

**IN THE COURT OF APPEAL FOR BOTSWANA**  
**HELD AT LOBATSE**

**Criminal Appeal No. 4 of 2001**  
**[High Court Criminal Appeal No. 40 of 1998]**

In the matter between:

**LEONARD MHAMO**

Appellant

And

**THE STATE**

Respondent

I. Bahuma for the Appellant  
M. Batsalelwang for the Respondent

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**J U D G M E N T**

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**CORAM: K.R.A. KORSAH J.A.**  
**LORD WEIR J.A.**  
**N. W. ZIETSMAN J.A.**

**LORD WEIR J.A.:**

The appellant was convicted of the crime of rape and sentenced to imprisonment for a period of 8 years. The appeal is against conviction only. Three grounds of appeal were advanced. First, there was insufficient evidence relating to the identity of the appellant for the trial magistrate to hold it proved that he was the assailant. Second, there was no corroboration of the complainant's evidence that she was subjected to forcible intercourse. The third ground of appeal was that there was a miscarriage of justice inasmuch as the magistrate in his judgment failed to consider the evidence for the defence. These were in substance the grounds of appeal

advanced before Nganunu C.J. He dismissed the appeal but granted leave to appeal to this court.

It is appropriate to consider first of all the third ground of appeal since if there has been a substantial miscarriage of justice through a failure to consider the defence evidence, that will be the end of the matter.

A study of the magistrate's judgment reveals that while he gave full consideration of the evidence for the prosecution, he failed to make an analysis of or comment upon the evidence for the defence. This was conceded by counsel for the respondent. On the face of it, appears to be a signal failure on the part of the magistrate because his duty was undoubtedly to consider and weigh the evidence on both sides and to give a reasoned judgment upon both the case for the prosecution and the case for the defence. As was said by Leon J. in S. v. Singh 1975(1) 227 at p. 228.

"Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond

reasonable doubt. The best indication that a court has applied its mind in the proper manner in the above-mentioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses."

Turning to the present case it is important to have in mind how the magistrate regarded his task. He states:

"Our accusatorial system of criminal justice burdens the state with a duty to prove the accused's guilt beyond all reasonable doubt. No burden is placed on the accused to prove his innocence. If as in this case he proffers any explanation contradictory to the State's case, the court must determine whether or not such an explanation is reasonably possible even though not probable. If it is then accused would be entitled to an acquittal. If on the other hand the explanation is so unreasonable so as to be no question of it being believed by anyone then it may be rejected."

He then proceeded to give a careful analysis of the evidence for the prosecution and concluded "in the final analysis the factual matrix is so stable that it is absolutely safe to convict as the state has beyond all reasonable doubt proven the accused's guilt." What is clear is that although he makes no reference to the defence evidence he was well aware that the appellant had an "explanation contradictory to the State's case" and that he had a duty to determine whether or not to accept this explanation as reasonably possible. It cannot be said, therefore, that in considering his decision the magistrate did not have in his mind the nature of the appellant's defence and he correctly interpreted his duty as having to decide whether the State's case had been proved. By finding that case proved he must have rejected by inference the evidence for the defence. Where the magistrate was at fault – and

seriously at fault – was in failing to give reasons for rejecting the evidence for the defence in so far as it contradicted the case for the prosecution. In my judgment, the failure to make an independent appraisal of the defence's case was a misdirection and an irregularity, and the only way to avoid the conviction being quashed is for us to be satisfied that it is appropriate to invoke the provisions of Section 13(3) of the Court of Appeal Act [Cap 04:01]. This provides:

“Where the Court of Appeal, in an appeal against conviction, considers that, notwithstanding the fact that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, there has been no substantial miscarriage of justice, it may dismiss the appeal.”

In the case of **Molepi v. State Criminal Appeal No. 14 of 1999** precisely the same point arose and the Court of Appeal invoked the foregoing provision in order to confirm a conviction. The question is whether it can be shown that there has been any substantial miscarriage of justice arising from the magistrate's failure to consider the defence case in his judgment. In my opinion, the only way in which this can be demonstrated is for this court to examine all facts of the case. If it concludes that the evidence points irresistibly to the prosecution case having been established beyond reasonable doubt, then it is open to the court to find that there has been no substantial miscarriage of justice. Such an approach is in conformity with what is stated in the leading case of **Makwapeng v. State Court of Appeal Criminal Appeal No. 29 of 1998**. It was concerned with a different irregularity, namely a failure to give an accused person an opportunity to address

the court at the conclusion of the evidence. This was a breach of section 181 of the Criminal Procedure and Evidence Act. Nevertheless the general approach is apposite to the circumstances of this case and in any event is binding on us. Giving the judgment of the majority of the court, Aguda J.A. (at page 9) said:

"The approach which I believe that any appeal court in this country – be it the High Court or the Court of Appeal – must take and which I believe is in accord with what the Legislature of this country thought should meet the demands of justice should be this. Such a court must accept that the failure of a trial court to comply with the provisions of section 181 of the Criminal Procedure and Evidence Act, constitutes an irregularity in procedure. However, in deciding the issue whether or not to set aside the conviction following such an irregularity in procedure, the appeal court must look at all the facts established by the totality of the evidence led at the trial and if it is satisfied that the guilt of the appellant has been established beyond reasonable doubt, and that there was nothing the appellant could have told the trial court that would affect the verdict in any way, then the appeal court must exercise the power to do justice given to it by the Act establishing it, and dismiss the appeal. This, in my view, must be the proper approach for appeal courts to follow in cases of this nature."

In considering the strength of the prosecution case it is convenient to take note of the first two arguments advanced by counsel for the appellant. One of the crucial questions in the case is whether there was clear and convincing evidence that the appellant was the assailant of the complainant. The important evidence was the visual identity by the complainant herself. Having read the evidence we consider that there was ample material to enable the magistrate to hold it proved that the appellant was the person who assaulted her. First she had seen him in the bar where she had been working on a number of occasions in the hours preceding the alleged assault. This is not a case of an individual obtaining a momentary sighting of

a total stranger immediately before the assault. Although the actual assault took place in the darkness of a toilet the complainant said that she saw him in the light of the nearby bar and restaurant and indeed asked him to open the door in order that she could see him. On the basis of that evidence the complainant had an opportunity to see at close quarters someone whom she had already seen in the course of the evening. This, in my view, is strong evidence of identification.

The evidence of identity goes further in that the complainant was able to identify the appellant by the clothes he was wearing. She said that he was wearing a tracksuit along with a T-shirt with "NIKE" written on it. In particular shortly after the event she told DW5 Constable Mantswemabe that she had been assaulted by a man wearing a green tracksuit with red and white stripes. PWS then arrested the appellant and took him to the complainant who allegedly identified him. I consider that the overall evidence of the complainant identifying the appellant could hardly be stronger.

A study of the appellant's evidence, in my opinion, does not raise any difficulty which demanded reasoned analysis by the magistrate. He and his superior officers and others, subsequent to his release, went to the house of the complainant's father for reasons that from the defence evidence seem strange but, according to the complainant's father, was an attempt by the appellant to seek forgiveness for the crime he had committed. As to whether he was inside the bar where the

complainant was working the appellant's evidence was contradictory in a number of respects and is not supported by his companions DW3 and 4. I do not see that there was anything in the defence evidence which called for any close analysis by the magistrate or to raise a reasonable doubt in his mind on the matter of identity.

There remains the question of whether there was any corroboration of the complainant's evidence that she was subjected to forcible sexual intercourse. In my opinion there was ample corroboration of complainant's account. The witness PW2 who saw her after the assault noted that she had bruises on her neck which confirms her statement that "she was strangled" by her assailant. The medical evidence was to the effect that "she clearly had sexual intercourse and probably was forced." The bruising of the labia minora is associated with forced intercourse." The only curiosity is the finding of spermatozoa in the complainant's vagina which does not fit in with the complainant's own evidence that the appellant wore a condom. However she admitted having had unprotected intercourse with her boyfriend earlier in the day and that accounts for the presence of the semen. Finally there was evidence from the complainant's father that he observed her being distressed on returning home and that is a further adminicle of corroboration of her evidence.

For all these reasons I have come to the conclusion that there is no substance in the second and third grounds of appeal and that the case against the appellant was proved beyond reasonable doubt. In these circumstances there was no substantial

miscarriage of justice. I would like to emphasise that for my part I am disturbed by the omission on the part of the magistrate in an otherwise careful judgment to express his views of the evidence on both sides of the case. This is the second case within a space of a year to come before this court when such a failure has occurred and it is hoped that there will be no repetition in the future. It is only because the evidence against the appellant in this case was so convincing that I consider that we can invoke Section 13(3) of the Court of Appeal Act, thereby not being compelled to allow the appeal on the account of a serious error by the magistrate. The appeal is dismissed and the conviction and sentence is confirmed.

Delivered in open court at Lobatse on 1 July 2001

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**LORD D.B. WEIR**  
[JUDGE OF APPEAL]

**I agree:**

**I.**  
If.R.A. KO-RSAH  
[JUDGE OF APPEAL]

**I agree:**

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**N.W. ZIETSMAN**  
[JUDGE OF APPEAL]