

IN THE HIGH COURT OF SWAZILAND

CRIM. APPEAL NO. 73/06

In the matter between

SIBONISO NKOSINATHI MAGAGULA

APPELLANT

VERSUS

REY

RESPONDENT

CORAM

MAPHALALA J

MAMBA J Z.

FOR APPELLANT FOR

MAGAGULA M.

RESPONDENT

SIMELANE

JUDGEMENT 21=

JUKE, 2007

MAMBA J

[1] The appellant was charged with rape, it being alleged that he had on the 17- day of June, 2004. unlawfully raped Phumelele Sibiya at Masiphula area in the **Diszizz** of Shiselweni. He pleaded not guilty to the charge but was found guilty and sentenced to a term of six **fy** years of imprisonment.

[2] When the trial in the court a quo started, the appellant conducted his own defence but was later represented by Mr Z. Magagula, who also argued his appeal before us.

[3] At all times material hereto. The appellant and complainant were resident at Masiphula area and knew one another very well and in fact had a love affair sometime before the alleged rape. The complainant claimed that this love affair had been terminated by her in 2001 but the appellant maintained that this was not the case and they were still lovers on the day of the alleged rape.

[4] About 200m - 300metres away from the complainant's home there is a community water reservoir. Next to this reservoir is a bush.

[5] On the 17th day of June 2004, the complainant went to connect a hosepipe to the reservoir in order to draw water therefrom. This hosepipe was apparently made of several pieces joined together. According to the complainant whilst she was kneeling down attending to the joint in the hosepipe, the appellant approached her from behind, grabbed her and threw her onto the ground and caused her to lie supine. She was wearing a pair of trousers with an elastic band on the waist. The appellant pulled down the complainant's trousers and panties simultaneously and proceeded to rape her despite her protestations. He did this without ever uttering a word to her.

The complainant unsuccessfully tried to push him away. He did not use a condom and after he finished raping her, he left her lying on the ground crying and walked away saying he was sorry for what he had done. The complainant told him that his apology was of no use as the damage i.e. the rape had already been done.

[7] After the rape, the complainant went home to get money in order to telephone her mother who was working as a school teacher at Our Lady of Sorrows High School and on her way to make the call to her mother, she met **FW2**, Gogo Shamase to whom she reported that she had been raped.

[8] PW2 testified that she had just alighted from a bus when she met the complainant who was crying. On enquiry by her, the complainant told her that she had been raped by someone near "the river". (I have no doubt that this is an incorrect interpretation for reservoir). According to PW2 the complainant would not tell her who her assailant was but said she would reveal his identity to her "on another day". "The complainant continued on her journey towards Our Lady of Sorrows where she reported the matter to PW3 her mother, Constance Sibiya.

[9] PW3 testified that on the 17th June, 2004 she received a message to go to a certain eatery (Tea Room) near her school to meet the complainant. She went there and found her crying and being comforted by the lady owner of shop. The complainant was "very untidy, dirty and had scratches on her body. She appeared highly traumatized and down-spirited". Complainant informed her that she had been raped by the appellant and after a report of the rape was telephonically made to her father, the matter was reported to the police and complainant taken to the Matsanen; Health Centre .where she was examined by a doctor on the rezi day as there was no doctor available on the first day.

[10] The items worn, by the complainant when she was allegedly raped were taken by the police for forensic investigation and analysis but the results thereof were never disclosed to court by the crown.

[11] PW5 was Police Officer Thandiwe Dlamini who found the complainant at the Health Centre Tfhhd recorded a statement from her. She found her crying and told her that she had been raped by her former boyfriend as she tried to rejoin a hosepipe at the reservoir. Complainant told her further that she had tried to raise an alarm but her efforts had been sailed by her being strangled by the appellant. Thandiwe did not observe any dirt on the complainant's pair of trousers. This is one of the items of clothing that was taken for forensic tests and analysis by the police. However, PW5, 2949 Constable Mavuso said he together with another police officer went to attend to the complainant at Our Lady of Sorrows and found her crying uncontrollably. "Her cloths were dirty. Her pair of trousers was soiled³".

{12] In crass examining the crown witnesses and in his evidence in chief the Appellant denied having raped the complainant or ever having had sexual intercourse with her. He maintained that their love affair was still on and had not been terminated. He explained that the complainant had without any explanation stopped rsTV^q to him from 2001 to 2004 when they resumed their normal love attain. The appellant told the court further that or. the 16* June. 20G⁻¹ the complainant had invited him to visit her ai her home that day. He had agreed. However he forgot to honour the mtiitadcn and deeded to make up for it the next day when he visited her at her home at about 10.00 a.m. She had just finished cleaning the house. He had helped her carry- some containers to draw water iron a hosepipe connected to the reservoir nearby. He stated that they were talking tc one another generally and before they reached their destination the complainant sat dkr-m She suddenly became moody and reserrtd and would only speak to ■ if he asked her a question. She sat doirn wrah her hands on her knees and kept her gaze to the ground and ■arcciid not say what was wrong.- She was sobbing. Later she stood up and walked bone, still sobbr-.g. The appellant went to the salon

where he worked. He was arrested later that day and charged with the rape of the complainant.

[13] Blood samples were extracted/drawn from him and his pubic hair combed, presuming in search of foreign body tissues that might match those of the complainant. The results of this aspect of the investigation was not disclosed to him or the court a quo.

[14] According to the medical report the complainant was examined by a doctor at Matsanjeni Health Centre at 4.30 p.m. on the day of the alleged rape. I have my doubts about the correctness of this date on the report as it is clear from the evidence of the complainant that there was no doctor available to attend to her on the 17th June, 2004. The doctor observed that her hymen was freshly broken and the examination of her vagina was very painful. The doctor concluded that there was a "high likelihood of" forced vaginal penetration prior to" the examination.

[15] The cautionary- rule of practice employed in sexual assault cases was stated by **HANNAH CJ** in the case of **VTJLAKATI v R, 1982-1986 SLR (A) at 359D-E** as follows:

■ There is no rule of law requiring corroboration of the complainant's evidence in a case such as the present one but there is a well established common law/ role of practice in regard to complainants in sexual cases — terms of which a trial court must be aware of the dangers inherent in this evidence and accordingly should look for 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 and the identity of the alleged offender. If any or all of these elements are corroborated the court must warn itself of the danger at conviction. and — such circumstances, it will only

convict if acceptable and reliable evidence exists to show that the complainant is a credible and trustworthy witness.

In the present case, counsel for the crown rightly concedes that there was no 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 allegation that sexual intercourse took place. The only evidence that might 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 which she had contracted a sexual disease "

116] In **R v SANDILE SHABANGU CR. CASE NO. 233/06** a judgement by this court, delivered on the 7th day of May, 2007, the court ruled that it was time for the courts of this country to discard or jettison the traditional cautionary rule of practice pertaining to sexual offences and go ahead unshackled by it in the administration of justice. The court reasoned that the rule was arbitrary, empirically false and founded on a wrong premise.

[17] The court must look for corroboration only where the quality or nature of the evidence is such that it might be false; or there is a reasonable suspicion present in the evidence, that the complainant might be lying against the appellant. Such features or factors may include the past and present relationship between the parties.

1131 In casu corroboration is necessary not because it's a sexual assault case or because the complainant is a woman. It is required because of the particular features and the nature and quality of (the) evidence of the

complainant and PW3. Her evidence (which is confirmed by PW2), is that the first person she came across after the alleged rape, was PW2. She was crying or in a distressed mood and after being asked by PW2 if she was in that mood as a result of having been raped, she agreed but declined to name her assailant, promising to reveal his identity in the future. She does not offer any explanation for this stance. PW2 was obviously a concerned neighbour to whom one would have expected the complainant to confide in at that time. Complainant instead journeyed to telephone and later meet her mother to whom she revealed the identity of her assailant.

[19] It is clear from the totality of the evidence herein that both the complainant and her mother were not on good terms with the appellant. The complainant disapproved of the appellant's sexual liaison with Busi who was a much older woman than the complainant. The complainant terminated her love affair with the appellant because;

*I feared than you would impregnate me and deny paternity or rape me. Also- I had information that you were in love with this woman before court. I did not want to be embroiled with old peopBe. [see page 10 line 13-16] [and at page 24 lines 20-23 she says Tr.at] ~: feared that he would impregnate me and leave me with the c3dM. secondly he was in love with [Make] Busi and because there is H3Y and AIDS nowadays [I] feared that I could be infected cue to his tmrrrscurity."

~21>] She did no* offer any reason why she suspected or believed the appellant would abandon her after the birth of a child. There is no rrrddcariar in her evidence that the appellant had at any time during their lore affair tree tc pressure her into having sex with her against her will. Her assertion that she terminated their love affair because she feared the

appellant would rape her, is to say the least, curious and suspicious in the absence of a reason for her to hold this belief or fear.

[21] Complainant's mother told the court that she got to know about the love affair between the complainant and the appellant for the first time after the rape incident, (page 13 lines 19-22) The complainant, on the other hand informed the court that her mother knew about it before the incident, but she had later "told her that we are no lovers any more." (see page 11 line 1). When PW3 was asked by the appellant how she felt when she learnt that the Appellant and complainant were lovers, she replied that she was "very furious because what I knew is that you were in love with this woman before this court as you even stay at her home". . This, to my mind, suggests that she knew about the love affair before the alleged rape. Indeed complainant says so at page 28 lines 19-24 and that she did not approve of it. She did not approve of the appellant and his other lover, to whom she referred to as "this woman". She confirmed also that she had told the police that the appellant was a criminal who had stolen cellular telephones in the area and who should "be locked up for a long time". There is also the evidence of PW3 that the complainant told her that she had washed herself before being examined by the doctor. However, under cross examination the complainant said she had not done so. (vide page 30 lines 13-14)

[22] From the foregoing, the following facts and or conclusions relevant to the charge may be made, namely:

(a.) The complainant and the appellant were once lovers.

fb» This love affair was known to the complainant's mother and she strongly disapproved of it. (c) The complainant and her mother believed that the appellant was at the relevant time, engaged in a love affair with one Busi with whom he lived and was much older than him.

(4) The complainant disapproved of the love affair between Busi and the appellant, and this persuaded her to end her affair with the appellant.

(5) Though the complainant loved the appellant, she did not trust him, such that she feared appellant would rape her, impregnate her and not care for the resultant child and infect her with HIV/AIDS. She branded him promiscuous.

(6) The complainant's mother branded the appellant a criminal who deserved to be put away in prison for a long period.

(7) On the 17th day of June, 2001 the complainant and appellant were together near the reservoir in the area and she reported to her mother and the police that she had been raped that morning.

(h) The Medical Doctor who examined her concluded that her hymen had been "freshly broken". This is at least evidence of recent sexual intercourse. However, there is no indication how recent this could have happened. The bracket of possibility is not stated.

(i) There is no corroboration of the evidence of the complainant that it is the appellant who had sexual intercourse with her on the alleged occasion.

'23} Again, because of the apparent animosity harboured by the complainant and her mother towards the appellant, I am unable to say that in the absence of corroboration of the evidence of the complainant that it is the appellant who raped her on that day. I would therefore allow the appeal.

MAMBA J

I concur,

MAPHALALA J