IN THE HIGH COURT OF SWAZILAND

CRIM. APPEAL NO. 18/06

In the matter between VUSI

MICHAEL MHLANGA VS REX

APPELLANT

RESPONDENT

CORAM **MAPHALALA J MAMBA**

FOR APPELLANT FOR **J IN PERSON MR. M. SIMELANE**

RESPONDENT

JUDGEMENT 21«

JUSE 2O07

MAMBA J

1 The apprllan: -st=ls e-Ttstsd *oz.* ±te II- day of March 2005 and charged vrjrh the me of rapt The -.barge was that he had on the 23rd day cf February. lOl— ai Man;=ngs~5»~r.=;. unia^-fully and intentionally had sexual in^erco"-n-5e ich Gueo Hje2sr*re Ntshalintshali without her consent.

[2] On being arraigned on the 5th day of October 2005 he pleaded not guilty but at the end of the trial he was found guilty as charged and on the 18th day of November 2005 was sentenced to a term of five years of imprisonment. This term of imprisonment was not back-dated as is the norm in this jurisdiction.

[3j The appellant has appealed against the judgement of the court a quo on both conviction and sentence.

[4] In support of its case the crown led the evidence of four witnesses, one of whom was the complainant who gave her evidence as PW2.

[5] PW2 testified that on the 23^ day of February 2004 she went to a river in her area, MahlabatsinL hi the Mahlangatsha area, to do her laundry. She was alone. As she was washing at the riverside, the Accused who was well known tn her and was from the same neighbourhood, came to her, grabbed her around her waist, felled her, stripped off her panties and had sexual intercourse with her. She did not consent to such sexual mterca-urse and she screamed and or cried out for help but apparently no one tame tc her rescue. I note here in parentesis that according to "PW1. PW2 is disabled. She can not walk properly and cannot shout. Her hands shake stgrtificantiy such that she had to leave school at Grade II as she could not control her pen and was thus unable to dc her school wttrh. This was not disputed by the appellant. PW2 testified further thai she was injured on her back when the Appelant, threw her to the ground in the prtcess of raping her.

]€{ Alter the Appellant had raped her. she went into the river and had a bath. alD over her body. She thereafter gathered her laundry and proceeded to her heme going through the "-.ir-ie of Majahonke, one of her ne5£hbours and relatives. She was angry wtth the Appellant for having

raped her. She was determined to report the matter to her father. From her home, she went to the Chiefs Kraal in search of her father. On the way she came across the Appellant who pleaded with her not to report the issue to her father. She was not persuaded by his pleadings and went ahead and reported the rape to her father whom she found drinking marula beer at Mr Ntshalintshali's homestead.

[7] I pause here to note that it wculd appear that the appellant followed PW2 to the Chiefs Kraal because when she made the report to her father, the Appellant was at the Chiefs Kraal standing near a certain house / hut a distance away from PW2 and her father, ?W1.

[8] PW1 told the count that on the ***22r-*** cay of February, 2004 whilst at the home of his late brother with other people, having buganu, (marula beer), the complainant came, knelt befcre him and told him that she had just been raped by the accused near the river. He advised PW2 that smce it was after 5.00 pm it was aheahy late in the day for her to go to report the matter at the Police Station. He advised her that a report ■would have to be made to the police the following day.

J9 The following day, in the mommg. PW 1 went and reported the matter to PW3, Bonginduku Dlamini m his rapacity as a Sibondza- or community liaison officer in the area.

[10] On his return to his home. P5TL fare there the Appellant together with another boy. Tne Appellant- amcrmrg to PW1 admitted having raped PW2 the previous day and ***ssaz.*** he had made a mistake. He pleaded with PWI '"to settle the matter rite traditional way". PW1 would not hear of it and threatened to there arc: then stab the Appellant with a spear. The Appellant and his crmparrkr. left F.Vl's home only to return

later in the company of PW3. This time it was PW3 who requested "that we handle the matter the traditionafway".

[11] I pause here again, to note that there is no indication in the court record as to what settling the matter "in the traditional way" meant or entailed. Indeed when PW1 put this very question to PW3, he does not seem to have been given an answer or explanation or clarification.

[12] When the discussion between PW1 on the one side and the Appellant and his delegation on the other took place, PW2 was readying herself to go to the Police station to lay the charge of rape against the Appellant. FW3 failed to convince PW1 to handle the matter in the traditional way and it was reported to the Mankayane Police that day, a day after the alleged rape. PW2 was examined by a Medical doctor on the following day as there was no doctor available at the Mankayane Hospital on the 2-* day of February 2004.

113] PW3 explained that he had gone to PW1 at the request of the Appellant who wan:eti to apologise to PW1 "for what had happened" and that this is what he told PWL at his-home in the presence of the Appellant. PW1 refused to deal with the matter-'in the traditional way" because he feared that the local corrmturity would frown upon his actions.

{!-] The Doctor who examined the complainant on the 25th day of February 2004 gave her evidence as PW^. Other than that the ccmplainant walked with difficulty, arc had a fungal infection in the vasina, which was of a sexual -mgrr she was unable to note any abnormality on her. She concluned ***~~--sr :***

> *|tjhere is ever." in clean m cf past sexual exposure with recurrencv. There is no c:cmrmert: on how recent her last sexual

encounter was. I am of the opinion that there were no bruises and spermatozoa seen in her vagina because the young lady washed in the river after the ordeal."

[15] The doctor read from the report she compiled at the time of examination of the complainant but did not hand it in as an exhibit. I shall revert to this aspect later in this judgement.

[16] The Appellant gave sworn evidence in his defence. He admitted having been near the river with PW2 on the day in question but he denied having raped her. He confirmed further that he was present at the home of Mr Ntshalintshali when the complainant came and reported to her father that the Appellant had raped her that day at the river side.

[17] The Appellant told the court that he met PW2 near the river having placed the container which had her laundry (washing) on a stone. He asked her to furnish him with the telephone number of one Mandla. The Appellant had said she could not remember this number but had noted it somewhere at her home. The appellant invited PW2 "to go with me" and PW2 agreed. Along the way, the appellant instructed PW2 to get the phone number from her home and bring it to him at the Ntshalintshali homestead where the Appellant was going and would be found. According to the appellant. PW2 had objected to this but had invited the Appellant to her heme telling him that there was no one at her home. On being asked by him what she would give the appellant at her home, she had said she would give him all that he wanted. When he asked her if *alT included sex. she had laughed off such suggestion and told him that her sexual favours were only available on payment of a certain (imspecifed) fee. Both of them went into the Ntshalintshali homestead. Appellant remained there whilst P.V2 proceeded home alone promising to return later to give the Appellant Mandla's telephone number. The

rendezvous was set as a certain tree where PW2 usually met with her boyfriend, Thabo. She returnecf"*to the Ntshalintshali homestead, apparently without the telephone number and after a while proceeded alone to the rendezvous. He says he did not immediately follow her "because of the people I was with". They met later and had a long talk together near the bus station where the Appellant had gone to meet a friend who was expected to come by bus. During the conversation she had rebuked him for having referred to her meetings with Thabo, her boyfriend.

[18] When the bus came, the friend Appellant had come to meet was not there and he"returned, alone to the Ntshalintshali homestead to partake in the buganu drinking where he was joined later, at about 4.30 p.m. by PW1. At dusk, the complainant came and reported to PW1 that the appellant had raped her that day.

[19] Appellant denied having raped the complainant. He denied having requested PW3 to take him to PW1, to apologise for what he had done to the complainant. He said he had only asked PW3 to take him to PW1 after PW3 had reported to the appellant in the presence of his father that PWT had reported the incident to him. He said he merely wanted to speak to PW1 and

> "PW3 apologised on my behalf since I was denying the matter. PW1 did not accept that. PW3 left and I remained and begged
>
> **PWT.**

[20] Once again, I pause to mention that the Appellant was arrested a year later because he left his home at the end of February, 2004 to look for employment, first in Mhlambanyatsi, then Matsapha and eventually at Nhlangano where he was employed and lived until his arrest on the 11* day of March 2005.

[21] Under cross examination, the complainant denied having invited the Appellant to her home. She also denied the assertion by the appellant that the appellant found her near the river having placed her laundry on a stone. She admitted though that the two had met near the bus station. She further told the court that on being asked by the appellant where she was going she said she was going to her father and the appellant begged her not to report the rape to him (her father).

\22) In cross-examining the crown witnesses, the appellant, who conducted his own defence, did not specifically deny having raped the complainant.

[23] The evidence of die complainant is clear and straight forward. The identity of her assailant is a person who was well known to her. The appellant was well known to her. He was from the same neighbourhood. The Appellant has himself admitted having been in the company of the complainant on that day near the river and at the bus station. The incident occurred during the day and there is no question of mistaken identity".

]24] Regarding the actual sexual intercourse, PW2 was twenty (20) years oil when this incident took place. She was sexually active. She was a«rare, of what sexual intercourse meant or entailed. She said she did not consent to it

]25] The evidence of the complainant is corroborated, if corroboration were needed, by- the evidence of PW1 and PW3 who both told the court that the appellant had, without any prompting or approach by them admitted having raped the complainant and had apologised for having done so and pleaded that the matter "be settled in the traditional way".

PW3 was a Sibondza or Community Liaison member, in the area and was neutral and a disinterested person.

[26] I know of no law or rule of law or practice that lays down that no verdict of guilty of rape may ever be returned in the absence of a medical report corifirming that the complainant had sexual intercourse within a specified period.

[27] In **VTLAKATI v R, 1982-1986 SLR 358 (A) at 359 D-E HANNAH CJ** (as he then was) stated that:

> There is no rule of law requiring corroboration of the complainants evidence in a case such as the present one but there is a well-established cautionary rule of practice in regard to complainants in sexual cases in terms of which a trial court must warn itself of the dangers inherent in this evidence and accordingly should look tor corroboration of all the essential elements of the offence. Thus, in a case of rape, the trial court should look for corroboration: of the evidence of intercourse itself, the lack of consent alleged and the identity of the alleged offender. If any or all of these elements are mcorroborated the court must warn itself of the danger of comicting, and in such circumstances, it will only convict if acceptable and reliable evidence exists to show that the complainant :s a credible and trustworthy witness.
>
> In the presert case, counsel for the Crown rightly concedes that there was nc corroboration of the complainant's evidence that it was the appellant who had sexual intercourse with her and, looking through the record, it also appears that there was no corroboration of the ahegamor that sexual intercourse took place. The only evidence that rmght have corroborated the complainant on this latter issue was that of the doctor but all he could say was

that the complainant had obviously had intercourse sometime previously in consequence of^hich she had contracted a sexual disease...".

[28] That is the old traditional approach to the issue that the courts in this country, the Republic of South Africa and England, have followed in the past which has, however, since been rejected in those courts and replaced with a more rational, practical and realistic one.

[29] This court had occasion to deal with this issue in the case of **R v SANDILE SHABANGU** (unreported), a judgement of this court delivered on the 7* May. 2007.

[30] The nub of the objection to the old traditional approach to the evidence of complainants in sexual assault cases, is that, there is nothing per se iriherentiy or mtrinsically dangerous in accepting the uncorroborated evidence of such complainants. It has been empirically proven that there Is no evidence to suggest that complainants in sexual assault cases do testify falsely against innocent persons.

131] In rejecting the old approach, the courts have said, in all sexual assault cases, as in all other cases, the crown bears the onus of proving the guilt of the Accused beyond a reasonable doubt. However, where the nature and quality of the evidence of the complainant in a particular case is such that it :s attended with features which demand that it be approached with caution, then the trier of fact is enjoined to do so- because caution is cailed for - and not simply because it is a sexual assault case. Where for example the complainant is a five year old infant with no pre. ious sercual experience and therefore may not know what it is to be penetrated the trier of fact would, on that account and not because it is a sexual assault case, be expected to look for corroboration

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on t±ie issue or element of sexual intercourse. This would come, usually in the form of a medical report or*«n actual eye witness, as where the accused is found *inflagrante delictu.*

[32] In the present case, there is, apart from the Appellant's own admission to PW1 and PW3, no independent evidence that the complainant had sexual intercourse on the day in question. The evidence of the doctor who examined her two days after the alleged sexual intercourse could neither confirm nor dispel that allegation by her.

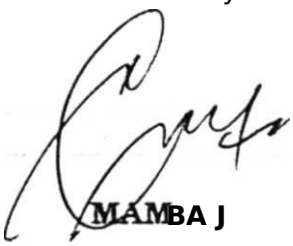
[33] Having considered the evidence as a whole, I have seen no red flags or signals, so to speak, which demand that I look for corroboration for the evidence of the complainant. The complainant was twenty years old, had a boyfriend and was sexually active. She knew what sexual intercourse was. And again, if corroboration of her evidence were required, this is supplied by appellant's admission of rape to PW1 and PW3 which I accept as having been made by him.

;34] In view of the conclusion 1 have reached above ; that corroboration of the evidence of the complainant was not required, it is not necessary for me to burden this judgement further by a reference to the medical report. As a matter of fact the court below did not base its conviction of the appellant on the concents of the medical report.

35] Rape is by its very nature savage, barbaric and an affront to society. I find nothing improper with the sentence of five years of imprisonment imposed on the appellant. If anything, it borders on leniency. The appellant himself did not m his submissions before us seriously challenge this sentence. The mcnm has, however, rightly in my view,

conceded that the court a quo ought to have backdated the sentence to the date on which the the appellant?«was arrested.

[36] For the foregoing reasons, I would dismiss the appeal and confirm both the conviction and sentence. The sentence of five years' imprisonment is backdated to the 11th day of March 2005.



MAMBA J

I agree

MAPHALALA J