

IN THE COURT OF APPEAL OF BOTSWANA  
HELD AT LOBA TSE

Criminal Appeal No. 21 of 2001  
High Court Criminal Appeal No. F192 of 1997

In the matter of:

EDWIN NTHARO

Appellant

vs

THE STATE

Respondent

Appellant in person

Mrs. J. D. Boshwaen for the Respondent

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J U D G M E N T

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Coram: Tebbutt, A.J.P.:  
Plewman, J.A.:  
Sutherland, J.A.:

PLEWMAN, J.A.:

Appellant was convicted on a charge of rape in the Palapye Magistrate's Court on 7 November 1997 and sentenced to 10 years' imprisonment and 4 strokes with a light cane. An appeal to the High Court was dismissed on 22 September 1998 but

was granted leave to appeal to this Court on 28 March 2001. He appeals against both his conviction and against the sentence.

As far as the conviction is concerned, the sole point at issue is whether the conviction can be sustained in light of the fact that the learned Magistrate found corroboration of the complainant's evidence only in evidence by a witness who merely confirmed the complainant's complaint of rape. It was on this basis that leave to appeal was granted. It is, of course, usually a requirement that in sexual cases, the court must have independent evidence corroborating the complainant's complaint. However, it is necessary to point out that the learned Magistrate in fact held that that he was justified, even in the absence of corroboration, to convict appellant because, having duly considered whether he could exclude the dangers of false incrimination, he felt he could accept the evidence of the state witness and convict even in the absence of corroboration. He also held (against the possibility that this was incorrect) that the repetition of the complaint was sufficient corroboration.

The first question which then arises is whether evidence of a complaint, without more, can be regarded as corroboration for the purposes of a conviction in a rape case. It is clear that in the practice of the courts of Botswana, it cannot be so regarded. Mbayi v The State [1989] B.L.R. 527 at 541 G. Corroborative evidence must come from an independent source. Evidence of recent complaint

comes from the complainant and only shows consistency in the victim's story. The case must accordingly be considered in the light of the learned magistrate's main finding.

In Botswana, the position seems to be that a Court is entitled to convict on the uncorroborated evidence of a complainant. In the Mbayi case (supra) Gyeke-Dako, J. said at p. 544 that it is "trite" to say that a Court can do so. This, too, seems to be the standpoint of South African courts. The standard work on Criminal Law and Procedure in South Africa, Lansdown and Campbell Vol V. (an update of the earlier work known as Gardiner and Lansdown) states at p. 934:-

"It is clear that a conviction for a sexual offence on the uncorroborated evidence of the complainant is competent, for the rule is not one of law but of practice. But however convincing her testimony, the court is required to warn itself of the special dangers inherent in relying on it alone."

The authorities relied upon for this proposition need not be repeated. In the present case, the Magistrate fully appreciated the known dangers underlying the rule requiring corroboration and warned himself of these dangers, and (subject to what emerges from an examination of the evidence) the Magistrate was entitled to convict on the uncorroborated evidence of the complainant. I should perhaps add a note that the rule as to the necessity for corroboration has been called into question in a recent decision in South African Constitutional Court. Whether this Court would wish to follow the same course need not, in the light of the facts of

this case, be considered. In my view, the present case may, for reasons which I now give, be disposed of by this Court on the basis of existing practice.

The Court was faced with conflicting versions of the event. Appellant's defence was one of consent. The complainant was a young girl of seventeen at the time of the offence. She had, on the medical evidence, previously had intercourse. She denied having consented to intercourse. The question which arises is whether there is anything to suggest her complaint had been or could have been motivated by any of the factors such as a desire for revenge or jealousy or emotional disturbance or any similar factors which provide the rationale for the rule relating to corroboration.

The question is whether it was safe for the Magistrate to accept complainant's evidence. Her evidence could be corroborated in the strict sense or even, in my view, by evidence which supports her evidence in a more general sense. In this country, what constitutes corroboration (in the strict sense) varies according to the circumstances of each case. This must also be the case with supporting evidence of a more general nature. So that in the present case, consent being the only issue, the only aspect upon which corroboration or support would in any event be sought would be evidence rendering the giving or refusal of consent either probable or improbable in the right degree, as the case may be. For present purposes it seems to me that it matters not whether one terms the evidence corroboration or whether

it indeed merely justifies the Magistrate's confidence that he was entitled to rely on the complainant's evidence. In either event, this court would be constrained to hold that it has not been shown that the Magistrate erred.

A brief reference to the evidence is called for. Complainant's evidence was that she did not know the appellant and met him for the first time when he arrived at the place where she resided with one Flora at about 10 a.m. on the 25 December 1996. Appellant, according to her, entered the house together with Flora. Complainant remained outside. Appellant then emerged from the house and asked complainant what her name was. She did not respond other than to tell him to ask Flora. Undeterred by this appellant (in complainant's words) "told me that he loved me". I take this to be a manner of speech intended to indicate that he wished to have sexual intercourse with her. She said that she was not interested.

Complainant's evidence was further that appellant then returned to Flora. Sometime later, as he was leaving, Flora called complainant into the house and asked her to accompany appellant to a party, and to bring her (Flora) some meat from the party. It was for this purpose that complainant followed or accompanied appellant. On their way there was an altercation which led to appellant slapping complainant's face. The incident is somewhat obscure but bore some relation to how and where complainant was walking. She was led initially in what appellant said was the wrong direction and then to a yard where appellant said the party was

being held. The place seemed deserted save for a young man who was sleeping in one of the huts. Upon their arrival, he was woken and left. Appellant wished complainant to enter the hut. She refused. Appellant thereupon attempted to drag her into the hut. She resisted and in some way moved towards another hut in so doing. Here she encountered a person she described as an "old man." Some discussion ensued about where the party was being conducted and whether the meat had by that time been grilled. At this point the "old man" left. Appellant then pulled complainant into the hut (as I understand it the first hut) locked the door and raped the complainant. This involved throttling her. Afterward, appellant unlocked the door and complainant made her way home. As she did not find Flora at home, she found her way to the police station to lay a charge.

Appellant's version is somewhat different. It may be said, in passing, that he does not seem to have put his version to complainant in cross-examination (as of course should have been done) but as he was unrepresented perhaps too much should not be made of this. He said that he encountered complainant on 20 December 1996 at a shop and that he (without more) "proposed love from her which she refused". He encountered her again on 21 December and proposed again. Complainant then said she would "think about it". On 24 December he went to a "disco" saw complainant who "agreed to be my lover." As to the 25 December, he simply denied everything.

In the face of this dispute, the other evidence led takes on some significance. The second witness (PW2) was a 44-year old man - I assume the "old man" to whom complainant referred. His evidence briefly was that he knew appellant and that he had seen him on 25 December "with a girl I did not know" at his (the witness) home. He had left for sometime and on his return he found the complainant crying. When he asked her why she was crying, appellant told him to "shut up". Before the appellant told him to shut up the complainant told him the appellant had been "twisting her hand". At this point, he again left the scene. It seems to have been because of the altercation with appellant.

Then there is the evidence of the third witness, (PW3) Flora. Complainant lived with her. She said that on 25 December it was she who had told complainant "to go with (appellant) who would show her a place where there was ..... a party" (being held). She asked complainant to "come back" and bring her some meat. Complainant did not return for a long time and when she did, she complained that appellant had raped her. The witness said she (the complainant) "was clearly very sad and sobbing". The witness knew of no relationship between appellant and complainant.

It is true that the evidence discloses certain inconsistencies (not unknown in lower courts where interpretation is less than perfect) which I have not set out. It is also true that the medical report contains no finding which would confirm the throttling.

But the important point, in my view, is that the complainant's statement as to how she came to accompany appellant and the day on which she did so, as also the place to which she was taken by him is borne out by the other evidence. These witnesses contradict any suggestion that the appellant's version can be accepted. That he had intercourse with the complainant is common cause but the supporting evidence establishes that intercourse must have taken place on 25 December and it can only be the events of that day that must be considered.

I find in the supporting evidence sufficient corroboration of the essential parts of complainant's account – that is evidence of the date, place and general circumstances including the evidence of what PW2 observed. What reason can there then be for rejecting complainant's evidence? The likelihood of her consenting to intercourse in these circumstances is very improbable. The Magistrate cannot be faulted nor can it be said that he disregarded evidence or misdirected himself. I would dismiss the appeal against the conviction.

As far as sentence is concerned, it must be appreciated that appellant (appearing as he did in person) could make no serious or meaningful submissions. Nonetheless, in my view, the Court should review the sentence. The sentence of 10 years is the mandatory minimum sentence. Having regard to the length of time since this offence was committed it seems to me that it would be undesirable to impose strokes.

The order I make is:-

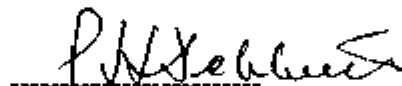
- 1) The appeal against the conviction is dismissed and the conviction is confirmed.
- 2) The sentence of the imposition of strokes is set aside.

Given in open Court at Lobatse this 30<sup>th</sup> day of January 2002.



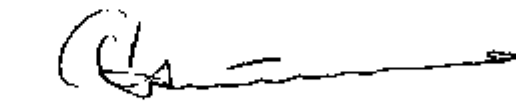
C. PLEWMAN  
Judge of Appeal

I agree



P.H. TEBBUTT  
Ag. Judge President

I agree



R. SUTHERLAND  
Judge of Appeal