

IN THE HIGH COURT OF SWAZILAND**HELD AT MBABANE CRIM. APPEAL CASE NO. 87/06****In the matter between:****MTHOBISI NZIMA****VS****REX****CORAM****FOR APPELLANT****FOR RESPONDENT****APPELLANT****RESPONDENT****MAPHALALA J****MAMBA J****IN PERSON****M. SIMELANE**

JUDGEMENT**25th January, 2008**

MAMBA J

[1] The appellant, an 18 year old male was arrested on the 13 November, 2003 and charged with the crime of rape. The crown alleged that the appellant raped the complainant one Zanele Shabangu at Fairview on the 12th November, 2003.

[2] The appellant was unrepresented and conducted his own defense. On being arraigned, he pleaded not guilty. He was, however eventually found guilty as charged and on the 16th December, 2004 he was sentenced to imprisonment for a period of seven years. This sentence was not back dated,

despite the fact that the appellant had been in custody since the time of his arrest stated above. He has appealed to this court against both his conviction and the sentence imposed on him by the trial magistrate.

[3] The case for the crown was based solely on the evidence of the complainant. She testified that on the 12th November, 2003 she intended to move into her newly acquired rented house at a Tsabedze homestead at Fairview in Manzini. She did not know this homestead. She was advised to go to the bus station in Manzini where she would find a bus that would take her to her destination-the Tsabedze homestead.

[4] The complainant had left her place of employment at Matsapha at 6pm and because it was already at night, she told a bus driver at the Manzini bus station that she would go and spend the night at the police station and search for the Tsabedze homestead the following day. This bus driver then took and introduced her to the appellant who was to show her the Tsabedze homestead that night.

[5] The appellant was a bus conductor and allegedly lived near the Tsabedze homestead. The complainant traveled from the bus station in the mini bus on which the appellant worked as a conductor. She did so on his advice. Before their

destination, the appellant advised the complainant that she could sleep in his house as it was already too dark and she would have difficulty locating the homestead.

[6] Both the appellant and complainant alighted from the bus at a certain bus station at Fairview and the appellant carried the complainant's luggage as they walked to his house. At his house, appellant told the complainant that she could sleep there and he would sleep in another house with his friends. She agreed.

[7] Shortly after getting into the appellant's room, persons who turned out to be the friends of the appellant, came. The appellant went out of the room to speak to them. He locked the complainant inside his room as he spoke to his friends outside. After a short while he returned, unlocked it and once inside, locked the door again.

[8] He prepared himself to sleep on a sponge inside the room and offered a grass mat to the complainant to sleep on. The mat was partly covered by the sponge the appellant laid on.

[9] The appellant started proposing love to the complainant who declined his overtures and told him that she was already committed to her boyfriend and was also pregnant.

[10] The complainant had a pair of trousers on under her skirt and as she lay on the mat, the appellant switched off the lights and joined the complainant where she slept and started fondling her. He tried to kiss her and she turned her face away from him. The appellant accused her of being childish. He put his hand under her skirt and tried to pull her pants down. The complainant resisted this by holding onto her trousers and pulling them up. They struggled over this for a long time. The appellant won. The complainant's pair of trousers got torn in the process and was forcefully removed from her body by the appellant.

[11] The appellant again taunted her and told her that a mouse and a cat can not live together. (No doubt he was the cat and she was the mouse). The appellant over-powered the complainant. He threatened her with violence if she should shout for help. He pushed her panties to one side and had sexual intercourse with her without her consent. After the rape he switched on the lights, had a meal and offered milk to the complainant. She declined the offer. Again he raped her. By this time the complainant was very tired or exhausted and was unable to offer any resistance.

[12] The next morning the appellant left the room leaving

the complainant behind. He instructed her not to lock the room. Later the complainant left the room and went to look for the Tsabedze homestead. She found it and left her belongings there before going to report her rape ordeal to the police.

[13] She led the police to the Manzini bus station where she identified the appellant as her assailant. She was then taken to the RFM Hospital where she was examined and given certain medication by the doctor.

[14] The appellant was arrested later that day and charged for having raped the complainant and he was taken into custody.

[15] In cross examining the complainant the appellant did not deny having had sexual intercourse with the complainant on the night in question. He also did not deny the circumstances under which he met the complainant and how the latter ended up spending the night in his room with him. He suggested, however, that the complainant consented to the sexual intercourse. He repeated this assertion in his submissions in the court below and before us.

[16]The complainant was adamant that she did not consent

to the sexual intercourse.

[17] The appellant's rights were explained to him by the trial magistrate at the close of the case for the crown. He said he fully understood such rights and elected to remain silent.

[18] The court found him guilty as charged and ruled that the evidence of the complainant was very clear, straight forward and no corroboration for it was necessary.

[19] The appellant urged us to find that the crown had failed to prove that the sexual intercourse between him and the complainant was without the consent of the complainant. He pointed to the complainant's failure to raise a hue and cry and the apparent ease with which she allowed herself to sleep in his room that night. I can not agree.

[20] The complainant was in an area she did not know. It was at night. She was a stranger in the area. She was desperate to get to her new house. She was even prepared at the bus station to go and spent the night at the police station. She was persuaded by the bus driver and the appellant that the appellant would, that night, take her to the Tsabedze homestead she was looking for. She did not shout for help because, inter alia, the appellant ordered her not to and also

because the room immediately adjacent to the room in which she was raped was to her knowledge, unoccupied.

[21] The appellant did not deny that there was a struggle between him and the complainant before the sexual intercourse. He did not deny either that he had referred to the incident as a cat and mouse situation-obviously the cat devouring the mouse against its will. Further the appellant did not deny that he had had sexual intercourse with the complainant with her panties on. If she had consented to the act, it would be strange, very strange indeed why she would not have removed them. The appellant further does not deny that the complainants pair of trousers was torn immediately before the sexual intercourse. These elements in my view, are not consistent with consensual sexual intercourse. They are in fact consistent with lack of consent. I would therefore dismiss the appeal against conviction.

[22] There is nothing on the record to indicate that the learned trial magistrate erred in passing the sentence he imposed on the appellant. The appellant took advantage of a desperate young lady who was trying to get to her house at night.

[23] When she intimated that she wanted to go to seek

shelter at the police station, the appellant inexplicably accused her of wanting to have sex with police officers. He offered to take her to her house. He held himself out as the Biblical Good Samaritan but turned out to be a wolf in sheep's skin. There is, in my judgement, nothing wrong with the sentence of seven years imposed upon him by the court a quo.

[24] As stated above the appellant was in custody for about eight months before he was sentenced. The learned magistrate did not back date his sentence-to take into account this period of incarceration. He should have done so. The crown has, rightly in my view, conceded as much.

[25] For the foregoing reasons, I would therefore dismiss the appeal on both conviction and sentence. The sentence is, however, to commence running with effect from the 13th November, 2003, being the date on which the appellant was arrested and detained.

MAMBA J

I AGREE.

MAPHALALA J