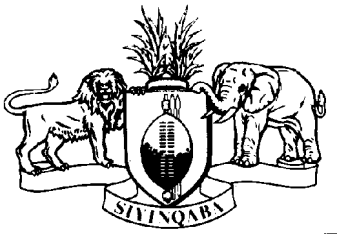

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.38/2002

In the matter between:

BHEKI MATSE		**APPELLANT**
	AND	
REX		**RESPONDENT**
CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**ZEITSMAN JA**

JUDGMENT

Browde JA:

This appeal arises out of the conviction in the High Court of the appellant who is convicted for a charge of rape. It was alleged by the Crown that on 27th September 1988 at Engonini the appellant raped A. He was convicted and sentenced to a term of imprisonment of 15 years. This appeal is brought against both the

conviction and the sentence.

The indictment contained the allegation that the victim of the rape was a female of 29 years of age who was mentally handicapped and incapable of giving consent. The uncontested evidence presented by the Crown regarding the complainant's mental capacity was that of Dr. D.R. Ndlangamandla a consultant psychiatrist whose report was handed in by consent. In the report the doctor, after examining the complainant, made the following conclusions:-

> "A is a 29 year old woman single with no children, never attended school because of her mental handicap and still lives with her parents. She cannot give any coherent account of herself or of the events that took place on the day of the said crime. She briefly says she doesn't remember anything and she doesn't know why she is with the police.
>
> Clinically, she is severely mentally retarded, with an IQ at the range of 20 – 30. She cannot differentiate between right and wrong and she is not able to follow court procedures. She is therefore not fit to stand trial or to give evidence in court."

The opinion of the psychiatrist was supported by the evidence of the complainant's mother who stated that her daughter was of "unstable mind" and that she never attended school and that all she could do around the house was sweep the place and wash the clothes. She went on to say that the complainant had never had a boyfriend. The latter statement was canvassed in cross-examination by the appellant who suggested to the mother that he had had a relationship with the complainant. It was flatly denied by the witness who suggested that the appellant had never been to her homestead and stated that if it was true that they were in love he should have taken the complainant to his home instead of, as she put it, "not just to go and then go up against her along the way". This statement arises from the fact that the act of sexual intercourse according to the Crown witnesses, and this was not disputed by the appellant, took place in a forest. The appellant stated that the act was committed near some houses but did not deny that the actual scene was among trees. If they were lovers as the appellant would have us believe, it is difficult to understand why it was necessary to take this retarded woman to a forest and have intercourse with her on the ground.

The evidence of Aaron Mamba was to the effect that he was called

on the day in question because someone was crying in the forest. He stated that "it was a female screaming". He stated that as he got closer to where the screaming was he saw the appellant on top of the complainant. His evidence was that as soon as the appellant saw him, he, the appellant, stood up, pulled up his trousers and ran away. He was chased by the witness and one Jimmy who had also responded to the screaming in the forest. They caught up with the appellant and took him together with the complainant, to the homestead where the complainant resided. Then the witnesses reported the incident.

The explanation given by the appellant during the course of his cross-examination of the witness Mamba was, to say the least, specious. He suggested that the screaming of the complainant was due to the fact that she was in pain and "it was a long time since we have been last together making love". As to his running away he stated that that came about because it would not have been polite to continue what he was doing with the complainant in Mamba's presence. If it was not such a serious matter one might be forgiven if one regards that explanation as being laughable. Needless to say, I fully agree with the Judge's rejection of that explanation.

The appellant gave no explanation whatsoever why the complainant should have screamed in such manner as to attract the attention of people who were apparently quite far away from the scene. Merely crying because of pain would not have done this. There is no substance in the appeal on the merits of the matter and the conviction is confirmed.

As far as the sentence is concerned I have no hesitation in agreeing with the court aquo that the crime was accompanied by aggravating circumstances. The appellant obviously took advantage of a woman incapable of defending herself and, having regard to the psychiatrist's evidence, was not even able to exercise any free will in relation to the lust of the appellant. The minimum sentence prescribed by Parliament for rape with aggravating circumstances is nine (9) years imprisonment. This long term of incarceration indicates a desire by the legislature to do all that a statute can to curtail, if not eliminate, the attacks on women and girls which are rife in this Kingdom. I agree unhesitatingly with the learned judge's expressions of abhorrence of the crime committed by the appellant and the need for an unambiguous

message to emanate from the courts that society will not tolerate the conduct of rapists in this Kingdom. I am of the opinion, however, that the learned judge's disgust caused him to impose a sentence which is so harsh as to induce a sense of shock. The appellant is a first offender and a young man of about 26 years of age. An opportunity should in my judgment be afforded him to benefit from his sentence of imprisonment and still be of an age when he can make a decent contribution to this society. Moreover, the complainant does not appear to have sustained physical injuries of any kind. There was also no evidence of psychological trauma. In view of her severe mental retardation referred to above, it is unlikely that this would, in any event, have been severe. Indeed the evidence indicated that she had no independent recollection of the events.

For those reasons I would confirm the conviction but reduce the sentence from 15 years to 10 years imprisonment back-dated to 27th September 1998 i.e. the date of the appellant's arrest and from which date he has been incarcerated.

J. BROWDE JA

I AGREE ***J.H. STEYN JA***

I AGREE ***N.W. ZIETSMAN JA***

Delivered in open court on the …….. day of May/June 2002