CRI/A/64/86

IN THE HIGH COURT OF LESOTHO

In the appeal of:

BERNARD MOFO — Appellant

v

R E X — Respondent

JUDGMENT

Delivered by the Hon. Acting Mr. Justice M. L. Lehohla
on the 2nd day of September, 1986

The appellant appeared before the magistrate's court sitting at T.Y. in the Berea district. He was charged with and convicted of rape. The charge read that: " Upon or about the 12th day of March 1986, and at or near Tsereoane in the district of Berea the said accused an adult male aged about 20 years did intentionally have unlawful sexual intercourse with Limakatso Motseremeli a girl aged 17 years without her consent and did thereby commit the crime of rape."

The appellant appealed against both conviction and sentence of two years' imprisonment in terms of a Notice of Appeal drawn on his behalf by Mr. Masoabi, an attorney of this Court.

The appeal was dealt with in terms of the Criminal Procedure and Evidence Act 1981; Section 327 of which reads: "If an appeal against a conviction or sentence from a subordinate court has been duly noted, the Court of Appeal, on perusing the record of the case, including the appellant's statement setting

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out the grounds upon which the appeal is based ..... may if it considered that there is no sufficient ground for interfering, dismiss the appeal summarily." (my underlining)

P. W. 1 'Matsepiso Hatlile testified that she is a Matron at St. Agnes High School where complainant and P.W.3 Nthabiseng Sekhonyana are students. On the day in question i.e. 12th March 1986 after lunch she realised that the two girls P. W. 3 and complainant were missing. When they eventually arrived before 6.00 p.m. the Matron called them and inquired about where they had been. They accounted for their delay in coming to school and gave her a report of what had happened to them. She observed that P.W. 2's eyes were red. She did not examine her as other girls were present. However she made a report to the police and the following day P.W.2 was taken to see a doctor. Much of P. W.1's evidence is hearsay and accused did not cross-examine her. However her observation of complainant's red eyes corroborates complainant's evidence that she had been crying when raped by accused. P.W.3's evidence also lends support to the fact that P.W.2 had been crying. Very significantly accused did not challenge this aspect of the evidence by any of the Crown witnesses who testified to it.

P. W. 2 testified that she is a student doing Form 2 at St. Agnes High School and that on 12th March 1986 she had attended an official parade at Lioli Stadium. There were many other students at that occasion including at least four of her teachers.

At around noon complainant and P.W.3 went on board a taxi intending to go back to school. Her teachers got a lift in one of the staff member's vehicle. The taxi was driven by accused. When the taxi was opposite St. Agnes High School

complainant asked accused to drop her and P.W.3. But accused ignored the girls' request to the annoyance of other passengers who were in the taxi. Instead of complying with this request or demand accused just laughed at the girls. When the last passenger headed for the door to come out of the taxi the girls followed him intending to disembark at Lekokoaneng but their attempts were foiled by the conductor who pushed them back, slammed the door shut while at the same time accused drove off and headed for Tsereoane. After passing Tsereoane the taxi turned back along the road leading to T.Y. But when it reached a place called Thaba Tsooana it left the main road and took a foot path and came to a stop. Accused opened the door and P.W.3 ran away chased by one Chilisi the conductor. Accused caught the complainant, pulled her towards a rock. Complainant's efforts to wrench herself free of accused's hold were but in vain as accused overpowered her. Accused forced her to go behind the rock and slapped her in the face when she tried to resist. The position of the rock was such that it screened accused and complainant from view from the vehicle and the foot-path users. Accused then broke a branch from a tree and asked complainant to give him what he wanted. He never named what he wanted. He then assaulted her, tried to fell and trip her but she resisted. However he resorted to what proved to be an effective tactic in compelling submission to his demands: he twisted her left hand with the result that complainant fell on it and then accused pressed her right hand with his to the ground. Then he had sexual intercourse with complainant who cried but nobody came to her help. Accused left her on his own and tried to remove the soil from her clothing but she disapproved of and resisted his attempts.

Accused then went to his taxi. Complainant went looking for P.W.3 and saw her next to some rock. P.W.3 removed the

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dust from complainant's clothing and took her to the taxi by force. The taxi took them back to St. Agnes and dropped them at a place called Matlosa's some four hundred paces from the school gate. It was around 5.00 p.m. when they came to the school.

Complainant made a report to the prefect who in turn took her to the Matron P.W.1. The following day complainant was brought before a doctor for examination. She had already had a wash and cleaned her body. She was emphatic that she never consented to having sex with accused. She also said she was not in love with the accused nor had she had any love affair with accused at any time previously.

Under cross-examination P.W.2 denied that she had at all said that she and her companion be dropped at Matlosa's because of their fear that they would be seen arriving late. She also denied that she was picked up at Matlosa's by accused on his way to Lekokoaneng. Accused's cross-examination of this witness was fairly brief and was calculated to show that P.W.2 and accused were lovers and that P.W.2 had promised to marry accused at the completion of her studies. There was also an attempt by accused to show that complainant and he used to go to Lekokoaneng a number of times before thus suggesting that the events of 12th March 1986 were a culmination of a steady and blossoming intimacy of some considerable age and not just a scone of yesterday's baking. Of significance is that, brief as his cross-examination of this witness is, nowhere has appellant attempted to pointedly gainsay complainant's version that he had sex with her against her will or at all. What approximates his denial in that regard is his last question to the witness i.e. "Why do you report that I had sexual intercourse with me (sic) when you came late?" What can be gleaned from this question as indicative of accused's mental attitude is two-fold. Either accused is dismayed that complainant should reveal their sexual act which was by consent, or that he is astounded that complainant

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should fabricate a false story against him. In either case accused detests complainant's picking on him in order to cover her fault of coming late to school. But if put in vernacular this question suggested that accused denied having had sex with complainant the answer to it removes the ambiguity referred to above, and it reads: "you did."

Of significance again is the fact that was revealed in reply by this witness to the Court's inquiry whether there is no village near where the alleged crime took place. It was replied that there was none nearby. It would appear therefore that however much she cried she would not be able to draw any villagers' attention to her predicament and consequent relief therefrom. Much of what P.W.3 said corroborated p.w.2's evidence. She testified that when the taxi stopped near the scene of crime she managed to run away and through use of her sheer physical strength was able to ward off and thwart whatever force the conductor of the taxi was trying to apply on her. She testified that she heard P.W.2 crying although she could not see her as she and accused were behind rocks where she had seen accused disappear with P.W.2. She also testified that complainant's clothing and head were dusty. Under cross-examination P.W.3 differs with P.W.2 on the question that accused took them once to Lekokoaneng while P.W.2's version is that accused never took them from school to Lekokoaneng at all. P.W.3's story corroborates P.W.2's story on material aspects of the case. She also denied ever saying they should be dropped at the gate because they did not want to be seen by the matron. Nowhere has this witness been challenged as untruthful by accused in saying accused and P.W.2 disappeared behind the rocks or that P.W.2 was heard crying behind the rock or that P.W.2's clothes and body were soiled.

/P.W. 4 ...

P. W. 4 Doctor Totink testified that he examined P.W.2 on 13th March 1986. He could not find wounds or any abnormality on her. This evidence was inconclusive as to whether there was rape or not. He testified that living sperms remain alive for forty eight hours. He went further to say there was penetration and in the medical report exhibit "A" he indicated that the examination was a little bit painful. This was rather sketchy but from what is material in it one can deduce that for him to come to a conclusion that rape took place as it is alleged to have taken place within 24 hours of his examination of the complainant he would expect to find live sperms in the complainant's private parts. However it is trite law that rape is committed once there is penetration however slight. There does not have to be the discharge of any semen into the female's private parts in order for the crime of rape to be constituted. In any event it is for the Court and not for a witness to make a finding whether or not a crime tried before it has been committed. P.W.4's evidence corroborates P.W.2's evidence on the material aspect of the case; namely penetration.

Appellant's story falls within a very narrow ~~campus~~ compass and it differs from that of the main Crown Witnesses i.e. P.W.2 and P.W.3. It is as follows. He left with these girls from Matlosa's Bus Stop on the day in question. They came to T.Y. collected some passengers and left for Lekokoaneng by agreement with the two girls. It was when appellant was waiting for passengers leaving Lekokoaneng for T.Y. that P.W.2 said to him she did not want to be seen by her uncle living in the neighbourhood. Appellant then went to buy drinks for the girls, and himself. Appellant went to one Terry who was repairing a tractor apparently to seek help inserting an aerial to a radio. It is during this period of delay that the girls became restive

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asking appellant to take them back to school. He obliged. However the girls asked that they be left at Matlosa's stop because they were late. That is all that appellant said in his evidence-in-chief.

Under cross-examination he admitted that he heard P.W.2 and P.W.3 saying that he went with them to Tsereoane and that in his evidence-in-chief he neither mentioned nor denied that he and they came to Tsereoane. He admitted hearing P.W.2 saying he took her out and had sexual intercourse forcefully with her and the fact that he did not deny that allegation in his evidence-in-chief. Asked what possible reason he could advance as the basis of P.W.2 and P.W.3 giving false evidence against him he said "Because they have agreed to say so." He however stated as untrue a question put to him that he had raped P.W.2.

I considered the grounds of appeal and found that while in fact there could be merit in the first ground that appellant was not represented at his trial and not legally advised before he pleaded to the charge in answer to which the learned magistrate indicated that appellant had reached the age of discretion and that being a taxi driver he owes great respect to the public using his taxi. I relied on Section 8(2) of the High Court Act which reads:

> " When considering a criminal appeal and notwithstanding that a point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings, unless it appears to the High Court that a failure of justice has in fact resulted therefrom."

I found that no failure of justice resulted from the non-observance of the allegation referred to in the 1st ground of the Notice of Appeal.

/As for ...

As for the second ground of appeal I found that it was based on something not appearing in the record. I found no merit in the third ground in the light of the fact that Crown evidence had shown that complainant's eyes were red showing she had been crying and that her body and clothing were soiled, and medical examination established that examination was a bit painful and that there had been penetration. All of these factors were not challenged by the accused.

The last ground of appeal is to the effect that sentence was severe and excessive regard being had ..... to the fact that appellant was a first offender. In a Swazi decision in a more or less similar appeal APP. case no. 8/86 Paul Dlamini vs The King (unreported) Hannah C. J. said "Rape is regarded by Parliament, by the Courts and by society as a whole as a very grave offence." Quoting with approval Lane L.C.J.'s passage in R. vs Billan and Others 1986 1 WLR 349 - the passage is extracted from the Criminal Law Revision Committee's 15th Report on sexual offences (1984) Cmnd. 9213 para 2.2 - Hannah C. J. said "Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse, associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecueity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be underestimated because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to

/which ...

which as a society we attach considerable value." An appeal against five years' imprisonment was dismissed. Complainant timeously complained to her prefect who in turn referred her to the matron.

In App. Case No 56/84 Dicks M. Vilakati vs Regina (unreported) The Swazi Court of Appeal at page 3 said: "There is no rule of law requiring corroboration of the complainant's evidence in a case ..... but there is a well-established cautionary rule of practice in regard to complainants in sexual cases in terms of which a trial court must warn itself of the dangers inherent in their evidence and accordingly should look for corroboration of all the essential elements of the offence. Thus, in a case of rape, the trial court should look for corroboration of the evidence of intercourse itself, the lack of consent alleged and the identity of the alleged offender. If any or all of these elements are uncorroborated the court must warn itself of the danger of convicting and, in such circumstances, it will only convict if acceptable and reliable evidence exists to show that the complainant is a credible and trustworthy witness." Needless to relate, I found that evidence in this case bears out all the three requirements mentioned above.

The underlying reason for the cautionery rule given in Vilakati (supra) was based on the following observation made by the Court: "It is the general experience of the courts that various motives may exist for a complainant in a rape case either to concoct an allegation of rape or to substitute the accused for the real culprit ..... a desire on the part of a woman to conceal or explain evidence of an extra-marital affair" was given as an example of one such motive. No such motive is ascribable to complainant in the instant appeal because as a school girl she cannot be said to have an extra-marital affair to hide. The medical form opposite pregnancy is filled "no".

Appellant did nothing to challenge the evidence that connected his presence at the material time with Tsereoane or Thabana-Tsooana the scene of the offence. He lamely answered when asked by court that "I deny because I did not get there.

If his defence is an alibi surely in order for his story to be possibly true he should have proved his assertion on a balance of probabilities. His failure entitles the court to draw a negative inference against his innocence.

On these facts the "perfectly sound, rational commonsense solution" to be found in the present case is that the appellant was the culprit in the rape of the complainant, cf. R vs Mlambo 1957 (4) S.A. 727 (A) 737 D-F and it is quite unrealistic under these circumstances to have regard to the realms of conjecture.

It is clear from my reading of the record that appellant gave false evidence and that he was untruthful in his attempt to raise a defence of alibi. In App. No. 21/85 Zunku vs The Queen (unreported) Maisels J. P. sitting on appeal in Swaziland said at page 6 "In Broahurst vs Rex 1964 AC 441 at 457 Lord Devlin stated: It is very important that the jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. ---------- Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt ....." (my underlining)

It would be a sad day if female users of public transport

/are denied ...

are denied exit at their respective fare-stages by unscrupulous taxi drivers with the assistance of their conductors, and taken to secluded places, off the main roads behind the rocks and sexually ravished after which the latter could be heard to say their conviction and sentence were wrong on the grounds that they were not legally advised before pleading to the charge. In any case I do not see what difference legal advice would make to a case where a man pleaded not guilty to a charge where he could plead either guilty or not guilty.

It was for the above reasons that I found it unnecessary to interfere with the learned magistrate's findings as to conviction and sentence and thus in the result summarily dismissed this appeal.

M. L. LEHOHLA
ACTING JUDGE

2nd September, 1986

For the Appellant : Mr. C. M. Masoabi