

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 12 of 1988

In the matter between:

EDWARD SEIRWANG

Appellant

and

STATE

Respondent

Mr. Camp for the Appellant

Mr. O. Marata for the Respondent

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J U D G M E N T

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Coram:

A. N. E. Amissah, J.P.

T. A. Aguda, J.A.

G. Bizos, J.A.

BIZOS, J.A.

The accused Edward Seirwang a 35 year old male, was charged with the offence of rape contrary to section 141 read with section 142 of the Penal Code (Cap 08:01).

In the particulars of the offence it is alleged that on the 27th April, 1988 and at the Show Ground in Gaborone that he together with an unknown person had unlawful carnal

2/.....

knowledge of Baratinyana Thupana without her consent.

He pleaded not guilty. He was not represented. He was found guilty and sentenced to imprisonment for a period of 6 years and 3 strokes. He appealed to the High Court. His appeal was dismissed on merits and on sentence. There are two applications before us. An application for leave to appeal on the merits and against <sup>the</sup> sentence and an application for the matter to be remitted to the Magistrate for the hearing of further evidence. I am prepared to assume without deciding that there is a proper application for leave to lead further evidence and that an application for leave to appeal on the record can be made in the alternative as was done in the present case by Mr. Camp Counsel for the Applicant/Appellant. The application to remit the matter to the Magistrate was to hear the evidence of the medical practitioner whose report on the examination of the Complainant was handed in terms of the provisions of section 222 of the Criminal Procedure and Evidence Act.

Whether or not leave to appeal should be granted and/or the matter should be remitted for further evidence depends on the prospects of success on appeal and whether or not the evidence intended to be led is likely to have any material effect on the final outcome of the case. For both these purposes it is necessary to examine the evidence leading to the Magistrate's findings.

The complainant a 22 year old teacher said that she attended a concert at the show ground on the night in question where the Botswana Defence Force band was performing. Shortly after midnight, she left and waited for a taxi on the side of the road. She was attacked by two men. One raped her whilst the other held her and covered her mouth. Two members of the Botswana Defence Force had remained behind packing their musical instruments. They heard screaming and rushed to the scene. Their evidence is clear and satisfactory in every respect. They found two men and the complainant. The one man was on top of her. The other ran away. The one who had been on top of her, was tripped by his own trousers, which had been released down to his knees, he fell and they apprehended him. The complainant evidence was to the same effect. The person who was tripped and apprehended was taken in the same vehicle with the complainant to the police station. The person who was taken to the police station is before us.

The applicant's evidence is to the effect that having left the concert himself he too was waiting for a taxi. He decided to urinate. He saw a man and a woman making love. There was another man standing some distance away. The first man finished the act and the other man who had been waiting came to the woman. She then started to shout. She was shouting for about four minutes. He could not help her because he was alone. The Botswana Defence Force men then came. Whilst questioning her the applicant approached them. One of the soldiers held him by the hand and told him he would have to explain himself at the police station. In the early hours of the morning of the 27th April the complainant was sent to see a doctor and he was locked up.

Mr. Camp in support of his applications submitted that the doctor's report raised a number of questions which did not support the conviction on the record as it stands or may well enable the applicant to elicit information from the doctor which would throw some doubt on the correctness of the conviction. The doctor noted that the Complainant smelled of liquor, that smears from her vagina and urine were taken to determine presence of sperm and pregnancy. The time of the examination was noted as 5 p.m. It was argued that this was vital information which could possibly establish a doubt of the applicant's guilt. The Complainant said when the Magistrate asked about the smell of liquor that beer had been spilled on her clothes at the concert. It is not likely that the doctor

will remember what the position was more than two years after the event. Even if complainant did have something to drink it can make no material difference in this case. The identity of the accused has been established by the evidence of two independent witnesses. The results from the laboratories would have been of no great consequence. The applicant says he saw the complainant making love. Whether she was pregnant or not I consider irrelevant on the facts of this case. The time noted by the doctor as "pm" must have been "am" as the accused himself says that he was put in a cell after the complainant was sent to hospital.

It may well be that where an accused is unrepresented as applicant was at his trial either the doctor must be called or the Magistrate must read and explain the contents and import of the report to the accused. If there are any uncertainties, ambiguities, or the result of any test is to be obtained, the prosecutor and the Magistrate should be careful that they have done whatever has to be done to assist the unrepresented accused. Referring the matter back is not likely to be of any assistance to the applicant.

There is one further matter to which reference must be made. The applicant said in his evidence that he asked to be taken to the hospital so that he could be examined as to whether he had had sex with the complainant but he says that they refused. He was not cross-examined by the prosecutor nor questioned about this statement by the Magistrate. He did not

identify the person or persons whom he asked. He did not put this to inspector Kgomotso who gave evidence for the State. The applicant can hardly be blamed for this. In any event it appears that the inspector received the accused from others on the morning of the 27th April. He is not the likely person to whom the request was made.

In any evenly balanced case failure to take an accused person to the doctor for examination more especially when he has asked for it may heavily tip the balance against the party who refused to take the necessary steps. So may a failure to explain fully and investigate discrepancies in a medical or other report handed in under section 222 of the Criminal Procedure and Evidence Act.

Be that as it may, the facts in this case show clearly and beyond any reasonable doubt that the complainant was raped and that the applicant was literally caught with his pants down. His evidence that he was co-incidentally present in the immediate vicinity was correctly rejected by the Magistrate particularly on the strength of the evidence of the two soldiers that say they apprehended him as he was running away from the complainant and tripped himself in his lowered trousers. His explanation that he had pulled his pants to urinate near the spot where two other men were busy raping her is so fanciful that it must be rejected as false.

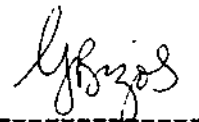
The sentence is a severe one. The submission that the

7/.....

Magistrate misdirected himself by saying that the mitigating factors were overwhelmed inter alia by the inherent seriousness of the offence of rape may have been an unfortunate way of saying what I have no doubt he really meant that rape is a serious offence and that although certain mitigating factors may be present it nevertheless warrants a severe sentence. I find that there was no misdirection. Even if there was, I would not have been persuaded to interfere with the sentence.

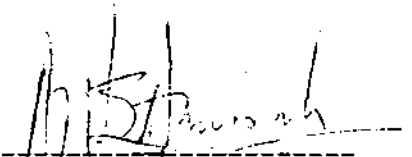
As I am firmly of the view that there are no prospects of success in either application, I would dismiss both the application for leave to appeal and the application for further evidence to be led and would allow the conviction and sentence to stand.

GIVEN at the High Court, Lobatse this 30th day of June 1988



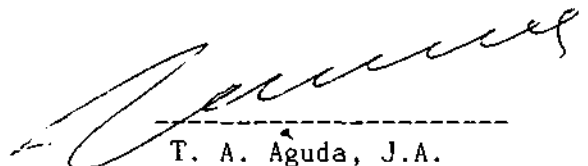
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G. Bizo, J.A.

I agree



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A. N. E. Amisah, J. P.

I agree



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T. A. Aguda, J.A.