HELD AT MBABANE

CRIMINAL APPEAL NO.16/1997

In the matter between:

THE KING RESPONDENT

vs

ANDERSON MAGAGULA APPELLANT

CORAM

LEON JA

SCHREINER JA

STEYN JA

FOR APPELLANT : IN PERSON

FOR RESPONDENT : MISS LANGWENYA

JUDGEMENT

Leon JA:

The appellant pleaded not guilty to the charge of rape but was convicted of rape and sentenced to six years imprisonment. In the indictment the following aggravating circumstances were alleged:

1. the accused severely assaulted the complainant before committing the offence:.
2. he was armed with a cane slasher to scare her off. He physically and verbally humiliated her as a result of which she suffered psychological trauma and shock.

These aggravating circumstances were held correctly not to have been proved and there is no evidence as to how they come to be alleged. Apart from the cryptic reference to the fact that they had not been proved the learned judge has not referred in his judgement any further aspect of this matter.

No police evidence was led. The Crown was about to do so to show that the complainant's face was swollen, but the Appellant's attorney indicated that that was common cause because the Appellant admitted strucking the complainant twice across her face.

The learned judge then suggested to counsel for the Crown that it was not necessary to lead such

evidence. However, in the summary of evidence attached to the indictment it is stated that the complainant would say that the Appellant was carrying a cane slasher. This was not her evidence despite a strong attempt by the prosecutor to get her to say that. She said he was carrying nothing. All this suggests that the complainant was untruthful. And the Appellant on this point was right in saying that the complainant was an untruthful witness. The Doctor who examined the complainant on the day in question did not give evidence but his report was handed in. The report did not refer to any injuries and the Doctor was of the opinion that the complainant had had sexual intercourse; that was common cause.

The Doctor, however, said that the complainant had told him that she had a boyfriend. That was denied by the complainant. The complainant and the Appellant lived close to one another. On the day in question the complainant joined by Thuli Sithole who was on her way to the shop and Thuli was walking slightly ahead of her. The Appellant blocked her way. The complainant was carrying a paraffin container. According to the complainant, the Appellant slapped her with his open hands, dragged her along and kicked her with a booted foot several times, although in this regard the complainant said in evidence that he did not kick her hard.

He said she must go into the bush but she refused. He said she had a choice, either to have sexual intercourse with him or lose her teeth. As a result of this threat she had sexual intercourse with him.

He ordered her not to report to anyone. Before they went into the bush PW2 had gone ahead. The complainant never went to buy paraffin but went straight to the police station to complain. On her way she came across Thuli and reported what had happened. The sexual intercourse lasted for about three hours during which he had intercourse with her three times. She had previously had a relationship with the Appellant but it only lasted two months and they did not have sexual intercourse during that period.

Apart from her face being swollen and the eyes being some what painful, the incident had not affected her in any way. That is in conflict with what is alleged in the indictment. The complainant admitted that at the request of her mother, she often went to the Appellants home to collect milk because he had cows. She did not go there on the day before the incident. She had been there on a Thursday. When the Appellant gave her a litre bottle of milk which she

undertook to return but did not do so. She said that when the Appellant blocked her way, Thuli turned round and must have seen something of what had occurred. She denied that the Appellant had asked her for the litre bottle or that she hit the Appellant with the container on the chest, which was his evidence. And that was why he had slapped her. She said that the Appellant was bigger and stronger than her. That was confirmed by the learned judge. He drew attention to the fact that she was a diminutive woman and he was a big man.

The assault took place on a foot path in broad day light with many people about. The Appellant testified that his cousin, one Dlamini who was not called as a witness witnessed the assault. The intercourse took place near the river. None of her clothes was torn. She sustained no injuries apart from the swelling on her face. She admitted making a statement to the police in which she said that the Appellant was carrying a plastic container, but she claims not to have mentioned the cane slasher.

This is inconsistent as I have said both with the indictment and with the summary of evidence attached thereto. And it is inconceivable this would have been invented by the police. When she met Thuli she was crying. She had sex before with the father of her child, that was in 1993 but they had separated. On the day on question she was having her periods. She did not tell the Doctor when he examined her that she had a boy friend. That is inconsistent with the medical report.

PW2, Thuli, was the other witness for the Crown. She confirmed that she had been with the complainant that day and she saw that the Appellant slapped the complainant with an open hand and dragged the complainant towards the bush. She then went off She saw that the Appellant was dragging her. She did not assist because she was afraid of the Appellant. When she returned from her shopping she met the complainant, saw that her face was swollen and asked her what had happened.

In response to that inquiry, the complainant said that the Appellant had forced her to have sex with him.

At the time of the event the complainant did not have a lover. The complainant did not shout for help nor was she crying when she met her again. That is in conflict with the complainant's evidence. The Appellant gave evidence under oath. He testified that when he met the complainant on the day in

question he asked her for the litre bottle which she had taken the

previous day. She then hit him with a plastic container on the chest. Annoyed, he then struck her twice on the cheek with his open hand. She apologised and asked whether they could not move away from the foot path as people would see there was a quarrel. They sat on the grass, they were still in love, they had intercourse by consent. They had been lovers for two years and he had no idea why his lover should trump up a case against him.

He said they normally had sex at his home, but there were occasions when they went into the bush.

He testified that he had had sex with the complainant only once on this occasion. Whereas it was the complainant's evidence to which I have referred that they had sex three times. And she was not cross-examined on this point. The Appellant said that he did not have time to give his counsel instructions. That seems to me to be inherently improbable. He admitted having being a big man and he admitted that the complainant was a little woman.

After setting out the facts the learned judge referred to the improbabilities in the Appellants version which include: (1) that a diminutive woman like the complainant would engage in a physical fight with someone like the Appellant who was much bigger than her. He found it difficult to understand why the complainant should want to draw the Appellant into the bushes. (2) If the Appellant and the complainant were lovers as maintained by the Appellant, why should they have sex in the bushes and why should she fabricate a case against the Appellant. I agree with all these improbabilities and I agree with the learned judge that the Appellant was demonstrated to be liar. His whole evidence reads shockingly and there was every justification for the learned judge to hold as he correctly did that the Appellant was a liar.

However, the learned judge does not refer at all to the imperfections in the complainants evidence which include the conflict between her evidence and the medical evidence. The conflict between her evidence and the allegations of aggravating circumstances, particularly with regard to the cane slasher. The conflict between her evidence and that of PW2 as to whether she was crying. The fact that she did not complain of her own volition but only when asked. In my view, by not referring to these matters at all, the learned judge was guilty of a misdirection in failing to refer to material matters which he ought to have referred to. That is an example of a misdirection. The question then is whether in view of that misdirection a court properly instructed would inevitably

come to the same conclusion. In my view, the answer to that question must be in the affirmative.

It must in the affirmative for two main reasons: The one is the fact that the complainant's companion Thuli corroborated the complainant's evidence that she was dragged into the bush. That is wholly inconsistent with intercourse by consent. The other is the fact that the Appellant was undoubtedly a lying witness and that is a legitimate consideration which a court is entitled to take into account in finding whether the guilt of an accused person has been proved. And finally, I should add that the complainant made a complaint about the rape straight away to the police and on her way she made a similar complaint to Thuli. If one has regard to the cumulative effect of the afore going, I am of the opinion that a court properly directed would have inevitably have concluded that the Appellant was guilty as charged.

With regard to the sentence, the sentence of six years imprisonment seems to me to be a proper sentence in the circumstances. I appreciate, as the Appellant has pointed out, that there are families involved and others would suffer as a result of his conviction. That is one of the consequences which regrettably occur often in these cases, but there was no misdirection on the question of sentence and there is no basis upon which this court can be justified in holding that the sentence was a shocking sentence. In my judgement, the appeal must be dismissed and the conviction and sentence must be confirmed.

R.N. LEON JA

I agree :

W. H. R. SCHREINER JA

I agree :

J.H. STEYN JA

Delivered on this.....day of September 1997.