

**IN THE HIGH COURT OF BOTSWANA**  
**HELD AT LOBATSE**

**Criminal Appeal No. 192/2000**

In the matter between:

**JUSTICE MOJALEMOTHO**

**Appellant**

and

**THE STATE**

**Respondent**

**Mr. Y. S. Moncho for the Appellant**

**Mrs. J. D. Boshwaen for the Respondent**

---

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

---

**CHATIKOBO J.,**

The appellant appeals against his conviction for rape and the sentence which was imposed upon him after conviction. In the court a quo he was unrepresented but in this court he had the services of Mr. Moncho who argued his case for him.

At the outset of the appeal Mr. Moncho advised the court that the conviction was being challenged on two grounds only. The first ground of attack was that the sexual intercourse was consensual and the second ground was that the conviction was flawed by the failure of the trial court to analyse the evidence of the witnesses called by the defence.

As far as the facts are concerned it shall suffice to summarise the evidence of the complainant. She was a student at Sedumedi Community Junior Secondary School in Bobididi ward, Molepolole. She had known the appellant since February 1998. On the 17<sup>th</sup> June 1998 she left school just after 6 p.m. since she was involved in drama rehearsals. As a result of the drama rehearsals she had lost her voice. Most of the students had gone home and she walked home alone. On the way she met some boys from her school but they parted shortly thereafter.

She asked one Setlhomo to accompany her and together they walked up to Bobididi ward where they met one Tshepho. As they chatted with Tshepho, the appellant arrived and they exchanged greetings before passing on. Setlhomo then turned back and she continued with Tshepho. The appellant followed them and caught up with them. The accused then held the complainant and asked her to accompany him. She declined because she was late and was in a hurry. Tshepho supported her but the appellant told him to keep quiet as he did not know anything. As he pulled her the accused picked up a stone and tried to strike Tshepho with it. He proceeded to take the complainant's notebook from Tshepho and the latter left. The appellant then dragged the complainant and although she shouted for help no-one heard her because she had lost her voice. This was now around 8 p.m.

She said at this point the appellant lifted her and carried her on his back. As he crossed the road near a place called Kopano a passing motorist stopped and asked what the problem was but the appellant told him to keep quiet. The motorist then

went his way. She was taken to a certain house wherein she was thrown onto a bed and the appellant removed her shoes and underpants. He lowered his trousers, lifted her dress so that it covered her eyes. He then had sexual intercourse with her against her will. Her panty was torn as she was being undressed. As she lay on the bed she heard footsteps of someone entering the house. She tried to shout for help but a lady's voice said she was making noise. This lady said the complainant should be ashamed to follow a boy at his place. Later the lady said there was nothing she could do as she too feared the appellant.

The complainant managed to go outside on the pretext that she wanted to go and urinate. The accused accompanied her outside. She managed to flee leaving her pair of pants and notebook behind. When she arrived home she was crying and holding her shoes in her hand. Her panties and note book were later recovered by the police in the room in which she was raped. She denied being the appellant's lover.

The submission that the complainant consented to sexual intercourse was based partly on the evidence of the appellant's aunt, one Nnanika Mojalemotho, who stayed together with the appellant. Her evidence was that on the day in question, she arrived home between 7 p.m. and 8 p.m. On entering the house she heard the appellant talking to a girl in one of the rooms in the house. She did not hear what they were saying. She then told the appellant to dismiss his companion as she wanted to sleep but they continued talking. She later heard them laughing and she

repeated that the appellant must tell her companion to leave. Then she heard the door being opened and footsteps going out. This witness's evidence is in conflict with the appellant's own evidence. Nowhere in his evidence did the appellant state that he was having a jovial conversation with the complainant when his aunt arrived. His evidence was that on entering the house he went around looking for blankets and that once he obtained blankets he and the complainant immediately embarked on foreplay and while they were caressing each other the aunt arrived and the complainant said she wanted to leave. She left shortly thereafter. It is quite clear to me that this evidence does little to dent the story told by the complainant. It only serves to stress the unsatisfactory nature of the appellant's evidence.

The lack of consent on the part of the complainant derives support from the appellant's own evidence. In his evidence in chief he stated that his aunt arrived when they were caressing each other and as soon as the aunt demanded to know who the girl was he allowed her to leave. In other words he was saying that no intercourse took place at all. It was only during cross-examination that he made a veiled admission that sexual intercourse had taken place. One finds passages such as these in his evidence under cross-examination: "There was no light in the house in which we had sex" and , "I do not know why she arrived home crying. It was not my first time to have sex with the complainant. We had had sex 4 to 5 times before."

If he had had consensual sexual intercourse with the complainant it is unlikely that in his evidence in chief he would have tried to deny that intercourse had occurred.

Also, it was only in cross-examination that he sought to suggest that her aunt was angry and that she induced fear into the complainant thereby forcing the latter to leave.

The submission is also made that the only evidence of resistance by the complainant was at the beginning when they were far from the appellant's home. This submission disregards the bizarre manner in which the complainant was conveyed to the appellant's bedroom. She was lifted and carried on the appellant's back and being voiceless she could not scream. This grotesque behaviour even attracted the attention of a passing motorist. On arrival at the appellant's house she was dropped onto the bed, undressed and raped. It is difficult to imagine what she could have done to protect herself in these circumstances.

Her resistance is also borne out by the evidence of Tshepho who was in her company when she was dragged away by the appellant. According to Tshepho, the complainant turned down the appellant's request that she accompanies her saying it was late and she wanted to rush home. Appellant then started to pull her. When the witness asked where he was dragging the complainant to, the appellant became aggressive. He threatened to stab the witness, picked up a stone and tried to stab him. He snatched the complainant's notebook from him and took the complainant away. He was furious.

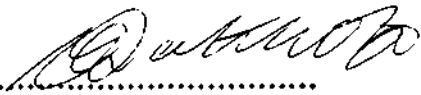
It is apparent from this evidence that there can be no question of there having been an agreement between the appellant and the complainant.

The final submission made on behalf of the appellant was that the trial court erred in failing to analyse the evidence of the defence witnesses. That criticism does not accord with what appears in the judgment. The trial court dealt with that evidence at page 32 of the record and concluded that it did not advance the appellant's case further. I did not understand Mr. Moncho to argue that the evidence of those witnesses was of a better quality than that of the State witnesses. It was not. Those witnesses were clearly partisan to the appellant and their evidence does not accord with the probabilities.

It is highly improbable that if the complainant was in love with the appellant she would forget her underpants in the appellant's room. It is unusual for a woman to forget to wear her pants when she is dressing. The fact that the complainant left her notebook and pair of pants in the appellant's room is consistent with her having fled from her assailant.

In my view, the appeal is devoid of merit and it is dismissed.

DELIVERED IN OPEN COURT AT LOBATSE THIS <sup>22<sup>nd</sup></sup>.....DAY OF MARCH 2002.

  
.....  
E. CHATIKOBO  
JUDGE