IN THE APPEAL COURT OF SWAZILAND

APP. CASE NO. 56/84

HELD AT MBABANE

In the matter of

DICKS MACALA VILAKATI Appellant

and

REGINA

CORAM: ISAACS, A. J. P.

WELSH, J.A.

HANNAH, C.J.

JUDGEMENT

HANNAH, C.J.

On 26th November, 1984 this appellant was convicted by the Chief Justice, Mr. Justice Will, of the offence of rape and was sentenced to six years imprisonment. He now appeals against that conviction by Notice of Appeal dated 11th December 1984 in which his complaint, in general terms, is that it was not he who committed the offence.

The evidence before the court a quo fell within a fairly narrow compass and may be summarised as follows: Lucy Ngwenya, the complainant in the case, testified that on the evening of 23rd February 1984 she retired to bed in her house on Tambuti Estate having earlier that day attended the funeral of her child. It must have been a very difficult, tiring and emotional day for her. According to her evidence, at about 11p.m. she was awoken by a man who had entered her bedroom and who asked where her husband was. She said she lit a paraffin lamp and by its light she was able to recognise the man as the appellant who occupied a house nearby.

I pause here in the narrative to mention Crown Counsel's submission that there is nothing strange to be read into the fact that the man permitted the complainant time to light the lamp as the initial purpose of his visit was to see the husband. But, as the witness herself said, the appellant should have known that the husband, a security guard, would have been on duty and, speaking for myself. I do find this aspect of the case rather curious.

The appellant then grabbed the complainant, pushed her against a wall and threw her to the ground. She temporarily lost consciousness and came to to find the appellant having sexual intercourse with her. She struggled to free herself but the appellant throttled her causing bruises on her neck. After the act of sexual intercourse had been completed the appellant left and from the kitchen window she was able to see him entering his house.

Again I pause to mention a point made by the appellant, a point which has some force, that had

he been the rapist it is hardly likely that he would have boldly returned to his own house in full view of the victim.

The complainant said that she reported the rape to a certain woman but the only person to give evidence concerning any such report was Amos Mkhwanazi, a security guard on the estate, who testified that at 12.45a.m. that night the complainant came to him alleging that the accused had raped her. Apart from a doctor who examined the complainant three days later and found that she was suffering from a sexually transmitted disease and that she had an abrasion on the left side of her neck that, essentially, was the evidence for the prosecution.

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As against the foregoing, the appellant gave evidence to the effect that he spent the whole of the night of 23rd February in his house which he was, at that time, sharing with a friend. The friend gave evidence that he was also in the house that night and because of a noisy external door near where he was sleeping he would have been disturbed had the appellant opened it to leave or enter. He said he was not disturbed.

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 cautionary rule of practice in regard to complainants ni sexual cases in terms of which a trial court must warn itself of the dangers inherent in their evidence and accord-ingly 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 alleged and the identity of the alleged offender. If any or all of these elements are uncorroborated the court must warn itself of the danger of convicting and, in 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 and that on the day of examination she had an abrasion of recent origin on her neck.

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Unfortunately, the lack of corroboration of the complainant's evidence found no mention in the judgment nor did the learned Chief Justice give himself any warning, at least expressly, of the danger of convicting without it. That is not to say, of course, that he did not bear this important matter in mind but this court has no option but to proceed on the material before it and cannot make assumptions unsupported by the record.

In his judgment the learned Chief Justice simply contented himself with stating that he accepted the evidence of the complainant and save for referring to the fact, which was common ground, that the appellant was well known to her gave no reason for this finding. I should mention here that Crown Counsel relied heavily on the fact that appellant and the complainant were known to each other but this assists the Crown only to exclude mistake and not on the question of credibility.

It is the general experience of the courts that various motives may exist for a complainant in a rape case either to concoct an allegation of rape or to substitute the accused for the real culprit.

That is the underlying reason for the cautionary rule. It is unnecessary in this judgment to canvass such motives save to say that one, not infrequently found, is a desire on the part of a woman to conceal or explain evidence of an extra-marital affaire. Such evidence may, of course, consist of a sexually transmitted disease and, while I do not suggest that that was necessarily the position in the present case, the fact that the complainant was suffering from such a disease was certainly worthy of consideration in assessing the general credibility of her testimony. When to that is added the fact that the complainant must have been under great stress on 23rd February there was, in my view, a clear duty placed on the learned Chief Justice to consider her evidence

with the utmost caution. Such sense of caution is, unfortunately, not evident from the terms in which the judgment was couched and, in these circumstances. I am not satisfied that the totallity of the evidence was properly weighed.

Had reasons been given for accepting the evidence of the complainant I might be disposed to arrive at a different conclusion but as they were not and in the absence of any direction on the question of corroboration I do not consider that it would be safe to allow this conviction to stand. Accordingly, I would allow this appeal.

N.R. HANNAH

CHIEF JUSTICE

I agree

R.S. WELSH

JUDGE OF APPEAL

I agree

I. ISAACS

ACTING JUDGE PRESIDENT