

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Criminal Application No. 45 of 2002
High Court Criminal Appeal No. F19 of 1999

In the matter between:

MOSEKI BUSANG

Appellant

and

THE STATE

Respondent

The Appellant in Person
Mrs S. Mangori for the Respondent

J U D G M E N T

CORAM: P. H. TEBBUTT, J.P.
A. M. AKIWUMI, J.A.
J. M. NGANUNU CJ (J.A.)

TEBBUTT, J.P.

The appellant was convicted by a magistrate of rape and, having tested HIV positive, was sentenced to 15 years imprisonment. It is to be noted that he was arrested for the offence on the 2nd May 1998. The sentence was not backdated to the date of arrest. The appellant has been given leave to appeal to this Court and he now appeals both against his conviction and sentence.

On the conviction, he has submitted that the evidence given by the complainant was not credible. He averred that at one point in her evidence she had said she had never, previous to the alleged rape, had intercourse

with the appellant while at another point she said she had done so once before. A careful reading of the record, however, establishes that she consistently denied that she ever had intercourse with the appellant. But even if she had had intercourse previously with him, this does not mean that she had consented to doing so on the occasion in question at the trial.

In her evidence she was emphatic that she gave no consent to having intercourse with the appellant. The appellant gave no evidence at the trial in his defence to dispute her allegations. In my view the evidence against him is overwhelming and he was correctly convicted by the magistrate. His appeal against conviction is therefore dismissed.

On the question of the sentence it is conceded by the State that the sentence of 15 years was inappropriate. The correct sentence in terms of the 1998 amendment of the Penal Code was one of 10 years imprisonment and therefore it was the sentence which the trial court was obliged to impose. The sentence therefore will have to be corrected and will be reduced from 15 years to one of 10 years imprisonment. Furthermore, his sentence is backdated to the date of his arrest on 2nd May 1998

DELIVERED IN OPEN COURT AT LOBATSE ON THE 15TH DAY OF JANUARY 2003.



.....
P. H. TEBBUTT
JUDGE PRESIDENT

I agree,

P. H. Sebent
.....
for A. M. AKIWUMI
JUDGE OF APPEAL

I agree,

J. M. Nganunu
.....
J. M. NGANUNU
CHIEF JUSTICE
(JUDGE OF APPEAL)