IN THE HIGH COURT OF SWAZILAND

CRIM. APPEAL NO. 16/2007

In the matter between:

SIBUSISO MKOTO SIMELANE **APPELLANT**

VS

REX

CORAM **ANNANDALE J**
MAMBA J

FOR THE APPELLANT **In person**

FOR THE RESPONDENT **Ms Q. Zwane**

JUDGEMENT 5th
February, 2009

MAMBA J,

[1] The Appellant, a 20 year old man, appeared before the Senior Magistrate at Pigg's Peak on a charge of Rape. The charge sheet alleged that on the 12th July 2005 he unlawfully and intentionally had

[2] He made his first court appearance on the 10 August 2005, just a day after his arrest. His rights to legal representation, by an attorney of his choice and at his expense were explained to him on his first appearance and also on the 27th October, 2005 before his plea was taken and on both occasions he informed the court that he would conduct his own defence.

[3] On being arraigned he pleaded guilty to the charge. This plea was, however, quite properly changed to that of not guilty by the presiding Magistrate when it emerged from the Appellant's cross-examination of the complainant that the Appellant was contending that the sexual intercourse was with the consent of the complainant who, in fact was the instigator thereof. For some reason or reasons not immediately apparent on the face of the record, the trial took just close to two years to be finalized.

[4] At the conclusion of the trial, the Appellant was found guilty as charged and sentenced to a term of 7 years of imprisonment. He was sentenced on the 17th July, 2007 and the sentence was ordered to run with effect from the 9th August, 2005; that being the date on which the Appellant was arrested and taken into custody. He has appealed against his conviction only, complaining in essence that the court a quo should not have believed the evidence of the crown, in particular that of the complainant, regarding the absence of consent by her.

[5] I should point out from the out-set that whilst the alleged rape was committed in the veld at night and there were no independent witness to it, the identity of the alleged perpetrator thereof was not in issue because the Appellant admitted that he was the man who had sexual intercourse with the complainant on the night and at the place in question at the time material herein. His defence was that the complainant consented to the sexual intercourse.

[6] I now examine the evidence that was led before the court a quo. I shall examine the evidence by the crown first and then the evidence of the Appellant.

[7] The first witness called by the Crown was the complainant, a grown up woman whom the trial Magistrate said was old enough to be the Appellant's grandmother. She lived in the same neighbourhood as the Appellant who was well known to her.

[8] On the 12th July 2005 the complainant left her homestead at about 2 pm on some personal errands which included fetching her blanket from one of her neighbours and also buying sugar from one of the local tuck shops (spaza shops). At one of the Simelane homesteads in the area where *umcombotsi* beer was being sold, the complainant, the Appellant and one Albert Ntsini, the Appellant's uncle were present at the same time, that is to say, in the presence of each other. Of these three, the Appellant was the first to leave this drinking place. The complainant left for her home after sunset. She walked with the aid of a walking stick. Just before crossing the Mganda river, the Appellant came from behind her and rudely pushed her under her arm almost causing her to fall. The complainant complained to the Appellant about this conduct and asked him where he was going to which the Appellant said he was going to his home.

[9] The Complainant was apprehensive of the Appellant's conduct aforesaid and decided not to cross the river but go to the homestead of Albert Ntsini the Appellant's uncle, to report to him what the Appellant had done to her. The Appellant's uncle gave evidence for the Crown as PW2. He was a Community Police in the area at the material time. He advised the complainant not to proceed on her journey home but to spend the night at his house. She declined this offer stating that her husband had visitors at home and she also needed to take home that night the sugar she had purchased. She then set out on her journey home, alone again.

[10] Near Shongwe's homestead after crossing the Mganda river, the appellant came from behind her, grabbed her by her cloths, "put his leg between her thighs and threw her to the ground. She got such a fright that she soiled herself. Swiftly but roughly under her arm and pressing in her armpit and almost causing her to fall. The Appellant lowered his trousers to his knees and raped her. He was armed with a stone and threatened to hit the complainant with it. After the rape, the Appellant left the scene. The complainant did likewise. They both proceeded on their separate ways, in silence. She said she was so confused that she did not know what to do such that when she got home she did not report her ordeal to her husband but returned to the

Appellant's uncle - whom we already know was a Community Police - to report the incident.

[11] He again advised or asked her not to go home but to spend the night at his house. This time she agreed. The next day both went to report the matter at the home of the Appellant's grandfather. The incident was reported to the Appellant's grandfather, in the absence of the Appellant. The matter was, on the advice of the said grandfather reported to the Police.

[12] The evidence of PW2, the Appellant's uncle is substantially the same as that of the complainant, save in the following respect: PW2 was of the opinion that the complainant was drunk whilst at the Simelane homestead, despite her testimony that she had not taken any alcoholic drink at the material time. This witness further told the court that when he called the Appellant, after the rape had been reported to him, the Appellant ran away and did not want to speak to him. There are two further aspects of his evidence that are worth mentioning and both are contained in his evidence given in cross-examination by the Appellant. First he was asked:

> "Can you deny that after I had left the 2 sugar canes at her homestead, I went [past] the Simelane homestead where you and the complainant called me and I went to the

Simelane homestead and the complainant told me that she wanted to have sexual intercourse with me. She was from fetching the blanket from the shop by then?"

His answer was :

"That is correct I was present when the complainant called the Accused [but] I did not hear [what she said to him.]" (see page 16 lines 2-8). Secondly, the

Appellant put it to him that he did not run away when called by this witness after the rape report but infact went to where PW2 and the complainant were and the complainant "told me that i must admit that we had sexual intercourse the previous day, so that the matter will be reported to the Chief's Kraal and that her husband had beaten her up when she got home the previous day," his reply was

"That is correct".

This answer is, to say the least, curious in light of this witness's assertion earlier on that the Appellant ran away and did not talk to either the complainant or this witness. The evidence is overwhelming though in my judgement that the complainant did not speak to the Appellant after the rape incident or anytime after the report had been made to PW2. The complainant was also not chastised by her husband for having had sexual intercourse with the Appellant. The rape incident was reported to him after the Appellant had disappeared in the area. In fact in re-examination PW2 clarified the position by stating that:

"When I went to wake up the Accused he ran away. The complainant then said the matter must be talked in hush terms... I next saw him here in court" (see page 24 lines 11-15).

[13] The evidence strongly suggests that the Appellant disappeared from his home in Pigg's Peak for about a month and was arrested on the 15th August, 2005. He says he had returned to his place of employment away from Pigg's Peak.

[14] The Appellant gave evidence in his defence and stated that he had met the complainant twice on the day in question. The first encounter was at the homestead where the complainant was found in the company of two

old women and PW2 drinking beer. The complainant beckoned him to her and told him that she wanted to make love to him. She indicated this by putting her thumb in between her index and middle fingers. The second meeting was at the Appellant's garden where he cut sugar cane for her and the two agreed to meet for their sexual escapades at the marshy sport near a Shongwe homestead.

[15] At around 10pm, presumably that being the appointed time, the Appellant went to the rendezvous and not before long was joined there by the complainant. Again it was her who started the ball rolling culminating in the sexual intercourse after which they parted ways, promising to meet again the following day; presumably for another bout of the same.

[16] On the next day, the Appellant was surprised when the complainant, in the company of PW2, confronted him and tried to pressure or cajole him to admit, publicly I suppose, to having had sex with her

> "so that the matter will be dealt with at the Chief's Kraal and that my family will pay a fine, [but I] was afraid to agree because she was an old woman [and] my uncle advised her to go to police and report that I had raped her."

In summary, that is his evidence in chief. He maintained this under cross-examination and suggested that the complainant was crying rape because her husband had discovered her infidelity and had assaulted her for it. He suggested further that the complainant had falsely implicated him in the rape because in the year 2003, he had planted dagga in the area and after harvesting the herb he turned down her pleas to share it with her.

[17] The learned trial Magistrate, correctly in my view held that the crown had proven the guilt of the Appellant beyond a reasonable. He held that the following factors were inconsistent with the Appellant's allegation that the complainant consented to the sexual intercourse and were in fact consistent with the lack thereof namely:

(a) the report by the complainant to PW2, before the actual sexual intercourse, that the Appellant pushed or manhandled her near the river, under suspicious circumstances;
(b) the fact that the complainant soiled herself immediately before the sexual intercourse;
(c) the complainant's shout for help which was immediately stopped by Appellant's threats of physical violence;
(d) The fact that the Appellant ran away from his home when called by Pw2 who was in the company of the Appellant after the rape complaint had been made to PW2, who was a Community Police.

[18] I accept that the Appellant does not bear the onus to give or suggest a reason to the court why the complainant has falsely implicated him in the commission of the offence, but the facts cited above are clearly consistent with lack of consent on the part of the complainant. One also notes, as did the trial court, that the complainant's husband only got to know about the sexual intercourse between the Appellant and his wife after the issue had been reported to PW2. It is further inconceivable and totally unreasonable that the complainant would, in 2005, seek to lay a false charge of rape motivated by the alleged dagga incident that occurred in 2003. The complainant must have been evil, most unforgiving and totally unimaginative to have hatched such a plan or stratagem and under such circumstances.

[19] Whilst there is merit or justification in the Appellant's criticism of the evidence by the crown regarding its failure to lead evidence to substantiate the allegation or prove that indeed the complainant soiled herself when she was attacked, this non disclosure as to what became of the clothes worn by the complainant then or indeed what the complainant did about this incident after the attack, does not in my judgement detract from the overall tenor of the evidence against the Appellant. The crown is not expected to establish its case beyond a

shadow of a doubt. It has to do so beyond a reasonable doubt. The said non disclosure does not cast any reasonable doubt on the veracity and cogency of the evidence by the crown.

[20] For the above reasons, I would therefore dismiss the appeal.

MAMBA J

I agree.

ANNANDALEJ