IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Criminal Appeal No. 19/2004

In the appeal of

Malcolm Mbongiseni Dlamini Appellant

vs

The King Respondent

Coram J.P. Annandale, ACJ
S.B. Maphalala, J

For the Appellant Mr. J. Maseko of Ntiwane & Associates

For the Respondent Mr. Makhanya, DPP's Chambers

JUDGMENT

15 December, 2005

[1] This is an appeal originating from the Magistrate's court at Manzini whereat the appellant was convicted of the crime of rape and sentenced to seven years imprisonment. He appeals against both his conviction and sentence.

[2] The outcome of his appeal was unduly long delayed, following finalisation of his trial on 26 September 2003, due to various factors. According to the papers before us, the certified record of proceedings dates the sentence as 26 September 2003, whereas the notice of appeal precedes it, being filed on the 9th September 2003. The warrant of committal, referred to in the index of the record, is conspicuously missing. The subordinate court coversheet of the record does not reflect the dates of either the conviction or sentence. The date of the judgment is presumably

the 26th August 2003, as reflected on the record, with sentence apparently imposed the same day.

[2] Whether the appeal was timeously noted or not was not argued before us. Consequently, the issue of condonation for late filing of the appeal was also not considered by us and we proceeded without further ado.

[3] The appeal was initially enrolled for hearing on the 7th October 2004 by Matsebula J and Shabangu AJ. For unrecorded reasons it was postponed for a week, on which date the late Shabangu AJ was not present at court, resulting in a further postponement. It was eventually heard on the 21st October 2004, on which date judgment was reserved. Some months went by without a judgment being delivered by the court, which I understand by the surviving judge to have been a dissent of opinion, wherefore no judgment was given at all.

[4] Almost a year later, in August 2005, this was made known by my learned brother Matsebula, J, with the result that the matter was heard *de novo* before this court. Our judgment is unanimous and we agree for the following reasons.

[5] The appellant was charged of having raped the complainant on new year's day in 2003. He conducted his own defence at the trial, having been informed of his rights to legal representation, and tendered a plea of not guilty. Having heard the evidence, the learned magistrate duly convicted him and imposed seven years imprisonment, backdated to the date of his arrest. This backdating of sentences had become a common and sagacious practice, due to long periods of incarceration prior to finalisation of trials, further due to restrictive bail legislation that was applicable at the time.

[6] The appellant comes to this court on the ground that the court *a quo* erred in law and fact by convicting him despite "insufficient cogent and reliable evidence", which evidence "lacked corroboration in material respects". It is an appeal purely based on factual findings by the court *a quo.*

[7] The essence of the appellant's defence is that although carnal knowledge is acceded to, the intercourse was consensual and neither forcibly imposed upon the complainant nor that it was a last minute change of her attitude. His version is that it was only much later, well after the events, that the complainant, jilted by her other lover, decided to lay false charges, as is said to be evidenced by her later efforts to have the charge withdrawn.

[8] The evidence on which the learned magistrate relied upon to enter a conviction was indeed cogent, reliable and corroborated, otherwise than as argued on behalf of the appellant.

[9] In the court *a quo,* the prosecution relied on the evidence of N M, the complainant, also that of Bongiwe Tsabedze, a superfluous witness who took the matter no further, the investigating police officer, the medical doctor who examined the complainant, about whose coming to court on being so ordered a question hangs, and lastly one Nellie Dludlu to whom the first report of the matter was made.

[10] The complainant related her stormy past relationship with the accused, an affair marked by repeated violence against herself. On Christmas eve, he called her and arranged to meet her again, apparently to rebuild past bridges that were burned by the characteristic violence of their past. As soon as they got together again, after some two months of segregation, the violence erupted again. He assaulted her by slapping her and kicking her baggage.

[11] Her former boyfriend apparently repented again, obtaining the forgiveness of her parents in the process.

Nevertheless, his advances continued and culminated in her accession to an invitation by him to go to a new year's party. He would take her there in his friend's car, in the company of others, to celebrate in safety.

[12] Instead of meeting him as requested, an envoy of his caused her to fall for a ruse and she ended up again being assaulted by her former lover at a bridge over the Usuthu River.

[13] Continuing his past mode of conduct, profusely apologising and wanting to "make up", he persuaded her to follow him to his grandfather's house. Once there, and being cold, he asked her to take off her dress and offered her his tracksuit for warmth, but she declined to undress, only using the upper half of his tracksuit. She then persuaded him to take her home.

[14] On her arrival at home, she narrated her ordeal to her brother, who told her in turn that he had already been told by bystanders how she was pulled towards the river by the accused and that he had been to his home to make enquiries about the report. Her parents then went to the accused's home to discuss the matter, resulting in her going with him to some games the next day, accompanied by two chaperones.

[15] All went well until the early evening of new year's day when the accused boasted about his ability to beat her despite the presence of others. It culminated in her being assaulted by the accused, who thereafter pulled her away, taking his prize to his lair.

[16] Once at his home, alone with the victim he bragged about "disciplining a prostitute" and when she rejected his repeated but

unwelcomed advances, he pounced upon the complainant. She refused to undress and he did it for her, whereafter he forced himself upon her.

[17] She further narrated her ordeal suffered during the ensuing night, with the accused having not one but a further two rounds of sexual intercourse with her. She testified that she told him that she would lay a charge of rape against him, upon which he replied that he "would get food in prison". She vividly described how he forcibly penetrated her while asking her if she did not realise that he actually loved her. In the early morning hours she tried but failed to sneak out of the door, and upon being confronted, suffered the sexual humiliation for the night.

pi8] She stated that by then her clothes were torn by the accused. Miraculously, she was allowed to leave his house, despite telling the accused of her intention to lay a charge against him.

[19] She went to Nelly Dludlu, her sister in law, and reported her crisis. Somehow, she acceded to first go to the mother of the accused before reporting her nightmare to the police. She told his mother that she would not relent and forgive the trespasses against her, from where she called the police who met her at the telephone.

[20] From there, the police went out, brought the accused to her and she identified a baton which he used to assault her with. She was then taken to a doctor for medical examination, after laying a charge against the accused. In court, she related her evidence, explicitly the absence of consent, and identified her clothes worn at the time as being torn by the accused.

[21] Subjected to lengthy cross examination, she steadfastly stuck to her guns, denying any way in which she would have agreed to willingly have sexual intercourse with the accused. Allegations of liquor abuse were flung at her, but the issue of him being a jilted

lover was the main thrust of his attack. She fully agreed that he was entitled to feel aggrieved due to being jettisoned by her but his unwelcome and forced advances, culminating in sexual intercourse, was vehemently and repeatedly disavowed as being without her consent. Furthermore, the injuries she suffered during her ordeal, resulting in her clothes being torn by the accused, was said to be a way in which the accused's version of consentual intercourse was attempted to be forced upon her.

[22] Her demeanour and candid expression seems to have impressed the learned trial magistrate. In his judgment, he makes no adverse remarks upon her evidence, which he accepted in full, contrary to that of the accused, who gave a totally different angle of the manner in which intercourse occurred. The court *a quo* found it incongruous that the complainant reported her ordeal at the first opportunity to Nellie Dludlu, showing her the signs of assault on her battered body, complaining about having been subjected to forced sexual intercourse, should it have been a belated afterthought as put to her by the accused. It is this witness who tried to settle the matter by calling for a peacemaking meeting between the mother of the accused and the complainant. When it failed to materialise, the complainant proceeded to call the police forthwith, stating her complaint. Acting on her call for help, the police came to her belated rescue. The complainant held fast to her complaint of having been forced to submit herself to the accused, a man who repeatedly used force and violence to cajole her into submission.

[23] The two police officers who attended to her likewise testified about the injuries noted on the victim's hand and thigh and her torn clothes.

[24] The doctor who examined the complainant recorded his findings on a standard form which is given to him by the police. Although the criminal code allows for it being admitted on mere production

by the prosecution, rendering it *prima facie* evidence of whatever is stated in it, the court disallowed it on the basis that the accused is unrepresented.

[25] Section 221 of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938) reads that:-

> "*221 In any trial in a magistrate's court a report signed by a person stated therein to be a duly qualified medical practitioner in regard to any injury or the state of mind or condition of body of any person ... shall be* prima facie *evidence that such report is the report of the practitioner whose name appears thereon and of the contents of such report.*
>
> *Provided that the court may of its own motion or on the application of the prosecution or the accused require the attendance of the person who signed such report.*"

[26] From the record of proceedings, neither the prosecution nor the accused applied to have the examining doctor come to court for *viva voce* evidence, to be examined about the report he wrote. The court exercised its discretion to do so, albeit for no other reason than that the accused was unrepresented.

[27] This is not a requirement in law, not being substantiated by anything recorded by the court. The court *a quo* cannot summarily be faulted to exercise its discretion in the manner in which it did, but the record does not substantiate any reason for doing so, apart from the fact that the accused was unrepresented.

[28] A fully comprehensive explanation to undefended accused persons about the admissibility requirements, evidentiary value and other facets of such reports may well result in less inroads

being made upon the speedy resolution of criminal trials as well as the need for overburdened medical practitioners to leave their much needed and understaffed medical posts to come to court for perfunctory repetition of what has already been recorded in their medical examination reports. The criminal code also makes provision for timeous discovery of such reports and related procedures, further, in the absence of such doctors from the Kingdom or posthumously, to provide for its admission. Time, effort, expenses and unnecessary evidence can be avoided by a proper application of statutory provisions for such evidence to be admitted.

[29] In the present matter, no prejudice was occasioned to the accused and the point was not argued against the appellant either.

[30] In the event, the doctor testified that he found signs of recent sexual activity, as is common cause. He further stated that her genitalia was indicative of sexual assault, manifesting in a painful examination. He further noted bruises on her skin, on her buttocks and right hand. He thought the recent intercourse to have been nonconsensual due to the bruises on her body but could not also determine it from the state of her private parts.

[31] The appellant's counsel argued that the complainant made up a story of rape due of problems she foresaw in explaining away why she spent the night at the protractor's house, also that she was at the time involved with a new lover.

[32] There is no substance in this argument. The conduct of the accused person is in total consonance with the evidence of the complainant. The use of violence and force was evident from her own evidence, corroborated by her friend to whom she reported the incident as well as the evidence of the medical doctor. There is no room for the suggestion that she complained about being raped to be an afterthought, a figment of her imagination to absolve her from

providing an explanation for a night away from home or to bamboozle a new lover.

[33] The complainant's evidence, which was correctly accepted by the trial court, is straight and to the point. She detailed previous advances and incidents of violence by the accused, also how she fell for him again on the night in question. He knew about her abhorration of violence yet her disposition to reconcile time and again. She knew about it too, yet irrationally again acceding to a further interlude on new year's day. Alcohol may have played its condescending role yet again, but she clearly made it understood that she does not want to sleep with her former lover.

[34] The argument that she wanted to hide away the night she spent with her former lover, loses sight of the reality of events. She did make timeous arrangements with her family as to where she would be going for the night - a party somewhere else than the bed of the accused. Had she not been victimised, she could have returned home, declaring herself to have done what was expected of her, as apparently her parents supported the rekindling of fires with her former lover. She also could have explained her lateness of arrival to her new boyfriend, by whatever avenue open to her imagination. Yet, she reported her ordeal to a friend early in the morning, resulting in her agreeing to see the mother of the accused to try and work out a potential way out of his predicament.

[35] When his mother failed to cooperate, being "too busy", she continued on her quest for justice to be done to her. She called the police and laid a charge.

[36] The final argument of the appellant is that she belatedly tried to have charges against him withdrawn. This she denied not only with alacrity and persuasion, but also it transpired that the mother of the accused misrepresented herself to both the

prosecutor and the police as his grandmother, not mother. The complainant did not seek to have the matter withdrawn, as argued. What she did was to accompany his mother to the prosecutor and police, but no more. She would not agree to a suggestion put to her by the accused that she did not file a valid and true complaint against him.

[37] The physical harm that was inflicted on her, undenied by the accused, also does not auger well with a defence of voluntarily accession to intercourse.

[38] The intercourse was preceded with real and actual assaults by the accused, repeatedly so. To argue that it had nothing to do with her complaint about being raped, raising it as an afterthought to aggravate her charge and to conceal their illicit interlude from her new lover and her parents, cannot be sustained.

[39] The accused levelled a last and lame-hearted attack on the complainant's evidence by stating that he withdrew his sexual organ from hers when she asked him to do so because of the discomfort she suffered at the time. Whether he did so to tie in his evidence with the physical situation as described by the doctor, a defective septum that disallowed full penetration, or whether he wanted to demonstrate his willingness to oblige her wishes, the trial magistrate correctly rejected it. He did not put this defence to her as being one indicative of an absence of intent to rape her. His intentions were overtly manifested in his misbehaviour from the time they met, when he started with a repetition of his demeaning behaviour by yet again assaulting her, culminating the next morning when he finally and for the third time forced himself upon her.

[40] It is for these reasons why the factual findings of the court *a quo* cannot be set aside on the basis as argued before us. I propose that the appeal on the merits be dismissed.

[41] Wisely, counsel for the appellant abandoned the appeal against sentence. Based on what the accused did to the complainant, assaulting her and raping her three times during the night when he forced her to remain in his house, should well have resulted in a sentence of more than just seven years imprisonment.

[42] The crown did not file a cross appeal on sentence, to seek it to be substituted with a more appropriate sentence, with some years of imprisonment added to it. Quite possibly, regard was being had to the limited jurisdiction of the court *a quo,* or for any other reason. We therefore did not consider it appropriate to interfere *mero motu* with the sentence on appeal and it does not fall into any of the recognised categories that justifies it to be done.

[43] In the event, the conviction and sentence of the accused which he brought on appeal to this court stands to be dismissed. It is so ordered.

J.P. ANNADALE, ACJ

I AGREE

S.B. MAPHALALA, J