that he was not to defend Rape allegations but a lesser charge of abduction, thus could not prepare his defence according to the latter charge.
(3) The complainant's mother is the source of the allegations as she was intending to make me work for her without pay and when I refused, she made the accusations of Rape.
(4) The Complainant's mother was further infuriated by the fact that I was residing and eating at her house and my refusal to work for her caused a rift between us, thus the false allegations.
(5) The learned magistrate failed to read between the lines about this highly orchestrated plot by the mother of the ten (10) year old that she was more concerned about the blankets I was using, the meals she offered appellant and the shelter the appellant was offered for the three weeks he spent at her house, as a result she felt abrieved by appellant's refusal to engage himself in a job he was not interested in, thus she made the false allegations of Rape.
(6) The magistrate was overwhelmed by the fact that she is a female also and believed at last that appellant did in fact abduct the complainant, but failed to look at the personal circumstances of the appellant namely, that he did not commit the offence, that he is the father of five (5) children who are far away in Mozambique and a wife who fill (sic) depended on him as he was looking for employment opportunities in Swaziland.

It is our considered view that the appeal is doomed to fail for the reasons that follow herein below. We shall deal with the accused's grounds of appeal seriatim, beginning with ground 1.
(1) that the case was fabrication against the appellant as it was reported at the

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Police Station as a rape but the Doctor's finding were negative.

The obvious answer to this ground is the application made by the Crown in terms of Section 154 for the amendment of the charge to attempted rape. It became clear from the complainant's testimony that peraetration had not occured and this was confirmed by the medical report. The accused, being unrepresented may not have understood the effect of the amendment and this was apparent even during the appeal. There is therefor no merit in this ground of appeal. The Courts must however do their level best, to explain to accused persons, especially if unrepresented, the various stages of the trial and especially unexpected developments like amendment of the charge and the handing in of documents like the medical report, without leading the Doctor's evidence.

(2) As indicated in (1) above, there is no merit in this ground because the amended charge is a competent verdict which the Court could have arrived at even without the amendment. The amended charge was less serious and it cannot be said that the accused was in anyway prejudiced regarding his defence. I must however mention that the amended charge was not abduction as alleged by the accused.

If it was the accused's view that he did not have an opportunity to prepare his defence, which is unsupportible, in view of the finding in the foregoing paragraph, he could have asked for a postponement but he did not He agreed to proceed with the matter. He cannot be heard to complain now, especially because he suffered no prejudice as a result of the amendment, which could not be cured by a postponement.

(3) (4) and (5)

I will deal with these grounds jointly. It is alleged that PW 2 concocted the charge against the accused because she intended the accused to work for her without pay and he refused to work. It is further alleged that because of the complainant's refusal, to work, a chasm between them developed, resulting in the false charges against the accused.

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It was however not put by the accused to PW 2 that she had fabricated the story for the reasons alleged. Had it been put, the Court a quo could have seen her reaction thereto and formed an impression on her demeanour in this regard. There is a long line of authority relating to the defence's case being put to Crown witnesses and the result of the failure to do so. See - S v P 1974 (1) SA 581 (R. A. D.) and R v DOMINIC MNGOMEZULU & OTHERS Case No.94/90 (unreported).

It is also worthy of note that other than PW 2, there is the evidence of PW 3 Mkhonta, who is an independent witness, who confirmed that the accused pleaded for forgiveness. This evidence confirms PW 2 and PW 1's story. PW 3 had nothing to gain by testifying against the accused.

No reason is suggested by the accused as to why PW 1 would have had to concoct rape charges against him if her intention was to make the accused work. She could have easily expelled the accused unceremoniously.

One should also not lose sight of the issue relating to the El.00, which the accused explains otherwise. As correctly observed by Miss Nderi, it puts the used on the spot and tends to confirm the Crown's case. Furthermore, no evidence was led to confirm the accused's story regarding his explanation for his giving the El.00 to the complainant. The Crown's evidence was found to have been credible by the learned Magistrate and we have no basis to differ. The accused also failed to put it to PW 2 that the El.00 was for liquor and not to silence PW 1.
On the whole, we are of the view that there is no reason to interfere with the conviction of the accused.

(6) That Magistrate was overwhelmed by the fact that the accused abducted the complainant because the Magistrate was also a female.

There is no merit in this ground at all. The Court knows no gender, race, colour or creed. There is nothing to indicate that the Learned Magistrate's gender in anyway clouded or interfered with her independence and detached handling of the matter. This ground of appeal must also fail. It is important to mention that no attacks of this

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nature on the Magistrates or other presiding officers should be made in the future, unless that can be clearly demonstrated from the contents of the record. It denigrates the authority of the Court to suggest partiality where none can be shown.

Regarding the sentence, it is my considered view that the sentence was fair regard being had to the accused's interests and there is therefor no reason to interfere with it. My view however is that the accused should have been convicted of the more serious crime of attempted rape, which was proved beyond reasonable doubt by the Crown. The accused must count himself fortunate to have been convicted of the less serious crime of assault with intent to commit rape.

On the whole, I would dismiss the appeal.

T. S. MASUKU

JUDGE

I agree

J. M. MATSEBULA

JUDGE