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IN THE COURT OF APPEAL OF SWAZILAND

Crim. Appeal Case No.13/2004

In the matter between:

NICHOLAS MAGAGULA **APPELLANT**

VS

REX

CORAM **LEON J.P. BECK**
J.A. ZIETSMAN J.A.

JUDGMENT

Beck J.A.

The appellant was convicted of rape and was sentenced to 12 years imprisonment, backdated to the date of his arrest. He has appealed against conviction and sentence.

The complainant was 20 years old at the time of the offence and she was sexually active according to the medical evidence. She shared a room with her aunt who was a switchboard operator at the hospital and a lover of the appellant.

At about 7pm on the night in question the complainant's aunt left their room to go to work as she was on a night shift. Shortly before her departure the appellant had arrived somewhat inebriated. The complainant prepared some food for him and then went to bed clad in a nightgown and a panty and she went to sleep.

Some time later she was awakened from a deep sleep because the appellant had lain down behind her, had pulled down her panty and had inserted his penis into her vagina. He had also turned up the volume on a bedside radio so that the music was very loud.

The complainant screamed and struggled to free herself from the appellant in order to flee the room, which she succeeded in doing but her nightgown got torn in the process.

Her cries were heard by neighbours who appeared when she emerged from the room, whereupon the appellant locked himself in the room. The complainant immediately made her way to the hospital in her torn nightdress to tell her aunt what had happened.

Her aunt saw her arrive at the hospital in tears and she saw that her nightgown was torn. The complainant told her what the appellant had done and her aunt examined her panty and said she found it wet with "sperms". She took the complainant to the out-patients department where a Doctor examined her, after which the Police were phoned and a Police Officer came and accompanied them home where they found the appellant who was arrested and taken into custody.

The medical evidence was that the complainant's sex life was active, as I have already mentioned and as the complainant herself confirmed in her evidence. The examination revealed merely that the perineum was wet, and that there was a wet discharge. The only finding that the Doctor could make was that there was possible evidence of sexual intercourse, but he took vaginal smears and sent them for laboratory testing which established the presence of spermatozoa.

The appellant, who conducted his own defence, gave evidence. He admitted that he came to their room that night, but he denied that he raped the complainant. He conceded that he and the complainant had been on good terms, but he suggested that she bore a grudge

against him because-so he said-he would not let her go out at night because he suspected that sne was going out to have sex.

That suggestion was neither put to the complainant nor to her aunt and it seems to have been a belated afterthought. In any event it affords no reason whatsoever for the evidence of the complainant's aunt.

The appellant submitted to us that his conviction should be overturned because the Crown did not call the complainant's neighbours to corroborate what the complainant said; nor was the torn nightgown produced as an exhibit; nor was the appellant taken to a Doctor by the Police to have a sample of his sperm taken so that it could be compared with the sperm found on the vaginal swabs.

As to the first of these submissions, it is not known whether the two occupants of adjacent rooms whom the complainant named were available to be called. The trial took place 4 years after the event. Moreover, there was little need for further corroboration in the light of the evidence given by the complainant's aunt.

With regard to the torn nightgown the evidence is that by the time this matter was brought to trial the Police had lost the exhibit. Once again, the complainant's evidence that it was torn was corroborated by her aunt.

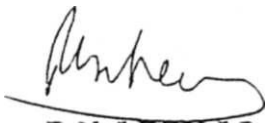
It is true that DNA tests could have been ordered by the investigating officer to ascertain whether the appellant could be identified with the vaginal swabs, but facilities for such testing are not available in Swaziland and the failure of the Police to have gone to such lengths cannot be used to diminish the credibility of the evidence that was led against the appellant and which the learned trial judge correctly found established his guilt beyond a reasonable doubt.

As for the backdated sentence of 12 years I am unable to find any misdirection by the learned trial judge, nor do I find the sentence startlingly inappropriate. It is true, as the appellant pointed out, that the complainant was neither a child nor a virgin, but by its

intimate nature rape is a most gross violation of a woman's right to bodily dignity and safety, and it is a disturbingly prevalent offence with all its risks of serious, possibly fatal, infection for the victim.

In my view there is no merit in the appeal against both conviction and sentence. Accordingly the appeal as a whole is dismissed and the conviction and sentence are both confirmed.

I agree



N.W. ZIETSMAN J.A.

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Delivered on the. .day of November 2004.