IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Criminal Appeal No. 13/2004

In the Appeal of

CALVIN LINDA MAGONGO

versus

THE KING

Coram

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

For the Appellant: In Person
For Respondent: Mr. S. Fakudze

JUDGMENT

26 APRIL 2006

[1] This appeal has a long and unfortunate history of undue delay. As far back as December 2003, the appellant was convicted of rape and sentenced to seven years imprisonment in the magistrate's court at Big Bend. Soon thereafter, about just out of time, he noted an appeal against both conviction and sentence.

2] Eventually, after lapse of some eight months, the appellant appeared for hearing of his matter. He expressed concerns about the record, which caused a further delay. Certain psychiatric reports, at subsequent dates, compounded the issue. Furthermore, the court which sat on the appeal could not reach consensus about the outcome of the appeal but before a split decision by the two members of the court could be handed down, one of the judges died.

[3] Further delays eventually were brought to a halt in February this year when a reconstituted court heard the matter and we are *ad idem* about the final outcome.

[4] A disconcerting aspect that came to the fore was the apparent failure by the learned trial magistrate to appraise himself of the proceedings prior to the hearing at which he presided and the outcome of which is challenged on appeal.

[5] Initially, the accused was indicted on charges of rape and assault as is set out in the record of proceedings of the court *a quo,* marked as "Rider A" (at page 4 of the record).

He pleaded guilty before Magistrate Gumedze, on both counts of rape and assault on the 2nd April 2003. Thereafter, the matter was postponed for trial, which for some unknown reason did not take place on the 14th May 2003, and was followed by numerous other postponements. It does not appear from the record that there was good cause to delay the trial of a man who pleaded guilty for such an inordinately long time. Warranted delays and reasons for postponements must be succinctly stated by judicial officers.

[6] Eventually, on the 29th October 2003, following the first appearance of the accused in December the previous year, he now appeared before a different Magistrate, Mr. Magagula, who inexplicably required the accused to plead yet again, but this time, on quite a different charge. Firstly, the assault charge inexplicably disappeared and the rape charge, though referring to the same incident, was now alleged to be accompanied by aggravating

factors, as per the dictates of Section 185 bis of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938).

[7] At the hearing of the appeal, this axiomatic duplication was extensively sought to be canvassed by the court. Very little help and assistance was offered by the learned magistrate'. Despite causing a delay in the hearing of the appeal, to obtain his explanation for the anomaly, he did not deem it worth his while to respond. When again required to do so, the Clerk of Court filed the following, on his behalf: -

> "*...he answered and said that he asked the accused if he still stood on his previous plea and that is when the accused changed his plea. He promised to reply to your directive but did not and has since returned to University in the Eastern Cape.*"

[8] This is wholly unsatisfactory of a magistrate. He makes a serious error, apparently refuses or neglects to reply to a querie on appeal, then fails to comprehend the importance of it and gives an answer that does not accord with the facts as he recorded it. At best, one could only hope that he learns some law at the University he is reported to attend, as well as how to act on directives from the High Court.

[9] This court, sitting as a Court of Appeal, gave consideration to remitting the matter to the magistrates court to be properly heard, setting aside the irregular proceeding of Mr. Magagula. However, we were convinced not to do so, since it would jeopardise the accused, causing much more delay in finality of the outcome. Yet, he has received no judgment to an assault charge to

which he pleaded and faced a longer sentence to the charge he was irregularly required to plead to again.

[10] Under the circumstances, the court decided to quash the assault charge and to determine the appeal, on the evidence, but to do so in light of the first rape charge, as was pleaded to before magistrate Gumedze. The accused would otherwise be disadvantaged if he were to be judged on the second rape charge, alleged to be with aggravating factors. This is highly unusual and should not readily be followed as precedent, but it is the best practical solution to the present circumstances.

[11] I now turn to deal with a further aspect that caused another delay in this appeal, namely a history of mental illness. Somehow, for unrecorded reasons, reports by Dr. Ndlangamandla of the National Psychiatric Hospital came to be placed before us. The first report states the appellant to be diagnosed with a depressive disorder, aggravated by stress, also that sometimes he has suicidal "ideation". He continues to say that the patient is treatable and that he is on appropriate treatment, not overtly psychotic but in need of care, control and treatment in an appropriate institution.

[12] The second report is in similar vein, stating the appellant to be suffering from "Depressive Disorder" and "Stress Disorder secondary to psychosocial stress". Also, that he shows features of depression of late, anger and violence. Currently, he is "fine apsychotic and eu1±iyrriic and fit to continue trial".

[13] No issue was made at either the trial *a quo* or at the hearing of the appeal concerning a possible defence of insanity or that he was not fit to stand trial. The record

reflects no indication that the trial court was made aware of any possible mental incapacity. Both psychiatric reports were filed long after the appellant was sentenced.

[14] For all practical purposes applicable to the appeal, we place no further regard to these reports other than taking mere cognisance of it.

[15] I now turn to the merits of the appeal.

[16] In his notice of appeal, it is stated that the court *a quo* erred in law and fact by not holding that all witnesses wilfully set out to misinform the court regarding their "experience".

[17] Further, that it was not proven beyond reasonable doubt that spermatozoa was found in the complainant's private parts, also alleging a misdirection in acceptance of the evidence by witnesses who were intoxicated on the day in question.

[18] It is also held out to be the case that the appellant was prevented from asking questions of "great importance".

[19] Finally, this all is said to have culminated in a wrong conviction.

[20] He also has a complaint of the non-backdating of his sentence, having spent a year in custody prior to being sentenced.

[21] The crown opposes each of these grounds of appeal.

[22] The brief facts of the matter can be summarised as

being that the complainant testified that on the date in question an altercation between her "husband" and the accused resulted in the former taking to his heels after being threatened by the accused, who drew a knife. As she also tried to get away, the accused hit her and she fell down, after which he kicked her. Two other men who were with her then also ran away. The accused then continued to brutally kick her, then ordering her to get up and go with him.

[23] He took her to a derelict bus. She again tried to escape but failed. Inside the bus he ordered her to strip off her clothes and he then had penetrative intercourse with her, very much against her will.

[24] Thereafter, he released her and the police found her inside a house. She said that she knew the accused from sight, having seen him before at a shebeen, but that he had not made any previous advances towards her, nor did they quarrel in the past.

[25] She was then taken for a medical examination, treated and discharged.

[26] She denied suggestions by the accused of a former relationship and confirmed that he used a knife to first chase away her "husband" and thereafter the other two men. She also denied various suggestions of past moments shared together or of an inclandestine relationship with the accused, especially that she consented to the intercourse she now complains about. He denied having had intercourse with her on the day in issue since he "had injuries", in stark contrast to a previous question by him when he told her that they were lovers, which is why she did not raise an alarm and that she "had

consented to the sexual intercourse".

[27] This crucial self-contradiction by the accused person adversely impacts on his own credibility. This denial and admission is followed up by his own words when he addressed the court in mitigation and said that he "*did not mean to do what happened but I was angered by the conduct of the complainant*".

[28] The "husband" of the complainant supports her evidence about the events that preceded the crime. He was with her and two other men when the accused approached them and grabbed her by the hand. When he interfered he was threatened by the accused who had a knife and he ran off. On his return, one of the other two men showed him his dirty t-shirt, "due to manhandling in the scuffle", as was also described by the complainant.

[29] He found his "wife" the following day, after searching for her with the security guards, and described her appearance as Being "*severely beaten as she had a swollen face, mouth and bruises on her abdomen.*" The accused was found nearby.

[30] The complainant related to him how the accused had assaulted and raped her in a derelict bus. He clarified the position that the complainant is actually his girlfriend as they are not married.

[31] The security guard who helped searching for the complainant testified that when she was found, she had bleeding cuts on her mouth and complained of pains all over her body. He found the accused at a nearby shebeen and took them all to the police station.

[32] The police officer who then investigated the matter confirmed that the complainant's clothing was bloodied and dirty. He also confirmed receiving reports about the accused using a knife to chase off the men who were with her prior to the incident and that the accused person was pointed out to him as being the culprit.

[33] The medical examination report also confirms that the complainant had head injuries - "abrasions to face and scalp, bruises to scalp". Further, as a result of the medical examination, where the doctor recorded his observations to be that she had a tear on the left side of the vestibule, he concluded that violent intercourse had taken place.

[34] In his own evidence the accused said that two weeks prior to the incident he and the complainant set off to find alternative accommodation for her, *en route* having intercourse. He related some details about a relationship he says he had with her. This evidence, though more detailed, is not an afterthought. He canvassed some aspects of it with her in cross examination but which she all denied. The referral to a previous sexual encounter was first mentioned in his own evidence.

[35] He then related his version of the night in issue, laying as background a jealous disposition towards the complainant and her other boyfriend, or "husband". When he saw the two at a shebeen in a compromising situation, he says, he stood back but at closing time he went to her and took her by the arm. In this process he relates an altercation between himself and the men who were with her, a to and fro throwing of stones.

[36] The stone throwing was not canvassed with either the complainant or her "husband", nor with the third witness

who was with them. Their version gives quite a different perspective about the events preceding the incident and one would have expected him to put it to them if it was indeed the truth of the matter, namely that he defended himself against an attack by them instead of him being presented as an interfering attacker.

[37] He then related how the complainant told him about her "husband" (PW2) and that he "*then got so angry that I did something I could not even recall what I did to her except that I saw her falling on the ground in the process*".

[38] The accused then mooted a version of events totally different from that what was related by the complainant. Whereas she testified that he then took her away from the scene of the attack towards a derelict bus and raped her there during the course of the night, he related how he would have taken her to a friend to try and sort out their relationship. He did not put this totally different version to her in cross examination. He also notably refrained from stating categorically, in his own evidence, that the incident in the scrap bus never occurred, as was detailed by the complainant and which forms the backbone of the charge against him.

[39] The accused called as witness the friend he spoke about, Michael Matse, who testified about an unknown night when the accused and complainant would have come to his house and spoke with him. The accused would have told him about being attacked and injured by companions of the woman.

[40] His evidence about the two people visiting him in the early morning hours after a quarrel was not put to the complainant by the accused. He also did not say if the

visit was on the date of the incident but presumably it could be taken as such. However, if it was true, it does not derogate from the evidence of the complainant about the events in the scrap bus where she said she was raped. At worst, it could then be taken as a passing by of the first opportunity to report the incident. His evidence was not canvassed and explored in cross examination but as said, it does not derogate that of the complainant.

[41] In his reasons for judgment the learned Magistrate found corroboration of the complainant's evidence in the medical examination report. He accepted her evidence, though without any measure of careful analysis.

[42] When I have regard to the totality of the evidence at the trial, I cannot but agree with the factual findings made by the trial court. The evidence of the complainant was largely unchallenged in so far as the actual complaint of forceful sexual intercourse in the scrap bus goes. The accused cross examined all witnesses at length, but failed to deal with the real issue at stake. No real challenge was made to the veracity of the complainant's evidence about the incident itself.

[43] Her evidence about the preceding events was well corroborated and the version of the accused himself, although having quite a different perspective, also is in line with an altercation prior to the actual event. Her evidence about forceful penetration is supported by the medical examiner's report.

[44] Seemingly, the accused was beside himself with anger when he saw the complainant with another man. This was aggravated when she would not readily succumb to him when he followed her and her friends. It resulted in

a severe attack on herself, culminating in her being raped in the bus.

[45] There is no merit in any of the grounds of appeal. There is no reason whatsoever to find a concoction of premeditated lies against the accused, or of orchestrated wilful misinformation incorrectly implicating the appellant as a wrongdoer.

[46] Also, the fact that no spermatozoa was proven to have been found in the victim's private parts take the matter no further. There is no legal or other such evidentiary requirement. Also, the accused did admit intercourse between himself and the complainant when he cross examined her.

[47] A misdirection by the trial court, said to be due to intoxicated witnesses, also has no merit. Seemingly, most witnesses were at a shebeen prior to the incident, the accused included. However, no issue was taken with their state of sobriety after they had left. If a witness was too intoxicated to remember what happened and accurately recount it, it should have been taken up during the trial and not first mentioned at the stage of an appeal. Even so, there is no justification to reject the evidence that was presented due to alleged intoxication. The witnesses gave clear evidence about what they experienced.

[48] Lastly, the accuracy of the appeal record was not challenged. Despite the unfounded allegation by the appellant that the trial court prevented him from asking certain questions of "great importance", the record shows otherwise. The trial court allowed numerous questions to be asked that has no bearing on the matter at all and was not aimed at discreditation either. At the trial, lengthy

cross examination was recorded. When the appeal was heard, the' appellant also could not say what he was prevented from asking.

[49] There is no substance in a misdirection by finding and holding that the appellant was positively connected to the rape of the complainant. As held above, the trial court did not err in its factual findings and correctly convicted the accused.

[50] The rape was preceded by wanton violence. The complainant was hit and after falling down, repeatedly kicked by her assailant. He hereafter further ventilated his anger by forcing himself upon her. Of his eight previous convictions, a conviction of assault is the most recent. When considering the backdating of a sentence, it is within the discretion of the trial court. The sentence of seven years imprisonment, under circumstances like the present, is much less than what would have been imposed by this court. There is no justification to interfere with the sentence.

[51] Accordingly, I hold that the appeal against both conviction and sentence be dismissed and it is so ordered.

J. P. ANNANDALE, ACJ

I AGREE

S.B. MAPHALALA, J